

BOARD DECISION

Application Number : 2021/890
Assembly Date/Number : 7.4.2022/173
Decision Number : 2022/219
Applicant : S.E.S
Applicant's Attorney : Att. K.E.S
Address :
Addressee : G. Complex Management
Addressee's Address : ...

I. SUBJECT OF THE APPLICATION

1.The application is related to the allegation of violation of the prohibition of discrimination on the grounds of religious belief and sex by reason of it was not allowed to enter the complex pool wearing a burkini.

II. EXAMINATION PROCESS

2.The following was stated by the applicant in the application:

a.They had an flat in the ... summer complex, that she regularly swam in the complex pool due to her back and neck problems and that she did not have any problems,

b.But on 09.08.2021, while swimming in the pool, the person in charge of the pool told her that she had to get out of the pool because the residents of the complex were visually disturbed by the burkini,

c.She was warned by the complex supervisor with an announcement as follows: "Burkini person in the pool, burkini person in pool, get out of the pool, I am telling you it will be bad, it is forbidden to enter the pool with a burkini, burkini person get out of the pool.",

d.She got out of the pool after this situation, was humiliated in front of the residents of the complex, and could not enter the pool again,

e.She asked to meet with the complex management but was rejected,

f.She sent a notice through a notary public to end the ban on entering the pool with a burkini and to give her a copy of the decision of the general assembly of condominium owners,

g.Also she has been discriminated against on the basis of religious belief in her right to use common areas Under Law No. 634 on Condominium Ownership, and on the basis of gender because she wears religious clothing specific to women.

3.The opinion in writing received from the addressee G. Complex Management is as follows:

a.That the applicant did not request a meeting with the complex management,

b.That it is forbidden to enter the pool with clothes and similar garments because if closed clothes were worn while using the pool, it could breed bacteria in the pool, and this prohibition was taken at the general assembly of the condominium owners, in which the applicant's spouse also took part,

c.That the applicant had sent a notice requesting the annulment of the prohibition, but that as the complex management, they are obliged to implement the existing decisions unless the decision of the general assembly of the condominium owners is annulled or a new decision is taken, and that the applicant had declared that she regularly used the pool,

d.That on the date of the incident subject to the application, there was a complaint about entering the pool with clothes on, and without knowing who entered the pool, the complex supervisor announced, "Dear residents, please do not enter the pool with clothes on. Dear

residents, if there is someone in the pool with clothes on, please get out",

e. In addition, the complex management also stated that there is no problem in using the pool with a burkini, which is claimed not to harm health, and that the issue will be brought to the agenda at the first general assembly of the condominium owners.

4. Regarding the reply of the addressee, the applicant stated that she tried to contact the complex management through the instant messaging application but was not answered, that her spouse voted for rejection at the general assembly of the condominium owners, that she was not authorized to take any action since she was not a condominium owner, that the relevant decision taken at the general assembly of the condominium owners was contrary to the Constitution and the mandatory provisions of the laws, that she could not use the pool since the day of the incident, that she was the only one in the pool at the time of the incident, that the announcement was not directed to the general public because she was specifically warned by the person in charge of the pool, and submitted the statements of the person who witnessed the incident subject to the application as an annex to the opinion letter.

5. In the witness statement submitted to the file, she states that an announcement was made as "Lady in burkini, get out of the pool", the announcement was repeated as "Lady in a dress in the pool, you cannot enter the pool with a dress, get out of the pool", she saw a person in the pool from a distance, her neighbors stated that person was Ms. S., she stated that she wanted to enter the pool with a burkini in previous years but was not allowed, and that although she requested it at the general assembly meeting of the condominium owners, it was not included in the agenda.

III. RELEVANT LEGISLATION

6. Article 10 of the Constitution titled "Equality before the law" states as follows: *"Everyone is equal before the law without distinction as to language, race, color, sex, political opinion, philosophical belief, religion, sect, or any such grounds. (...) (Additional para: 7/5/2010-5982/1 article.) Measures to be taken for children, the elderly, the disabled, widows and orphans of war and duty martyrs, disabled and veterans shall not be considered contrary to the principle of equality. Government bodies and administrative authorities are obliged to act in accordance with the principle of equality before the law in all their actions."*

7. Article 13 of the Constitution, entitled "Restriction of fundamental rights and freedoms", states as follows: *"Fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality."*

8. Article 14 of the Constitution entitled "Prohibition of abuse of fundamental rights and freedoms" states as follows: *"None of the rights and freedoms embodied in the Constitution shall be exercised in the form of activities aiming to violate the indivisible integrity of the State with its territory and nation, and to endanger the existence of the democratic and secular order of the Republic based on human rights."*

9. The relevant part of Article 24 of the Constitution entitled "Freedom of religion and conscience" states as follows: *"Everyone has the freedom of conscience, religious belief and conviction. Acts of worship, religious rites and ceremonies shall be conducted freely, as long as they do not violate the provisions of Article 14. No one shall be compelled to worship, or to participate in religious rites and ceremonies, or to reveal religious beliefs and convictions, or be blamed or accused because of his religious beliefs and convictions."*

10. According to Article 3 of Law No. 6701 entitled "Principle of Equality and Non-discrimination":

"(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.

(4) Natural persons and legal persons created under private law who bear responsibility in respect of non-discrimination shall take necessary measures for detection of discrimination, elimination thereof and ensuring equality in respect of matters falling under their mandate.”

11. According to paragraph 1 of Article 5 of Law No. 6701 titled "Scope of non-discrimination" it is stated 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.”*

12. Subparagraph (g) of paragraph 1 of Article 9 of Law No. 6701 states that the Institution is in charge of *“quiring 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

13. Paragraph 1 of Article 17 of Law No. 6701 titled "Applications" states that *“Each and every natural person and legal person who claim to have suffered from violations of non-discrimination can apply to the Institution”*. In this framework, as a result of the preliminary examination of the application made by S.E.S., who claims to have been harmed by the violation of the prohibition of discrimination, it has been concluded that the issue can be considered as an application that can be examined by our Institution.

14. The applicant claimed that she could not use the complex pool because she was wearing a burkini, which was a violation of the prohibition of discrimination on the grounds of religious belief and on the grounds of sex, as it was religious clothing specific to women. Multiple discrimination occurs when a person is discriminated against on the basis of more than one different personal characteristic in a single case. In multiple discrimination, attitudes and actions contrary to the prohibition of discrimination are taken against a person due to more than one personal characteristic. In the event of a violation of the prohibition of discrimination on multiple grounds, the consequences of the treatment become more severe and have a multiplier effect (*HREIT, Decision No. 2021/191 para. 25.*). As a matter of fact, within the scope of Law No. 6701, multiple discrimination will be in question if the discriminatory practice is related to more than one basis. In this framework, it is necessary to make a separate evaluation in terms of the grounds of discrimination alleged in the case subject to the application.

15. In her petition, the applicant claims that she lives her religion as an individual, that she wears a burkini in accordance with her religious beliefs, that she was not allowed to enter the pool by the complex management and that her freedom of religion and conscience has been violated. Freedom of religion and conscience is one of the fundamental rights and freedoms protected by national and international human rights instruments. This fundamental right of everyone is enshrined in Article 18 of the United Nations Universal Declaration of Human Rights, which states: *“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching,*

practice, worship and observance.”

16. Article 9 of the European Convention on Human Rights, which provides protection at the regional level, states as follows: *“1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”*

17. The jurisprudence of the European Court of Human rights, which states *“While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to ‘manifest [one’s] religion’. Bearing witness in words and deeds is bound up with the existence of religious convictions.”* (ECHR, *Kokkinakis/Greece*, A. No: 14307/88, 25.05.1993, para. 31.) has distinguished between the internal dimension (forum internum) and the external dimension (forum externum).

18. The Constitutional Court, on the other hand, explained the internal dimension as the ability to freely change one’s beliefs, not to be forced to declare one’s beliefs, not to be condemned and not to be subjected to pressure because of them, and the external dimension as the right to manifest one’s religion or belief through teaching, practice, and solitary or collective worship and rituals. (CC, *Tuğba Arslan*, A. No. 2014/256, 25.06.2014, para. 57.).

19. Everyone has the freedom of conscience, religious belief and conviction. Freedom of religion and conscience is absolute with the internal dimension and cannot be restricted. However, the external dimension of this freedom, i.e. the freedom to manifest one’s chosen religion or beliefs, is not absolute and can be restricted. According to Article 9 of the ECHR, freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others. The ECHR has interpreted the article of the Convention as follows: *“Religious freedom is primarily a matter of individual thought and conscience. This aspect of the right set out in the first paragraph of Article 9, to hold any religious belief and to change religion or belief, is absolute and unqualified. However, as further set out in Article 9 § 1, freedom of religion also encompasses the freedom to manifest one’s belief, alone and in private but also to practice in community with others and in public. The manifestation of religious belief may take the form of worship, teaching, practice and observance. Bearing witness in words and deeds is bound up with the existence of religious convictions. Since the manifestation by one person of his or her religious belief may have an impact on others, the drafters of the Convention qualified this aspect of freedom of religion in the manner set out in Article 9 § 2. This second paragraph provides that any limitation placed on a person’s freedom to manifest religion or belief must be prescribed by law and necessary in a democratic society in pursuit of one or more of the legitimate aims set out therein. (ECHR, *Eweida and Others v. United Kingdom* A. No: 48420/10, 2013, para. 80).”*

20. Article 24 of the Constitution, which regulates freedom of religion and conscience, states that acts of worship, religious rites and ceremonies shall be conducted freely, as long as they do not violate the provisions of Article 14 and refers to Article 14 with regard to the limitation of this freedom. In this context, freedom of religion and conscience shall not be interpreted in such a way as to make it possible for the State or individuals to engage in activities aimed at the destruction of fundamental rights and freedoms recognized by the Constitution or at their restriction to a greater extent than provided for in the Constitution. According to Article 13 on the limitation of fundamental rights and freedoms, fundamental rights and freedoms may be restricted only by law and in conformity with the reasons mentioned in the relevant articles

of the Constitution without infringing upon their essence. These restrictions shall not be contrary to the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality. As a matter of fact, the Constitutional Court has stated that the freedom to manifest one's religion and belief can only be restricted for the reasons set out in paragraph 5 of Article 24 of the Constitution and under the conditions set out in Article 13 of the Constitution (*CC, B.S. Application, A. No: 2015/849, 18.07.2018, para. 68.*) and that, due to the indispensable importance of the freedom of religion and belief in a democratic society, which is protected in many international declarations and conventions on human rights at both universal and regional levels (*CC, Tuğba Arslan, A. No: 2014/256, 25.06.2014, para. 52.*) there must be a compelling social need to interfere with this freedom. (*CC, Ahmet Sil, A. No: 2017/24331, 09.05.2018, para. 32.*)

21. In the incident subject to the application, the applicant entered the complex pool wearing a burkini, but was warned by the complex officials for wearing clothes and was made to get out of the pool. In this context, the applicant claimed that she could not enter the pool wearing a burkini and that she was discriminated against on the grounds of her religious beliefs. Conformity with religion or belief, or the practice of the requirements of religion or belief, may include not only ceremonies, but also certain customs relating to diet, the wearing of certain clothes, the wearing of headscarves and various rituals. In this context, it should be recognized that wearing a burkini is also a form of expression within the scope of freedom of religion and belief (HREIT, Decision No. 2020/26, para. 29.).

22. Similarly, the United Nations Human Rights Committee, in its General Comment No. 22, explained the scope of the concept of worship as follows: *“The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest. The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or head coverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group. In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.”*

23. In the present case, the management of the complex claims that the reason why the applicant could not enter the pool wearing a burkini was the decision of the general assembly of the condominium owners. However, as explained above, freedom of religion and conscience cannot be interfered with in violation of the guarantees set out in the relevant articles of the Constitution. Therefore, it is considered that the applicant's freedom of belief has been interfered with by the decision of the general assembly of condominium owners without a legitimate legal regulation.

24. In addition, the management of the complex claims that entering the pool wearing clothes and similar garments may breed bacteria in the pool and that they have decided to ban it in order to protect the health of the residents. In the opinion previously requested by our Institution from the Ministry of Health on the subject, it was stated that there is no evidence in the scientific literature that can be evaluated that entering the swimming pool with a burkini will harm the right to health. Considering the opinion letter of the Ministry of Health within the scope of the present case, the addressee's claim that the decision was taken to protect the health of the residents is not based on an objective and justifiable reason. When all these issues are evaluated together, it is evaluated that the applicant was subjected to discrimination on the basis of belief because she could not enter the pool wearing a burkini.

25. In the present case, the applicant alleged that she had been discriminated against on the grounds of her sex because she wore women's religious clothing. Differential treatment of a person on the basis of gender without a legitimate and reasonable basis in the exercise of a right or the fulfillment of an obligation constitutes gender discrimination. Discrimination on the basis of gender is prohibited both through international and regional human rights mechanisms and within national legal systems. It is seen that there are many international regulations on the subject, especially the conventions prepared within the United Nations, the Council of Europe and the European Union. (*HREIT, Decision No. 2020/267, para. 26.*) As a matter of fact, according to Article 1 of the United Nations Convention on the Elimination of All Forms of Discrimination against Women, "*For the purpose of this Convention, the term "discrimination against women" means any distinction, exclusion or restriction based on sex which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by women, irrespective of their marital status, of human rights and fundamental freedoms based on equality of men and women in the political, economic, social, cultural, personal or other fields.*"

26. In the case of an allegation of violation of the prohibition of discrimination, the ECHR states that where an applicant establishes that he or she has been subjected to different treatment with at least some evidence that can be called "prima facie evidence", it will be for the other party to prove whether that different treatment has taken place or whether it is justified (*ECHR, Chassanou and Others, v. France (Grand Chamber), Application No: 25088/94, 28331/95, 28443/95, 29.04.1999, para. 91-92.*). As a matter of fact, in the applications made to the Institution within the scope of Law No. 6701, the applicant must prove that the other party has not violated the prohibition of discrimination and the principle of equal treatment if the applicant demonstrated the existence of facts that constitute strong indications and presumption regarding the reality of her claim. The applicant claims that she had been discriminated against because of her gender. Regarding this situation, the complex management asserts the decision of the general assembly of the condominium owners stating that no one can enter the pool with a burkini. However, the burkini is produced not only for women but also for men and men can also use the burkini. In this framework, it is considered that the decision taken in the relevant general assembly of condominium owners is for all women and men, regardless of gender. On these grounds, since the applicant failed to demonstrate the existence of facts that constitute strong indications and presumption regarding the reality of her claim of discrimination on grounds of gender, there was no sufficient conviction that there had been a violation of the prohibition of discrimination on grounds of gender.

27. Law No. 6701 defines direct discrimination as 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. As a result, it has been concluded that direct discrimination, which is listed among the types of discrimination in Article 4 of Law No. 6701, has occurred and the prohibition of discrimination on the basis of belief has been violated.

V. DECISION

On 07.04.2022, it was decided with the dissident vote of Harun MERTOĞLU and with the MAJORITY OF VOTES:

1. That there was A VIOLATION OF THE PROHIBITION OF DISCRIMINATION on the ground of "belief",

2. AN ADMINISTRATIVE FINE of 1.963 TRY shall be imposed on the Addressee,

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 TİRYAKİ
II. Chairperson

e-signed
Dr. Burhan ERKUŞ
Board Member

e-signed
Dilek ERTÜRK
Board Member

e-signed
Att. Harun MERTOĞLU
Board Member

e-signed
İsmail AYAZ
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: Harun MERTOĞLU Dissident Vote

HUMAN RIGHTS AND EQUALITY INSTITUTION OF TÜRKİYE

15.04.2022

REASON FOR DISSIDENT VOTE

Decision Name : S. E. S.
Decision Number : 2022/219

Constitution

I. Personal inviolability, corporeal and spiritual existence of the individual

Article 17 - Everyone has the right to life and the right to protect and improve his/her corporeal and spiritual existence.

The corporeal integrity of the individual shall not be violated except under medical necessity and in cases prescribed by law; and shall not be subjected to scientific or medical experiments without his/her consent.

No one shall be subjected to torture or mal-treatment; **no one shall be subjected to penalties or treatment incompatible with human dignity.**

Law No. 6701

Principle of Equality and Non-Discrimination

ARTICLE 3- (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.**

Types of Discrimination

ARTICLE 4- (1) Types of discrimination falling into the scope of this Law 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.

(2) Unfavourable treatments sustained by persons who launch administrative or judicial proceedings or take part in such proceedings in order to ensure the respect of the principle of equal treatment and prevent discrimination as well as by representatives of such persons on account of such proceedings also constitute a discrimination.

Scope of non-discrimination

ARTICLE 5- (1) 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 law defines the subject of discrimination as " the exercise of legally recognized rights and freedoms". The Law prohibits discrimination 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.” and states that unlawfully preventing the exercise of rights and freedoms through an act or practice based on these grounds constitutes discrimination.

The applicant made an application to the Institution claiming that she was discriminated against on the basis of religion and belief because she wanted to enter the pool, which was built for the use of the residents of the complex, in a burkini, and that she was prevented by the complex management on the grounds that entering the pool in a burkini was prohibited by the decision of the condominium owners general assembly.

The Board has decided that there was discrimination based on religion and belief with reason as follows: “Conformity with religion or belief, or the practice of the requirements of religion or belief, may include not only ceremonies, but also certain customs relating to diet, the wearing of certain clothes, the wearing of headscarves and various rituals. In this context, it should be recognized that wearing a burkini is also a form of expression within the scope of freedom of religion and belief”.

I disagree with the Board's decision for the following reasons.

Residents should benefit from common areas and pools without discrimination. It is not a correct practice for the complex to discriminate among its residents. It is absurd to determine residents' access to the pool based on the clothes they wear and to base this on unscientific health and hygiene grounds.

Complexes are managed in accordance with the Condominium Law. For this reason, the resident who does not accept or participate in the decision against the decisions taken by the complex administrations has the right to cancel the decision by using judicial and administrative remedies.

Whether or not the resident has sought her rights under the Condominium Law is a matter for the applicant and the resident. Whether the applicant exercised this right or not is of no concern to the Institution. Therefore, there is no obstacle to conduct a violation examination under the Law.

In the present case, the applicant's personal rights guaranteed under Article 17 of the Constitution were discriminated against on grounds of belief. However, I am of the opinion that the issue does not fall within the scope of the discrimination regulated in Article 5 of the Law. Whereas:

The addressee complex management serves only the residents of the complex. No one from outside the complex can use the pool in question. More precisely, the addressee has not publicly offered the pool service.

There is no service provision.

In the Board's decision, no assessment was made as to which of the legally recognized rights and freedoms the applicant was prevented from exercise. Only the scope of freedom of religion and belief was assessed according to national and international legislation. I fully agree with these assessments. However, the issue is not that the applicant's freedom of religion and belief has been violated. There is no relation between the jurisdiction and the final decision.

Moreover, wearing a burkini is not a requirement of Islam. It is not an appropriate perspective to consider the headscarf, which is a commandment of Islam, and the burkini in the same category.

In conclusion, I do not agree with the majority opinion as the subject matter of the application does not fall within the scope of Article 5 of Law No. 6701 regulating the scope of discrimination.

e-signed
Att. Harun MERTOĞLU
Board Member