

BOARD DECISION

Application Number : 2021/1017
Meeting Date/Number : 1.3.2022/170
Decision No : 2022/139
Applicant : 1) H. K.
2) K. K.
Applicant's Attorney : Att. K. İ. K.
Address : ...
Addressee Institution/Person : ... Municipality
The Addressee's Address : ...

I. SUBJECT OF THE APPLICATION

1.It is related to applicants' allegation that they were denied municipal services because of their political opinions.

II. EXAMINATION PROCESS

2.The allegations listed in the application is as follows:

a.The applicants were siblings, the house they lived in was located at the end of a dead-end street called ... street in the town of ... the house belonging to their neighbors was located at the 500th meter of this 1000 meter long street, and there were 2 households in total on the street,

b.In the months preceding the application date, the roads of all the households in the town without exception were asphalted and some of them were covered with concrete by the Municipality of the town, in this context, even the roads used only for tea cultivation and woodcutting activities, where there was no human life, were asphalted, but the asphaltting and concreting work on the ... street was carried out up to 500 meters and the work was not continued afterwards, the road work done up to the house of the neighbors on the street was not asphalted and concreted from the part leading to their own houses,

c.The rubbish bins next to the applicants' house were removed,

d.For these reasons, the applicants had problems reaching their homes in rainy weather, they used different roads, the applicant H. K. had to sell one of his vehicles because he could not use it, and the other vehicle had maintenance costs because the road was rough, muddy and potholed, since the road was not asphalted, considering the climate of the region, the road became unusable during heavy rains and there was a danger of slipping,

e.The applicants were tea farmers, a large part of the tea fields they owned were located on ... street, this street was also used by other tea farmers for tea deliveries, many people were deprived of public service due to the attitude of the administration,

f.The fact that the street where the applicants lived was asphalted only up to the point where their neighbors' houses were located, whereas the roads of all households in the town were asphalted, suggests that the administration did not distribute its services equally and discriminated against them,

g.That the discriminatory situation arose from the fact that the applicant H. K. conducted election work on behalf of the party that was the rival of the current municipal administration in the municipal elections and that his political opinions differed from those of the current municipal administration,

h.Verbal requests were made to the Municipality many times, but no result was obtained, and the requests sent in writing to solve the problem were rejected on 08/09/2021.

3.Article 18, paragraph 2 of Law No. 6701 states that “*The Institution shall ask the interlocutor of the alleged violation to submit an opinion in writing. The opinion in writing shall be communicated to the Institution within fifteen days following the communication of request. The opinion in writing shall then be communicated to the applicant who shall be asked to submit his/her opinion to the*

Institution within at latest fifteen days following such communication.” per this provision, the opinion in writing regarding the applicants’ allegations was requested from the ... Municipality, which is the party addressed to the allegation of violation.

4.The addressee ... Municipality submitted its opinion in writing to our Institution with the letter dated 04.11.2021 and numbered 780. Regarding the opinion received; the aforementioned road is in the road concreting program, concreting activities will be carried out when the time comes, 40% of the 120 km of roads within the borders of the town are stabilized, the municipal service requested by the applicants for 500 meters is requested by the entire community, due to the disaster on 15/07/2021, infrastructure damage amounting to 50 million TL occurred in the town, no damage was detected on the road subject to the complaint, therefore, the aforementioned road is not in the urgent and priority road program, after the infrastructure damage is eliminated, the existing road will be concreted in turn within the framework of the road concreting programme.

5.The representative of the applicants submitted his opinion in writing against the opinion in writing to our Institution with a petition dated 03.12.2021. Regarding the opinion received; in the application they made to ... Municipality before applying to our Institution, the Municipality responded that "asphalt was poured on the old concrete roads and the road subject to the application was not asphalted because it was soil", this situation is an indication of discrimination, the roads of some citizens living in the town were concreted in the past and nowadays they are renewed, his clients had to wear boots on their way home, the administration should not report abstractly, should report the names and addresses of the people whose roads were not asphalted despite the request from them, on 15.07.2021, the ... street used by his clients was also seriously damaged by the flood event, the attached pictures are proof of this situation, the administration did not need to carry out damage assessment work, when the photographs submitted in the annex are examined, it will be seen that the clients had to cover the dirt road with scrap tiles they carried in order to reach their houses, heavy tonnage trucks cannot use the road due to the fact that the lower part of the road is broken, the asphaltting work carried out up to half of the aforementioned road was carried out in 2019, not after 15.07.2021, when the disaster event occurred, the administration gave false information to the Institution, ... the town did not experience a flood disaster for the first time on 15.07.2021, the flood event is an ordinary issue in the town, flood disasters were also experienced in August 2017, October 2018, February 2019, the aforementioned road was also damaged in previous disasters, Municipality receives aid from the central government every time there is a disaster, in the flood event on 15.07.2021, 1 house collapsed in the town, 3 citizens who were trapped under the house lost their lives, it was stated by the state authorities that the damage in the town would be covered, the damaged houses were expropriated by the administration, the demands for the asphaltting of the roads have been an ongoing situation for years, that there will be some difficulties in disaster-stricken areas, but there should be no discrimination between citizens in the services provided, if there are difficulties encountered, why the roads of other town residents were asphalted after the disaster, the roads in the town that do not carry a disaster risk were also asphalted, the photographs sent in the annex of the petition are proof of this situation, the information that 40% of the roads in the town are dirt roads is not true, this rate decreased to 10% after the current Municipality took office, the attached press releases are proof of this situation, there was a rubbish bin on the street ... where his clients live, but later the Municipality first moved the rubbish bin in front of the neighbors' house and then completely removed it from the street, therefore, they could not receive garbage service from the Municipality, 1 meter high retaining wall was built by the Municipality up to the tea field belonging to his client H. K. in the ... region in the Municipality, and that the retaining wall was terminated by the Municipality at the exact point where his client's field started, the photographs he sent are proof of this situation.

III. RELEVANT LEGISLATION

6.Paragraph 6 of the preamble of the Constitution states that *“That every Turkish citizen has an innate right and power, to lead an honorable life and to improve his/her material and spiritual wellbeing under the aegis of national culture, civilization, and the rule of law, through the exercise of the fundamental rights and freedoms set forth in this Constitution, in conformity with the*

requirements of equality and social justice.”

7. Article 10 of the Constitution, entitled "Equality before the law", states as follows:

"Everyone is equal before the law without distinction as to language, race, color, gender, 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."

8. Article 123 of the Constitution entitled "Integrity of the administration and public legal personality" states as follows: *"The administration is a whole with its formation and functions, and shall be regulated by law. The organization and functions of the administration are based on the principles of centralization and decentralization. Public corporate bodies shall be established only by law, or by presidential decree."*

9. The first and second paragraphs of Article 127 of the Constitution titled "Local administrations" states as follows: *"(1) Local administrations are public corporate bodies established to meet the common local needs of the inhabitants of provinces, municipal districts and villages, whose principles of constitution and decision-making organs elected by the electorate are determined by law. (2) The formation, duties and powers of the local administrations shall be regulated by law in accordance with the principle of local administration."*

10. Subparagraph (a) of the first paragraph of Article 14 titled "Duties and Responsibilities of municipalities" of the Municipal Law No. 5393 is as follows: *"Provided that such services be of local and common nature, municipalities; shall provide or cause to provide services in the following areas: urban infrastructure facilities such as land development planning and control, water supply, sewer and transport; geographic and urban information systems; environment and environmental health, sanitation and solid waste; municipal police, fire fighting, emergency aid, rescue and ambulance services; urban traffic; burial services and cemeteries; tree planting, parks and green areas; housing; culture and art, tourism and promotion, youth and sports (The last paragraph of Article 75 of this Law shall not apply to the construction, maintenance, repair and furnishing of secondary and higher education student dormitories and school buildings of all grades belonging to the State by municipalities, special provincial administrations, their affiliated organizations and the unions of which they are members and the companies subject to the audit of the Court of Accounts in which they are shareholders); social services and social aid; weddings; vocational and skills training; economic and commercial development."*

11. According to the third and fourth paragraphs of Article 14 of the aforementioned Law; *"(3) The order of priority in the provision of services shall be determined in the light of the municipality's financial situation and the urgency of the service. (4) Municipal services shall be provided to the public at the nearest possible locations and by the most appropriate methods."*

12. According to subparagraphs (a), (d), (e), (g) of the first paragraph of Article 15 titled "Powers and privileges of municipalities" of the aforementioned Law; *"Municipalities shall have the following powers and privileges: "a) Engage in activities and initiatives of all sorts to meet the common local needs of the town's inhabitants,*

d) Assess, accrue and collect the municipal taxes, duties, charges, fees and contributions pursuant to special laws; collect or cause to collect payments other than taxes, duties and charges which are to be collected for natural gas, water, sewer and other services under private law provisions,

e) Without prejudice to vested rights, supply potable, utility and industrial water; ensure the disposal of waste water and rainwater; establish or cause to establish and operate or cause to operate necessary facilities for that purpose; and operate or cause to operate spring water facilities,

g) Provide or cause to provide all services relating to the collection, transport, sorting, recycling, disposal and storage of solid waste."

13. According to subparagraph (d) of Article 2 titled "Definitions" of the Law No. 6701 on the Human Rights and Equality Institution of Türkiye; *"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,”

14. Article 3 of the aforementioned Law titled "Principle of Equality and Non-discrimination" states 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. (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.”*

15. 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.”*

16. The first paragraph of Article 5 of the same Law, titled "Scope of non-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.”*

17. Subparagraph (g) of the first paragraph of Article 9 of Law no 6701 states 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”*.

18. Paragraph (b) of the first paragraph of Article 11 titled "Duties and Powers of the Board" of the aforementioned Law is as follows: *“To take a decision about application on violations of non-discrimination and ex officio inquiries into violations of human rights or non-discrimination, to conclude the conciliation process when necessary about these applications and inquiries, to issue decisions of administrative sanctions foreseen in this Law against violations of discrimination.”*

19. Article 21 of Law No. 6701 titled "Burden of proof" is as follows: *“In applications filed at the Institution exclusively on the basis of an alleged violation of non-discrimination, if the applicant exhibits the presence of strong signs and presumptive facts relating to the veracity of his/her allegation, then the other party shall be required to prove the non-violation of the non-discrimination and principle of equal treatment.”*

IV. THE BOARD'S ASSESSMENT AND JUSTIFICATION

20. The first paragraph of Article 17 titled "Applications" of the Law No. 6701 on the Human Rights and Equality Institution of Türkiye 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.”* Within this framework, it was concluded that the application made by the applicants' Attorney K. İ. K. claiming applicants to be damaged by the violation of the prohibition of discrimination, can be considered as an application that can be examined by our Institution.

21. Discrimination on the grounds of political opinion means treating a person differently and unequally from other persons in terms of rights and freedoms solely on the grounds of political opinion, without any legitimate justification. Although the definition of the prohibition of discrimination, which covers this basis of discrimination and is subject to many national regulations

mentioned above, is not included in our Constitution, the Constitutional Court has defined it as follows; *"The principle of equality in Article 10 of the Constitution applies to 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 stipulated in the Constitution will not be harmed."*

22.The prohibition of discrimination is at the core of international human rights law and is specifically regulated in many international human rights treaties. According to Article 16 of the UN Covenant on Civil and Political Rights; *"All persons are 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."* According to Article 14 of the European Convention on Human Rights; *"The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, membership of a national minority, wealth, birth or other status"*. Article 2 of the Universal Declaration of Human Rights states as follows: *"Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, gender, language, religion, political or other opinion, national or social origin, property, birth or other status."* the second paragraph of Article 21 of the Declaration states that *"Everyone has the right of equal access to public service in his country."*

23.Public service, one of the most fundamental concepts of administrative law, is the main constituent element of the administration. Although there is no accepted general definition, public service in technical and narrow sense is defined as *"continuous and coordinated activities carried out by the state or other public legal entities or under their supervision and control in order to meet and satisfy general and collective needs and to ensure the public interest"* (ONAR, İdare Hukukunun Umumi Esasları, V. 1, p. 119.). Similarly, the Constitutional Court defined public service as *"the continuous and regular activities provided to the public 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 interest or benefit. The administration must act impartially in carrying out these activities, which must be continuous and regular, and must ensure that the service is carried out in a manner applicable to the requirements of the age and, to the extent possible, free of charge."* (CC, 1994/43 E, 1994/42-2 K, D.D. 09.12.1994, O.G. 01.1995/22181, Also CC, 2004/114 E, 2007/85 K, D.D. 22.11.2007, O.G. 24.12.2007/26736)

24.When implementing public services, a number of basic principles must be adhered to. These principles are not only the minimum common principles for all public services but are also strongly related to the essence of the public service. The principles governing public service can be listed as continuity and regularity, mutability, impartiality, equality and accessibility. The principle of equality refers to the obligation of the administration to act objectively in the provision of public services and the equal status of individuals in terms of benefiting from and participating in public services.

25.In administrative law, the relationship between the individuals and communities living in society and the institutions and officials in the public administration should never be understood as "those who administer" and "those who are administered", but rather as those who fulfil their duties and exercise the powers required by this, and those who "benefit" from the activities undertaken and services provided by the administration. Since this fact of benefiting must be accomplished in full

equality, both the service must be provided equally to all those who need that common and general need, and everyone must benefit equally from the service. (ÖZAY, Günışığında Yönetim, p. 247.)

26. According to the Constitutional Court, *“the fundamental principle is equal treatment and equal benefit in public service.”* (CC 1987/3 E, 1987/13 K, D.D. 22.05.1987, O.G. 18.09.1987/19578). According to the State Council *“In the field of administrative law, the principle of equality is conveyed together with the concept of public service. Accordingly, equality is one of the general principles of public service. Within this framework, the administration is not free to provide public services to whomever it wishes, but must provide them equally to those in equal positions and differently to those in different positions. Moreover, the principle of impartiality of the public service includes the obligation of “non-discrimination”.* (D.10.D. 1996/993 E, 1999/3627 K, D.D. 23.06.1999, DD, Y. 2000, S. 102, p. 679.).

27. In the specific case, the applicants’ attorney claimed that the roads in ... neighborhood... street, where his clients reside, were not asphalted and the garbage containers in the street were removed because of the fact that H. K. carried out election work on behalf of the party that was a rival of the current municipal administration in the municipal elections and that his political opinions differed from those of the current municipal administration and attached the result of the political party membership inquiry of his client H. K. to his application. In the research conducted by our Institution; according to the data of the Supreme Election Council, the political party that won the election in the town of ... in the General Elections of Local Authorities dated 31 March 2019 and the political party to which the applicant H. K. belongs are different. In this context, our Institution, which is assigned to inquire into, examine, take a final decision on and monitor the violations of non-discrimination principle – ex officio or upon an application, has come to the conclusion that the concrete application can be evaluated on the basis of the political opinion detailed above within the scope of Article 3/2 of Law No. 6701.

28. The asphaltting of roads, cleaning, and garbage collection services within the boundaries of the municipality, which are the subject of the application, are public services under the responsibility of the local municipality in accordance with the relevant articles of the above-mentioned Municipal Law. In fact, municipalities are public legal entities whose principles of the establishment are specified by law and whose decision-making bodies are elected by the voters in order to meet the local common needs of the people of the municipality. Provided that such services be of local and common nature, municipalities are also responsible for urban infrastructure services such as construction, water and sewerage, transportation, environmental and environmental health, cleaning, and solid waste services.

29. There is no doubt that the requests subject to the application are public services. Because the activities subject to the request are continuous and regular activities carried out by a public legal entity such as the Municipality in order to meet general and collective needs and to provide public benefit and are offered to the public.

30. The applicants’ attorney submitted a number of documents as evidence for the allegations he put forward in his petition to our Institution. These documents consist of a sketch of ... street, a vehicle sales certificate, a political party membership certificate belonging to the applicant H. K., a reply letter sent to them by the Municipality upon their application to the ... Municipality, general road photographs of the asphaltting works carried out in the town, photographs of the asphaltting of roads leading to single houses, photographs of the asphalted roads allegedly used only for tea cultivation and woodcutting activities, and finally colored photographs of the asphalted road on ... street.

31. When the submitted photographs were analyzed; it had been seen that in the photograph named as annex-2, the asphaltting and concreting work on M... neighborhood... street continues past the part where the house of the person stated to be the neighbors of the applicants was located to the side of the road where the neighbors park their vehicles, and the remaining part of the road is not asphalted but left as soil, in the photographs named annex-1, landslides were seen on the left side of the road towards the direction of the applicants' house, which was stated to have occurred on ... street due to the flood disaster that occurred on 15/07/2021, in the photographs named annex-3, annex-4,

annex-5 and annex-6, it was seen that there were general road images regarding the asphaltting works carried out in the town, asphalted and concreted roads leading to a single household, asphalted and concreted roads used only within the scope of tea cultivation and woodcutting activities, and roads stated to be asphalted after 15/07/2021 when the flood disaster occurred.

32.The addressee ... Municipality was asked for sketched samples of the asphaltting works in the town, including ... street, with letters numbered 4755 on 18/10/2021 and 5302 on 12/11/2021, and asked which elements were planned and implemented regarding the asphaltting works, but the Municipality did not provide any response on the subject.

33.Based on these documents, considering the fact that in the ... town, apart from the roads that are normally asphalted, only the roads leading to a single household and even the roads used only within the scope of tea cultivation and woodcutting activities are asphalted, and that there are roads asphalted even after 15/07/2021, when the flood disaster occurred, given the seasonal characteristics and physical conditions of the region where the road subject to the application is located, which is approximately 1000 meters long and where only the applicants and their neighbors reside, the continuing of the asphaltting and concreting work on the ... street, which has been damaged or at least at risk of being damaged by previous disasters, only up to the residence of the neighbors and the roadside where they park their vehicles cannot be considered as appropriate to the ordinary course of life. Within this framework, the administration is not free to provide public services to whomever it wishes, but must provide them equally to those in equal positions and differently to those in different positions. In other words, who will benefit from public services and under what conditions is determined in advance by objective regulations and it is ensured that everyone within this scope benefits from these services under the same conditions.

34.In this context, according to Article 21 of Law No. 6701 entitled "Burden of proof" abovementioned in the relevant legislation section, it has been concluded that the applicant's attorney has demonstrated the existence of facts that constitute strong indications and presumptions regarding the reality of his claim. The addressee ... Municipality has to prove why the applicants were treated differently in different circumstances and did not violate the prohibition of discrimination and the principle of equal treatment.

35.In its opinion in writing dated 04/11/2021, the Municipality sent regarding the application; stated that the municipal service requested by the applicant for 500 meters was requested by all the community in the town, that there was a 120 km road network within the borders of the town, 40% of which was stabilized, and that the aforementioned road was in the concreting program and would be asphalted when the time came, that approximately 50 million infrastructure damage had occurred due to the disaster in the town on 15/07/2021, that no damage was detected on the road subject to the complaint, that this road was not in the urgent and priority road programme, and that it would be concreted when the time came.

36.First of all, the fact that the addressee administration did not respond to our request to send samples of the sketches of the asphaltting works in the municipality, including ... street, and to our question on which elements the asphaltting works were planned and implemented, led to the inability to obtain any data to address the legality of the transaction in the sense of Law No. 6701 and to evaluate the applicability of the third paragraph of Article 14 of the above-mentioned Municipal Law in the specific case. The addressee stated that the request for asphaltting the 500-meter road was made by the entire population of the town, but did not provide solid data on who these people were, for which road they made such a request, and what the content of their request was, and used abstract and general statements. Although the addressee administration stated that no damage was detected on the road subject to the application, the fact that there were landslides on the left side of the road towards the direction of the applicants' house, which was stated to have occurred on ... street due to the flood disaster on 15/07/2021 from the attached photographs, has caused doubts and ambiguities against the addressee in the operation carried out. Considering the figures, which reflected to press, stated in the asphaltting operations of the addressee administration, which were submitted by the applicants' attorney as an attachment to the application, and the budget of the municipality, it was evaluated that

the cost of asphaltting 500 meters of road would not be a serious burden for the municipality. In addition, in its response, the administration did not share any damage assessment report regarding the damages incurred in the flood disaster dated 15/07/2021, nor did it submit any other official documents on the subject. Therefore, there is no legitimate justification for the actions of the addressee Municipality in not performing asphaltting operations on ... street and removing garbage containers from the street.

37. For the reasons explained above, it is concluded that the addressee ... Municipality was unable to prove why the applicants were considered to be in different states and subjected to different treatment, that the roads on ... street where the applicants resided were not asphalted and garbage containers were removed due to their political opinions, thus preventing the applicants from benefiting from the rights and freedoms recognized by law on an equal basis compared to those in a comparable situation and that the prohibition of discrimination regulated under Article 14 of the ECHR, Article 10 of the Constitution and Article 3 of Law No. 6701 was violated based on political opinion.

V. DECISION

On 01.03.2022, it was decided with the dissident votes of HARUN MERTOĞLU and SAFFET BALIN and with the MAJORITY OF VOTES:

1. That there was A VIOLATION OF THE PROHIBITION OF DISCRIMINATION on the ground of "political opinion",
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 TİRYAKI
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 AYZAZ
Board Member

e-signed
Mehmet Emin GENÇ
Board Member (On Sick
Leave)

e-signed
Muhammet Ecevit CARTI
Board Member

e-signed
Saffet BALIN
Board Member

e-signed
Ünal SADE
Board Member

e-signed
Att. Zennure BER
Board Member

Annex:

- 1- Harun MERTOĞLU Dissident Vote
- 2- Saffet BALIN Dissident Vote

10.03.2022

REASON FOR DISSIDENT VOTE

Decision Name : H. K.-K. K.
Decision Number : 2022/139

In the application claiming discrimination on the grounds of political and philosophical opinions in benefiting from public services, the Board concluded as a violation.

In summary, the applicants claimed that in the months preceding the application date, the roads of all the households in the town were asphalted and some of them were concreted by the addressee Municipality without exception, that the asphaltting and concreting of their streets were carried out up to 500 meters and the work was not continued afterward, that the road work done up to the house of his neighbors on the street was not asphalted and concreted from the part leading to his house and that the reason for all this was that he was a member of another political party.

The addressee Municipality, on the other hand, stated that the aforementioned road was in the road concreting program, that concreting activities would be carried out in due course and time, that 40% of the 120 km of roads within the municipality's borders were stabilized, and that the applicants' allegations were ungrounded.

In another letter of the Municipality included in the file, it is stated that their town consists of six neighborhoods and has a road network of 170 km, 25 km of which are asphalt roads, 75 km are concrete roads, 75 km are stabilized, and only deformed concrete roads are covered with asphalt.

There is no dispute that the mayor was elected from the AK Party and that the applicant was a CHP member. Whether political party difference will be considered discrimination based on "political and philosophical opinion" within the scope of Law No. 6701 is an issue to be discussed, which may lead to different results for each specific case, considering that the dynamics of voting for political parties may vary from election to election. Although this issue is the subject of an academic study to be conducted within the scope of the Law, there is no need for an evaluation contrary to the acceptance for now.

However, as can be understood from the information and documents in the file, the applicant H.K. stated that he was treated differently and the addressee stated otherwise. What must be done here is an examination pursuant to the Law.

Article 21 of the Law regulating the burden of proof is as follows: "*In applications filed at the Institution exclusively on the basis of an alleged violation of non-discrimination, if the applicant exhibits the presence of strong signs and presumptive facts relating to the veracity of his/her allegation, then the other party shall be required to prove the non-violation of the non-discrimination and principle of equal treatment.*" This article suggests that the burden of proof is on the addressee.

However, the addressee explicitly rejected the applicants' claim by stating that the first 75 km of roads within the municipality were stabilized.

A request for an on-site examination was also made in the parties' expressions.

It is not possible to reach a healthy and fair conclusion with the existing evidence and the claims of the parties.



In this case, what needs to be done is an on-site examination.

The statements of the parties in this respect were not taken into consideration in the examination, and the proposal of some Board members to conduct an on-site examination during the discussion of the application file was not deemed appropriate by the Board.

Therefore, I do not agree with the majority opinion since the examination was incomplete and the decision was made based on the examination report prepared as a result of the incomplete examination.

e-signed
Att. Harun MERTOĞLU
Board Member

REASON FOR DISSIDENT VOTE

Decision Name : H. K.-K. K.

Decision Number : 2022/139

Regarding the Board's decision dated 01.03.2022 and numbered 2022/139 regarding the issues claimed by the siblings named H. K. and K. K. in their application dated 06.10.2021;

In their petition, the applicants briefly stated that this discriminatory treatment of the house they lived in was located at the end of a dead-end street named ... Street within the borders of the town of ..., that there was a house belonging to their neighbors at the 500th meter of this 1000-meter-long street, that there were a total of 2 households on the street, that in the months preceding the application date, the roads of all the households in the town without exception were asphalted by the Municipality and some of them were covered with concrete, that even the roads used only for tea cultivation and woodcutting activities were asphalted, but that the asphaltting and concreting work on ... Street was carried out up to 500th meter and that the work was not continued afterward, that the road work carried out up to the house of the neighbors on the street was not asphalted from the part leading to his house, and that the garbage cans next to the applicants' house were removed, bases on the grounds that the current municipality was conducting electoral work on behalf of the rival party in the municipal elections and because of their political opinions.

Following the allegations of the applicants, in the letter sent to our Institution by the ... Municipality Presidency; it was stated that there were 120 kilometers of roads within the borders of the town, 40% of the aforementioned roads were stabilized roads, as well as the infrastructure damage amounting to 50 million TRY occurred in their town due to the disaster on 15/07/2021, no damage was detected on the road subject to the complaint, therefore, the aforementioned road was not in the road program that needed to be done urgently and with priority, and that the existing road would be concreted in turn within the framework of the road concreting program after the infrastructure damage is resolved.

Pursuant to Article 17, paragraph (9) of the Law No. 6701 on the Human Rights and Equality Institution of Türkiye, "*Applications which shall not be processed and reasoned decisions of inadmissibility as well as other principles and procedures related to applications shall be set forth through a by-law.*" By-Law On The Principles and Procedures for the Implementation of Law on the Human Rights and Equality Institution of Türkiye published in the Official Gazette dated November 24, 2017 and numbered 30250, regulates the applications made to the Institution, examination procedures, applications that will not be processed and reasoned inadmissibility decisions. In Article 48 of the aforementioned regulation titled "Processing the preliminary Examination", in paragraph (1), it is clearly stated that "*Applications to the Institution shall be subject to preliminary examination before proceeding with the examination and investigation.*" and in subparagraph, d), it is clearly stated that "*Whether it is requested from the relevant party to correct the practice alleged to be contrary to the Law before applying to the Institution*" will be assessed. Paragraph (1) of Article 49 titled "Decisions to be made un the preliminary examination" of the same regulation states as follows: "*In case the application does not meet any of the conditions stated in Article 48 a decision of non-examination can be taken...*". At the preliminary examination stage, it is procedurally incorrect that it was taken directly into examination regardless of whether it meets the conditions required for preliminary examination by the aforementioned regulation.

Although the applicants stated in their petition to the Institution that they requested the Municipality, which is the addressee institution, to correct the issues they claim to be contrary to the law with their written petition dated 08/09/2021, it was observed that this petition was not included among the documents attached to the petition. Before proceeding with the

examination, it is necessary to evaluate whether the applicant has written a petition to the addressee institution as specified in the Institution law and the relevant regulation.

While the relevant legislative provisions are evident, it is understood that an unlawful examination was carried out in terms of form because the examination was initiated regarding the application made by the applicants without completing the formal requirements.

On the other hand, the satellite photographs in the annex show that the applicants' houses have 2 roads from 2 different sides, the road on the left side is 50 meters long and all of it is a concrete road, while the 378-meter road on the right side is half asphalt and half stabilized. Even though there is a concrete road in front of the applicants' house, it is considered to be an abuse of the right of application that the applicants mentioned the issue in their application petition as if there was no road at all. (Annex;1)

Regarding the applicant H.K.'s claim that the roads of all households in the town were asphalted without exception, some of them were covered with concrete, even the roads used only for tea cultivation and woodcutting activities were asphalted, but the asphaltting and concreting work on ... Street was carried out up to 500 meters and the work was not continued afterward; in the letter sent by the addressee institution, it was stated that there were 120 kilometers of roads within the borders of the town and 40% of these roads were stabilized roads. It is seen that the Municipality denied the applicants' allegations that all roads in their town were asphalted or concreted without exception. It is possible to determine whether the addressee or the applicants expressed the truth only through on-site examinations. The allegations of the applicants were accepted as true in a manner that calls into question the impartiality of our Institution without any examination to clarify the matter.

On the other hand, the use of the statement that "... street was also severely damaged by the flood event on 15.07.2021, and that the attached pictures are proof of this situation," by interpreting 2 photographs taken by the applicants, from unknown source, shows that the examination was written in a careless, non-scientific and non-serious manner.

After a disaster happens anywhere, a damage assessment is carried out by the authorized public institutions, by a technical delegation composed of architects and engineers. While the applicant's statement on the subject should be evaluated after asking the relevant public institutions whether ... street was damaged after the flood, it is apparent that the Institution accepted ... street as a damage zone with these 2 photographs, which are of unknown source.

Overall, regarding the examination carried out; I disagree with the decision of the majority for the following reasons;

- An unlawful procedural examination was conducted due to the examination of an application that did not meet the formal requirements set out in the By-Law On The Principles and Procedures for the Implementation of Law on the Human Rights and Equality Institution of Türkiye, which was published pursuant to Article 17 of the Law No. 6701 on the Human Rights and Equality Institution of Türkiye,
- Making a decision based on a one-sided evaluation without assessing the explanations made by the addressee institution with regard to the allegations of the applicants,
- Accepting the information and documents stated by the applicants in their petitions, which should have been confirmed by the relevant institutions, as true without confirmation, Concluded that the applicants' abused their rights to apply by describing the concrete road in front of his house as if it did not exist, even though there was a concrete road in front of their house,

e-signed
Saffet BALIN
Board Member

Annex: Satellite Photo (1 P)