

HUMAN RIGHTS AND EQUALITY INSTITUTION OF TÜRKİYE

18.05.2022

BOARD DECISION

Assembly Date/Number : 15.3.2022/172
Decision Number : 2022/175
Applicant : Ex Officio Inquiry
Applicant's Attorney : --
Address :
Addressee : Presidency of Bolu Municipality
Addressee's Address : Büyükcami Mah. İzzet Baysal Cad. No: 99,
Merkez/BOLU

I. SUBJECT OF THE EX OFFICIO INQUIRY

1.This is an ex officio inquiry of the decision of the Bolu Municipal Council to apply different tariffs on water and marriage fees for foreigners living in Bolu, which constitutes discriminatory treatment on the basis of race and ethnical origin within the scope of the right to protect and improve his/her corporeal and spiritual existence, the right to marry and establish a family, and the right to access to clean water.

II. PROCESS OF EX OFFICIO INVESTIGATION

2.Bolu Mayor Tanju ÖZCAN made a statement to the national press on 26.07.2021 and stated the following: *"We will increase some fees, especially water bills and solid waste tax fees of foreign nationals by 10 times."*

3.On 11.11.2021, ÖZCAN made the following statements in a speech to the press: *"We do not want foreigners to marry and settle in Bolu and have children. We want them to return to their countries. We are bringing this regulation so that two foreign nationals do not marry in Bolu, so that they do not settle in Bolu, so that they do not have children in Bolu, so that two Syrians and two Iraqis do not marry in Bolu."*

4.In a press release dated 23.11.2021, ÖZCAN stated that *"The official currency of foreign nationals is not TRY, so we have set it as US dollars. We are not being racist. Are our foreign, refugee brothers and sisters disturbed by this? If they are, water is cheaper in Damascus. There, hodjas marry them. Hodja takes whatever you pay him. So, they don't necessarily have to get married in Bolu!"*.

5.Bolu Municipal Council, in the second session of November dated 22.11.2021 and numbered 2021/506, decided that the marriage fees of foreign nationals should be 100 thousand TL and the currency of the cubic meter tariffs of water used in residential areas for foreigners should be set in US dollars.

6.Considering the decision taken by Bolu Municipality within the framework of national and international human rights standards and the statements reflected in the press, an ex officio inquiry was initiated on the Bolu Municipal Council Decision with the decision taken at the assembly of the Human Rights and Equality Institution of Türkiye dated 23.11.2021 and numbered 2021/163.

7.Within the scope of the ex officio inquiry initiated upon the decision of Bolu Municipal Council; opinion in writing was requested from Bolu Municipality, the addressee of the allegation of the violation, pursuant to provision of Article 18, paragraph two of the Law No. 6701 on the Human Rights and Equality Institution of Türkiye, stating *"The Institution*

shall ask the interlocutor of the alleged violation to submit an opinion in writing." In the opinion in writing received; it was stated that the Council Decision subject to ex officio inquiry was sent and the issue was referred to Bolu Municipality Plan and Budget Commission to be examined and it was decided to be discussed again in Bolu Municipal Council to be resolved with the report to be prepared, but since the Bolu Municipality Plan and Budget Commission did not submit the report to Bolu Municipal Council, the issue was not finalized.

8. On 07.12.2021, our Institution requested to be informed about the decision taken by Bolu Municipal Council in the second session of November of Bolu Municipal Council dated 22.11.2021, to set the marriage fees of foreign nationals as 100 thousand TRY and to set the price per cubic meter of water used in residential areas for foreigners in US dollars. In the opinion in writing from Bolu Municipality, the following points were stated: *"At the Bolu Municipal Council assembly held on 22.11.2021, in accordance with the Council Decision No. 2021/506; regarding the Bolu Municipality 2022 Fee (Income) Tariff Schedules, which were referred to the Bolu Municipal Council with the letter dated 22.10.2021 and numbered 5880 of the Directorate of Financial Services to the Plan and Budget Commission with the Council Decision dated 01.11.2021 and numbered 2021/483 and will be applied as of 01.01.2022, in the assembly held by Bolu Municipal Council the said Plan and Budget Commission report was deemed appropriate, the fees specified in the Bolu Municipality 2022 Fiscal Year Fee (Income) Tariff Schedules prepared in accordance with Article 97 of the Law No. 2464 on Municipal Revenues and Article 18/f of the Municipal Law No. 5393 were accepted by the Bolu Municipal Council exactly as they came from the Plan and Budget Commission, a provision was added regarding the marriage fee tariff stating that "if neither of the parties is a Turkish citizen, the marriage fee is applied as 100,000 TL"; in the same decision regarding the water fee tariff "the price per cubic meter of water used in residential areas for foreigners who have a "permit to stay in Türkiye" in accordance with paragraph (j) of Article 3 of Law No. 6458 is determined in US dollars".*

9. In the additional opinion letter dated 14.01.2022 submitted by the Municipality, it was stated: *"In the 2022 Income Tariff Schedule prepared in accordance with Article 18 (f) of the Municipal Law No. 5393 and Article 97 of the Municipal Income Law No. 2464; 5th provision in the explanation section of the 15th page of the Directorate of Culture and Social Affairs; articles 10 and 11 on 26th page of Water and Sewage Directorate and the 7th, 8th, 9th, 10th and 11th provisions in the explanation section with binding provisions were repealed with the decision dated 03.01.2022 and numbered 2022/28 taken at the January 2022 I. Assembly of Bolu Municipality in line with the decision of the suspension of execution given by the Bolu Regional Administrative Court over the files numbered 2021/1417 and 2021/1420."*

10. The sixth paragraph of Article 17 of Law No. 6701 states that as much as ex officio inquiries into alleged violations of human rights and non-discrimination are concerned, it is imperative that explicit consent of the victim of violation or his/her legal representative be sought in cases where s/he is identifiable but in aforementioned incident, this provision wasn't applied since victims of violation can't be identified.

III. RELEVANT LEGISLATION

11. Article 10 of the Constitution, entitled "Equality before the law", reads as follows: *"Everyone is equal before the law without distinction as to language, race, color, sex, political opinion, philosophical belief, religion and sect, or any such grounds.*

(...)

State organs and administrative authorities are obliged to act in compliance with the principle of equality before the law in all their proceedings."

12. The first paragraph of Article 17 of the Constitution entitled "Personal inviolability, corporeal and spiritual existence of the individual" states as follows:

"Everyone has the right to life and the right to protect and improve his/her corporeal and

spiritual existence.”

13. Article 41 of the Constitution entitled "Protection of the family and children's rights" states as follows: *"The family is the foundation of Turkish society and is based on equality between the spouses.*

The State shall take the necessary measures and establish the necessary organization to protect peace and welfare of the family, especially mother and children, and to ensure the instruction of family planning and its practice.

(...)"

14. According to Article 14 of the European Convention on Human Rights (ECHR); *"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."*

15. According to Article 12 of the ECHR entitled "Right to marry"; *"Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."*

16. Article 23 of the United Nations (UN) Covenant on Civil and Political Rights (ICCPR) reads as follows:

"(...)

The right of men and women of marriageable age to marry and to found a family shall be recognized. (...)"

17. According to subparagraph (ç) of Article 2 titled "Definitions" of the Law No. 6701 dated 20.4.2016 on the Human Rights and Equality Institution of Türkiye; *"Multiple discrimination: A discriminatory practise based on more than one grounds of discrimination"*, according to subparagraph (d); *"Direct Discrimination: Any kind of different treatment that prevents or makes difficult, on grounds of discrimination cited in this Law, the exercise of legally recognized rights and freedoms by a natural person or legal person in an equal manner as compared to comparable persons"*.

18. Article 3 of Law No. 6701 entitled "Principle of Equality and non-discrimination" reads as follows:

"(1) All are equal in the exercise of legally recognized rights and freedoms.

(2) It is prohibited under this Law to discriminate against persons based on the grounds of sex, race, colour, language, religion, belief, sect, philosophical or political opinion, ethnical origin, wealth, birth, marital status, health status, disability and age.

(3) Where the principle of non-discrimination is violated, relevant competent and responsible public institutions and agencies and public professional organizations with public institution status shall take necessary actions with a view to putting an end to the violation, remedying its consequences, preventing its repetition and ensuring the launch of administrative and judicial proceedings into it.

(...)"

19. In the first paragraph of Article 4 of the aforementioned Law titled "Types of Discrimination", the types of discrimination are as follows: *"a) Segregation. b) Instruction to discriminate and implementing such instructions. c) Multiple discrimination. ç) Direct discrimination. d) Indirect discrimination. e) Mobbing. f) Failure to make reasonable accommodations. g) Harassment. ğ) Discrimination based on an assumed ground."*

20. The first paragraph of Article 5 of the same Law, titled "Scope of the prohibition of discrimination", states that *"Public institutions and agencies, professional bodies with public institution status, natural persons and legal persons established under private law providing services of education and training, judiciary, law enforcement, health, transportation, communication, social security, social services, social assistance, sports, accommodation,*

culture, tourism and similar services shall not discriminate, in respect of their activities, against persons who use or have applied to use or wishing to be informed of such services. This provision also covers access to buildings and spaces where public services are provided.”

21.Subparagraph (g) of the first paragraph of Article 9 of the aforementioned Law stipulates that the Institution is in charge of *“Inquiring into, examining, taking a final decision on and monitoring the violations of non-discrimination principle – ex officio or upon an application”*.

IV. THE BOARD’S ASSESSMENT AND JUSTIFICATION

22.Within the framework of the above-mentioned information and legislation, an evaluation will be made in line with the ex officio inquiry decisions dated 23.11.2021 and numbered 2021/163 taken by the Board regarding the Municipal Council decision in question. The decision of Bolu Municipal Council will be evaluated within the scope of the principle of equality and the prohibition of discrimination on the basis of race and ethnic origin.

23.In the decision taken by Bolu Municipal Council on 22.11.2021: Regarding wedding fees, it was stated that *"if neither of the parties is a Turkish citizen, the marriage fee is applied as 100,000 TL"*and in the same decision, regarding the water fee tariff, it was stated that *"the price per cubic meter of water used in residential areas for foreigners who have a "permit to stay in Türkiye" in accordance with paragraph (j) of Article 3 of Law No. 6458 is determined in US dollars"*.

24.The Mayor made the following statements in a press release dated 23.11.2021, immediately after the Council Decision: *"The official currency of foreign nationals is not TRY, so we have set it as US dollars. We are not being racist. Are our foreign, refugee brothers and sisters disturbed by this? If they are, water is cheaper in Damascus. There, hodjas marry them. Hodja takes whatever you pay him. So, they don't necessarily have to get married in Bolu!"*.

25.Bolu Municipality stated in its reply letter with additional explanations regarding its opinion in writing:

Stated that the Council Decision on the water and marriage fee tariff taken by the Council was repealed with the decision dated 03.01.2022 and numbered 2022/28 taken at the January 2022 I. Assembly of Bolu Municipality in accordance with the decision of the Bolu Regional Administrative Court to suspend the execution of the case numbered 2021/1417 and 2021/1420.

26.Bolu Municipal Council determined the tariffs for water and marriage fees together with a single council decision dated 22.11.2021 and numbered 2021/506. The said Council Decision was finalized in accordance with Article 23 of the Municipal Law No. 5393 and entered into force on 29.11.2021.

27.The decision taken by Bolu Municipal Council regarding marriage and water tariffs has been implemented as of 01.01.2022. Following the decision of the Bolu Administrative Court to suspend the execution, the date of the annulment of the decision by the Council is 03.01.2022. At this point, the annulment lawsuit filed in the administrative jurisdiction against the decision of the Council consists of the control of the conformity of the Council Decision to the law, and the ex officio inquiry made within the scope of the present case is about whether there is a discriminatory treatment within the scope of the "Principle of equality and non-discrimination" within the scope of Law No. 6701, which is exempt from the control of the conformity of the Council Decision to the law. Therefore, the evaluation and justification in this decision will be based on this pre-acceptance.

28.The decision of Bolu Municipal Council to apply different water and marriage fee tariffs to foreigners in the province will be evaluated within the scope of the principle of equality and non-discrimination on the basis of race and ethnic origin.

29.Within the scope of the principle of equality and the non-discrimination, it is necessary to set out the following general principles: The principle of equality and non-discrimination are concepts that can sometimes be used side by side and sometimes to mean the

same thing. Today, the principle of equality is an inseparable part of international conventions on human rights. In other words, the principle of equality and non-discrimination are recognized as fundamental legal norms at the highest level of international law. In this respect, the principle of equality should be recognized both as a right in itself and as a fundamental principle governing the enjoyment of other human rights and freedoms. (Constitutional Court, Tuğba Arslan Application, A. No: 2014/256, 25/6/2014, para. 107)

30. Although the Constitution does not include a definition of the principle of equality, the Constitutional Court has defined the principle of equality as follows:

"The principle of equality under Article 10 of the Constitution is for those with the same legal status. This principle envisages legal, not de facto, equality. The purpose of the principle of equality is to ensure that persons in the same situation are subject to the same treatment before the law and to prevent discrimination and privilege. This principle prohibits the violation of equality before the law by applying different rules to certain individuals and communities in the same situation. Equality before the law does not mean that everyone is subject to the same rules in all respects. The specifics of their situation may require different rules and practices for some individuals or communities. If the same legal situations are subject to the same rules and different legal situations are subject to different rules, the principle of equality stated in the Constitution will not be harmed." (Constitutional Court, M.2009/47, D.2011/51, D.D. 17/3/2011).

31. Even if Article 10 of the Constitution is not regulated in the form of prohibition of discrimination, since the principle of equality has a normative value to be relied upon in all cases in the constitutional context, the prohibition of discrimination must also be effectively implemented (Constitutional Court, M.1996/15, D.1996/34, 23/9/1996). In other words, the principle of equality includes the prohibition of discrimination as a concrete norm. (Constitutional Court, Tuğba Arslan Application, A. No: 2014/256, 25/6/2014, para. 108; Nurcan Yolcu, para. 30; Gülbu Özgüler, para. 37).

32. Article 10 of the Constitution does not limit the persons who may benefit from the principle of equality and the scope of the principle. Pursuant to Article 11 of the Constitution, which states that *"The provisions of the Constitution are fundamental legal rules binding upon legislative, executive and judicial organs, and administrative authorities and other institutions and individuals."*, it is clear that the principle of equality regulated in the "General Principles" section of the Constitution also applies to the aforementioned organs, institutions and individuals. In addition, pursuant to the last paragraph of Article 10 of the Constitution which states that *"State organs and administrative authorities are obliged to act in compliance with the principle of equality before the law in all their proceedings."* legislative, executive and judicial organs and administrative authorities are obliged to act in compliance with the principle of equality and the prohibition of discrimination. (Constitutional Court, Nuriye Arpa Application, A. No: 2018/18505, 16/6/2021 para. 41; Nurcan Yolcu, A. No: 2013/9880, 11/11/2015, para. 35; Gülbu Özgüler, A. No: 2013/7979, 11/11/2015, para. 42).

33. Prohibition of discrimination, equality before the law and equal protection under the law without discrimination are fundamental and general principles of human rights protection. Article 2, paragraph 1, of the ICCPR therefore expresses the obligation of each State party to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 26 states that everyone shall be equal before the law and are entitled without any discrimination to the equal protection of the law, in this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. (Commentaries on Human Rights at the United

Nations: Human Rights Committee and Committee on Economic, Social and Cultural Rights: General Comment No. 18 of 1989)

34. In the judgments of the European Court of Human Rights (ECHR), discrimination is defined as treating persons in the same situation differently without objective and reasonable grounds. (ECHR, Zarb Adami/Malta, A. No. 17209/02, 20/6/2006, para. 71).

35. The ECtHR has stated that different treatment is discriminatory within the meaning of Article 14 of the Convention if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised. (ECHR, Beian/Romania (1), A. No: 30658/05, 6/12/2007, para. 58-64). In the "Belgian Linguistic Case", where the ECtHR set out the criteria for the application of Article 14 of the Convention, it stated the following:

"It is important, then, to look for the criteria which enable a determination to be made as to whether or not a given difference in treatment, concerning of course the exercise of one of the rights and freedoms set forth, contravenes Article 14 (art. 14). On this question the Court, following the principles which may be extracted from the legal practice of a large number of democratic States, holds that the principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 (art. 14) is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised." (ECHR, Belgian Linguistic Case/Belgium, A. No. 1474/62, 23/7/1968, para. 10). At this stage, the criteria set out by the ECtHR includes two points. These are the identification of a legitimate aim for the different treatment and the assessment of whether there is a "reasonable relationship of proportionality" between the different treatment and the aim sought.

36. The right to marry and found a family is regulated in the Universal Declaration of Human Rights (UDHR), the ICCPR and the ECHR. The first paragraph of Article 16 of the UDHR states as follows: *"Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family."* In the same vein, Article 23 of the ICCPR and Article 12 of the ECHR state that every individual of marriageable age has the right to marry and found a family. Article 12 of the ECHR states that marriage shall be performed in accordance with national law and gives states the initiative to regulate this issue. Although States may impose certain procedural conditions on the right to marry, these conditions must not affect the essence of the right. (F./Switzerland, A. No: 11329/85, 18/12/1987, para 32) Including procedures that make the right to marry excessively difficult or applying them in a discriminatory manner would be contrary to the ECHR. (K. M./United Kingdom, A. No: 30309/96, 9/4/1997, para. 2). As a matter of fact, in the ECHR's judgment of 2010 in O'Donoghue and Others v. the United Kingdom, it is emphasized that *"the existence of a fixed fee at a level which a needy applicant might not be able to afford could impair the essence of the right to marry."*

37. In addition to the right to marry as enshrined in international and regional human rights texts, the right to access to water as a human right should also be mentioned. In the current case, providing water service to foreigners in Bolu province with the dollar exchange rate will cause some problems for foreigners in accessing water service. At the Mar Del Plata Conference in 1977, where drinking water was expressed as a right for the first time, it was emphasized that *"All peoples, regardless of their stage of development, social and economic conditions, have the right to access to drinking water in quantity and quality equal to their basic needs"*. However, in its General Comment No. 15 on "The Right to Water" in 2002, the Committee on Economic, Social and Cultural Rights emphasized that everyone has the right to access to water for personal and household purposes, stating that adequate and clean water is necessary to

prevent dehydration deaths, to reduce water-related diseases, and to meet the requirements of consumption, cooking, personal and domestic hygiene. Furthermore, the Committee recognizes that in Article 11, paragraph 1, of the Covenant, everyone has the right to an adequate standard of living *"including adequate food, clothing and housing"*; that the phrase *"including"* emphasizes that the right is not limited to food, clothing and housing; that the right to water is essential for an adequate standard of living, especially as it is one of the most basic conditions for survival, and that it is related to other rights in the Covenant.

38. Rights such as the right to marry and start a family and the right to clean water are also directly related to the right to protect and improve his/her corporeal and spiritual existence as enshrined in Articles 5 and 17 of the Constitution. As the only being capable of development, human beings need to develop their biologically corporeal, informationally and intellectually spiritual existence in society. The most important purpose of the protection of human rights, which is based on human dignity, is to protect the corporeal and spiritual existence of human beings, which is their most basic need. In this framework, violations of the right to marry and establish a family, which are among the fundamental rights that the individual needs biologically and socially, and the right to access water, which is the most basic commodity for the individual to survive, will also hinder the protection and development of the individual's corporeal and spiritual existence.

39. Before making an evaluation under the prohibition of discrimination on the grounds of race and ethnic origin, it is necessary to set out the following general principles: in its General Policy Recommendation No. 1 on Combating Racism, Xenophobia, Anti-Semitism and Intolerance, the European Commission against Racism and Intolerance (ECRI) recommended that States Parties *"Ensure that all public services and services of a public nature such as healthcare, social services and education provide non-discriminatory access to all members of the public"* (...)

"oral, written, audio-visual expressions and other forms of expression, including the electronic media, inciting to hatred, discrimination or violence against racial, ethnic, national or religious groups or against their members on the grounds that they belong to such a group are legally categorised as a criminal offence, which should also cover the production, the distribution and the storage for distribution of the material in question".

40. While explaining the concepts of race and ethnicity, the ECHR stated the following in the *Timishev v. Russia* judgment, where it recognized that language, religion, nationality and culture may be inseparable from race:

"Ethnicity and race are related and overlapping concepts. Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies according to morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds." (ECHR, *Timishev/Russia*, 55762/00 and 55974/00, 13.12.2005, para. 55).

41. Article 1, paragraph 2 of the International Convention on the Elimination of All Forms of Racial Discrimination states that *"This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens."* However, General Recommendation No. 30 of the United Nations Committee on the Elimination of Racial Discrimination on Discrimination against Non-Citizens states that:

"Article 1, paragraph 2, must be construed so as to avoid undermining the basic prohibition of discrimination; hence, it should not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in particular in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights".

42.The aforementioned recommendation makes the following assessments regarding citizenship or immigration status:

“Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.”

The Recommendation recommends that States Parties should adopt some measures of general nature. These recommendations are as follows:

“Ensure that legislative guarantees against racial discrimination apply to noncitizens regardless of their immigration status, and that the implementation of legislation does not have a discriminatory effect on non-citizens; pay greater attention to the issue of multiple discrimination faced by noncitizens, in particular concerning the children and spouses of non-citizen workers, to refrain from applying different standards of treatment to female non-citizen spouses of citizens and male non-citizen spouses of citizens, to report on any such practices and to take all necessary steps to address them; ensure that immigration policies do not have the effect of discriminating against persons on the basis of race, colour, descent, or national or ethnic origin”.

43.In terms of the implementation of the abovementioned general principles regarding the prohibition of discrimination and the grounds of race and ethnic origin to the current case, it would be appropriate to mention the following points: It is necessary to evaluate the decision of the Municipal Council, which decided to apply different water and marriage tariffs for foreigners in Bolu province, within the scope of the principle of equality regulated in Article 10 of the Constitution and the provisions of Law No. 6701 regarding the prohibition of discrimination.

44.Article 10 of the Constitution and Law No. 6701 states that everyone shall benefit from the principle of equality without distinctions such as citizenship and nationality. Therefore, the protection of the principle of equality and the prohibition of discrimination can be enjoyed not only by Turkish citizens but also by foreigners within the country whose legal status is different.

45.First paragraph of Article 3 of Law No. 6701 prohibits discrimination on specified grounds, including *“race and ethnic origin”*. In particular, it is necessary to evaluate the tariffs for water and wedding fees determined by the Bolu Municipal Council Decision together with the statements of Bolu Mayor Tanju ÖZCAN. In fact, the Mayor stated that the marriage fees of foreigners will be 100,000 TL and water fees will be based on the dollar exchange rate, and that a different treatment will be applied in marriage and water tariffs especially for foreigners in Bolu province. In the decision, in addition to the explanation that marriage fees will be applied at the higher tariff if the two parties are not Turkish citizens, it is also stated in the decision that the application does not cover all foreigners who are not Turkish citizens, especially regarding water tariffs, and that it is for foreigners who have a permit to stay in Türkiye in accordance with paragraph (j) of Article 3 of Law No. 6458, except for foreigners who are legally recognized as refugees within the framework of the International Geneva Convention or who are accepted under temporary protection by the UN without a residence permit. According to Mayor Tanju ÖZCAN's statements in the press release *“Are our foreign, refugee brothers and sisters disturbed by this? If they are, water is cheaper in Damascus. There, hodjas marry them. Hodja takes whatever you pay him. So, they don't necessarily have to get married in Bolu!”*, it is observed that the foreigners targeted are especially foreigners under temporary protection who came to Türkiye from Syria. Another group is foreigners from Iraq, as expressed in the statement *“We are bringing this regulation ... so that two Syrians and two Iraqis do not marry in Bolu.”* This reinforces the conviction that there is a different treatment of foreigners of a certain racial and ethnic origin in the utilization of the services provided.

46. However, ÖZCAN's statements should also be evaluated in terms of xenophobia and hate speech. Freedom of expression, tolerance and respect for human dignity are recognized as the most important principles of a democratic social order. These principles are also protected by universal and regional human rights regulations. On the other hand, freedom of expression is not seen as an absolute right in the ECHR; Article 17 of the Convention clearly states that no right may be abused by any individual or group or by the State. As a matter of fact, as stated in the jurisprudence of the ECHR, one of the limitations on freedom of expression is hate speech targeting a certain group. It is acknowledged that, unlike harsh criticism, hateful expressions may provoke verbal and physical attacks against the persons or groups to whom they are directed, thus causing harm or the possibility of harm to the victims. However, in the case of hate speech, the balance between freedom of expression and non-discrimination is important for the effective implementation of the prohibition of discrimination.

47. Although there are different opinions on the scope of hate speech, Recommendation R (97) 20 of 1997 adopted by the Committee of Ministers of the Council of Europe defines hate speech as *“all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance”*.

48. ECRI's General Policy Recommendation No. 15 on Combating Hate Speech recommends a react response to hate speech by public figures, in particular politicians, religious or community leaders, emphasizing that they have a responsibility not only to condemn hate speech but also to protect and strengthen the values it threatens.

49. In the light of his statements, ÖZCAN's expressions aiming to cause a feeling of hostility and rejection are incompatible with the fact that Türkiye has been hosting a high number of refugees and migrants since 2011 and has been intensively engaged in integration efforts. Considering the fact that the person who made the statements is a mayor who provides public service and the size of the audience he can reach, it is considered that the aforementioned statements may pose a risk of inciting and deepening racial hatred among the public, increasing xenophobia and at the same time making it difficult to establish the awareness of the principle of equality, and for this reason, the aforementioned statements are considered to be hate speech.

50. The first paragraph of Article 5 of Law No. 6701, which regulates the scope of the prohibition of discrimination, states that *“Public institutions and agencies, professional bodies with public institution status, natural persons and legal persons established under private law providing services of education and training, judiciary, law enforcement, health, transportation, communication, social security, social services, social assistance, sports, accommodation, culture, tourism and similar services shall not discriminate, in respect of their activities, against persons who use or have applied to use or wishing to be informed of such services. This provision also covers access to buildings and spaces where public services are provided.”*, the provision prohibits public institutions and organizations from discriminatory treatment based on different aims during service presentation. Water and marriage services are public services provided by municipalities, which are nowadays local governments, and are reserved exclusively to municipalities. Public service is defined by the Constitutional Court as *“Continuous and regular activities carried out by the State or other public legal entities, or under their supervision and control, in order to meet general and common needs and to ensure public benefit or interest and offered to the public”* (Constitutional Court, 28.06.1995, M. 1994/71, D. 1995/23). Municipalities meet the basic needs of the society with the services they provide within their borders. However, in the presentation of these services, local governments should take into account the principle of social state in Article 2 and the principle of equality in Article 10 of the Constitution. According to Law No. 5393 on Municipalities, everyone is a fellow citizen of the municipality where they reside. Citizens have the right to participate in municipal decisions and services, to be informed about municipal activities and to benefit from the assistance of the municipal administration. In this context, local governments are obliged to

treat each individual, residing within the boundaries of the municipality in which they are located, equally. Municipalities should act fairly, transparently, accountably and in accordance with the principle of the social state, especially in the presentation of services such as zoning, sewage, water and marriage, which are given to them by legislation and are monopolies. Considering the fact that consumers do not have the opportunity to request these services from an alternative person or institution, the municipalities' determination of exorbitant tariff fees for these services will make access to water and marriage services more difficult and will be an abuse of the monopoly authority granted to municipalities by the Law. The abuse of the monopoly right by the stronger party in the contract is also a matter that can be evaluated within the scope of the concept of "immorality" mentioned in Article 27 of the Turkish Code of Obligations.

51. Article 18 of the Municipal Law No. 5393 titled "Duties and powers of the Council" regulates the duties and powers of the municipal council. In this context, the municipal council has been given the duty and authority to determine "*The fee tariff to be applied for services that are not subject to taxes, duties, fees and participation shares in the laws and that are subject to the request of the relevant persons*" in subparagraph "f" of the relevant article. Article 97 of the Law No. 2464 on Municipal Revenues titled "*Works subject to fees*" states "*Municipalities are authorized to charge fees according to the tariffs to be prepared by the municipal councils for all kinds of services that are not subject to fees or participation shares in this Law and that they will perform at the request of those concerned. The works granted to the Municipality as a monopoly are subject to its own special provisions*". Pursuant to Law No. 5393, the municipal council is the decision-making body of the municipality and decisions on the budget, final accounts, work program, zoning plan and program, borrowing, fee tariffs, municipal real properties are taken by the municipal council. Therefore, both the Municipal Law and the Municipal Revenues Law give municipalities the authority and duty to regulate marriage and water tariffs. However, in the presentation of these services, the relevant municipalities should take into account both the principle of equality before the law protected under Article 10 of the Constitution and the principle of equality and non-discrimination provisions set out in Law No. 6701. Paragraph 5 of Article 10 of the Constitution imposes a number of obligations on state organs and administrative authorities. According to the said provision, "*State organs and administrative authorities are obliged to act in compliance with the principle of equality before the law in all their proceedings.*" Therefore, municipalities are also required to take administrative action in compliance with this fundamental principle. Article 11, entitled "Supremacy and binding force of the Constitution", emphasizes that the provisions of the Constitution are the fundamental rule of law binding the legislative, executive and judicial organs, administrative authorities and other institutions and persons, and reminds that laws cannot be contrary to the Constitution. Municipalities shall not aim to make a profit in the services they provide, nor shall they be able to set a different pricing policy for different segments of the society. In the presentation of such services, which are only carried out by municipalities, different segments of the society should not be served with different motives. As a result, municipalities are obliged to take administrative action in compliance with these fundamental norms and to ensure that the principle of equality and the prohibition of discrimination are not prejudiced in their decisions.

52. In the present case, it is also necessary to mention the concept of multiple discrimination, as it is necessary to make an evaluation on more than one basis. "Multiple discrimination" which is counted under Paragraph 1-c of Article 4 of Law No. 6701, which regulates the types of discrimination, may occur when a person is discriminated against on different grounds in different areas, or when a person is subjected to violations of the prohibition of discrimination on more than one ground in a single incident. In the present case, multiple forms of discrimination were manifested in the discriminatory treatment of foreigners living in

Bolu province on the grounds of race and ethnic origin. In addition, with the decision of the Municipal Council, foreigners living in Bolu province cannot benefit from both water and marriage services equally with other individuals. Article 25 of Law No. 6701 states that administrative fines will be imposed on the relevant public institutions and agencies that violate the prohibition of discrimination, taking into account the gravity of the effects and consequences of such violation, financial situation of the perpetrator and aggravating effect of the multiple discrimination. Consequently, the aggravating effect of multiple discrimination will also be taken into account in determining the fine.

53. The principle of equality enshrined in Article 10 of the Constitution and Law No. 6701 prohibits differential treatment of persons in the same or similar situations without an objective and justifiable reason when enjoying legally recognized rights and freedoms. In this sense, differential treatment that does not pursue reasonable relationship of proportionality between the means employed and the aim sought to be realised will be contrary to the principle of equality and the prohibition of discrimination.

54. In the present case, it is seen that the decision of the Municipal Council includes discrimination on the basis of race and ethnic origin within the scope of the right to marry and establish a family and the right to access to water in services such as marriage and water provided by the Municipality for foreigners, especially Syrians and Iraqis, who do not have a residence permit or do not have an adequate residence permit. As also mentioned above, subjecting a person to more adverse and unjustifiable treatment because of his or her race, national or ethnic origin, or denying him or her access to public places and services solely because of his or her race or national or ethnic origin, is prohibited both by international conventions to which Türkiye is a party and by our national law. Since the decision in question is a different treatment against foreigners in the province that cannot be justified, disproportionate and not based on a reasonable justification within the scope of the right to establish a family and the right to marry and the right to access to sufficient and clean water, it is concluded that the prohibition of discrimination regulated in Article 3 of Law No. 6701 has been violated.

V. DECISION

On 15.03.2022, it was decided with the dissident vote of Saffet BALIN and with the MAJORITY OF THE VOTES;

1. That there was A VIOLATION OF THE PROHIBITION OF DISCRIMINATION in the incident subject to the ex officio inquiry,
2. AN ADMINISTRATIVE FINE 40.000 TRY shall be imposed on the addressee Bolu Municipality,
3. Notification of the decision to the parties and ANNOUNCEMENT to the PUBLIC,
4. Against the decision, an application can be made to the Ankara Administrative Court within 60 days from the date of notification.

e-signed
Prof. Dr. Muharrem KILIÇ
Chairperson

e-signed
Att. Alişan TIRYAKI
II. Chairperson

e-signed
Dr. Burhan ERKUŞ
Board Member

e-signed
Dilek ERTÜRK
Board Member
(Appointed)

e-signed
Att. Harun MERTOĞLU
Board Member

e-signed
İsmail AYZ
Board Member

e-signed
Mehmet Emin GENÇ
Board Member

e-signed
Muhammet Ecevit CARTİ
Board Member

e-signed
Saffet BALIN
Board Member

e-signed
Ünal SADE
Board Member

e-signed
Att. Zennure BER
Board Member

Annex:Saffet BALIN Dissident Vote

HUMAN RIGHTS AND EQUALITY INSTITUTION OF TÜRKİYE

22.04.2022

REASON FOR DISSIDENT VOTE

Decision Name : Bolu Municipal Council Ex Officio Inquiry
Decision Number : 2022/175

On 26.07.2021, it was learned from the news coverage of national and local press that Bolu Mayor Tanju Özcan stated that water bills and solid waste tax fees of foreign nationals living in the city will be increased 10 times. Özcan defended this decision by saying "My friend, you stop helping them, they still don't leave. You say 'I am not issuing you a business license', they still don't leave. We decided to take new measures".

As a result of the aforementioned news, discriminatory language against foreigners in our country, in particular Syrians, has been increasingly inflamed, the decision taken by Bolu Municipality has started to be discussed on national news channels, and the initiative of hate speech against immigrants coming to our country has been ignited in this way. As a result of this climate, on 10.08.2021, incidents took place in Siteler district of Ankara, where Syrian migrants live densely, and as a result, one of our citizens lost his life.

On 17.08.2021, an agenda proposal was submitted to the Board by myself to conduct an ex officio inquiry against the Mayor of Bolu Municipality due to the hate speeches that started on Syrians due to the provocative and discriminatory statements of the Mayor. The Board decided to follow up the issue and put it back on the agenda at a later date. On 01.11.2021, as a result of the new additional agenda proposal submitted by me, our Board decided to conduct an ex officio inquiry due to the discriminatory statements of the Mayor, which trigger xenophobia and contain hate speech, such as "10-fold increase in the water bill and solid waste tax fees of foreign nationals living in the city" and "My friend, you stop helping them, they still don't leave. You say 'I am not issuing you a business license', they still don't leave".

Even before the Board's ex officio inquiry decision was shared with the public, Bolu Mayor Tanju Özcan announced that they would submit a proposal to the Municipal Council to increase the marriage fee to be paid by foreign nationals living in the city to 100 thousand liras. Upon making the public statement of: "We don't want foreigners to marry in Bolu, settle in Bolu and have children. We want them to return to their countries, that is why we are proposing these decisions. I believe that it will be unanimously pass in the Council." our Board took a second ex officio inquiry decision on 20.12.2021 due to the statements of the practice regarding the over-charging of marriage fees from foreigners.

Bolu Municipal Council, in the second session of November dated 22.11.2021 and numbered 2021/506, determined new price tariffs for many service areas regarding the services provided by the municipality for the year 2022, and within this scope, it was decided that the wedding fees of foreign nationals would be 100 thousand TL, and the price per cubic meter of water used in residences for foreigners would be set in US dollars.

Although the decision taken by the Municipal Assembly is a decision taken on the same day, they are decisions that have 2 different legal consequences. Our Board has taken two different ex officio inquiry decisions, as detailed above, due to the two different discriminatory decisions announced to the public by the Mayor of Bolu Municipality.

Bolu Municipal Council, with a single council decision dated 22.11.2021 and numbered 2021/506, set hundreds of new price tariffs for the services provided by the Municipality, including new price tariffs for water and marriage fees for foreigners. As a result, the Municipal Council has made hundreds of decisions on different services that have legal consequences.

However, our Board imposed a single administrative sanction on Bolu Municipality due to the fact that 2 different discriminatory treatments applied by Bolu Municipality were taken by a single council decision. The text of the decision does not explain why a single administrative sanction was imposed based on two different ex officio inquiry decisions dated 01.11.2021 and 20.12.2021.

There is no need to be a professor or a lawyer to understand the law. Administrative acts are acts that have consequences in the field of administrative law, which are established by administrative authorities for the function of administration by using public power. Therefore, new price tariffs set on the same day or by the same council decision are each separate administrative acts. What is important is whether the decisions have taken consequences in the field of administrative law. Increasing the tariff of water used by foreigners by 10 times and setting the marriage fees at 100,000.00 TL are administrative acts that have completely different legal consequences. To consider this as a single administrative act is an indication of ignorance of administrative law or lack of knowledge to interpret administrative law.

In order to better understand the issue, for example, if a foreigner has the right to sue against the decision of the Municipal Council only against the increase in the water tariff or only against the increase in marriage fees, or for each of the determined fee tariffs, every citizen living in Bolu has the right to sue separately. Therefore, it is obvious for everyone that each of the fee tariffs adopted by the Municipality is an administrative act.

In conclusion;

The Board has taken two ex officio inquiry decisions regarding 2 different discriminatory treatment of foreigners by the Bolu Municipality with a special focus on Syrians. Although the subjects of the ex officio inquiry decisions were completely different from each other, two different discriminatory acts of the Municipal Council were linked to the same council decision, thus a single administrative sanction was applied to two different discriminatory acts.

With the statement of "My friend, you stop helping them, they still don't leave. You say 'I am not issuing you a business license', they still don't leave. We decided to take new measures" by Bolu Mayor Tanju Özkan on 26.07.2021, discriminatory language against foreigners, especially against Syrians, has become more and more inflamed and the initiative of hate speech has been ignited. Due to the public discussion of hate language for days, various provocations took place in our country and finally a citizen lost his life in Ankara.

Law No. 6701 on the Human Rights and Equality Institution of Türkiye assigned the Institution for the duty of combating discrimination. Discriminatory and hate speech should be removed from the country's agenda as soon as possible by fully implementing the Law without putting the duty in any sentence starting with but, yet, however. When administrative sanctions are imposed on those who engage in discriminatory treatment, as if as a reward, far from being a deterrent, irresponsible individuals or institutions that engage in discriminatory treatment will be even more encouraged.

Therefore, it is not possible for me to agree with the decision of the majority due to the imposition of a single administrative sanction for two different discriminatory acts without any legal justification, based on two different ex officio inquiry decisions taken by our Board due to two completely different discriminatory acts of the Bolu Municipality.

Saffet BALIN
Board Member