

BOARD DECISION

Application Number : 2021/1225
Assembly Date/Number : 7.4.2022/173
Decision Number : 2022/220
Applicant : V.Y.
Applicant's Attorney : --
Address :
Addressee : Miarosa İncekum Beach Kioxy Otelcilik ve Bilişim Sist.
Ltd. Şti. Addressee's Address:

I. SUBJECT OF THE APPLICATION

1.It is related to applicant's allegation that the addressee discriminated against him by refusing to accept his request for accommodation in a hotel because of his gender.

II. EXAMINATION PROCESS

2.The following was stated in the application:

- a.The applicant contacted Miarosa İncekum Beach Hotel on 22/10/2021 to make a reservation to stay with his friend Ş.A. for a few nights,
- b.For this purpose, a reservation request for 2 people was sent to the hotel's info@miarosaincekumbeach.com address and the fee information was asked,
- c.In the reply given by the hotel official, it was stated that there is no male accommodation in their hotel and the fee information was not shared,
- d.They were not admitted to the hotel only because of their gender, and that they were therefore discriminated against.

3.An opinion in writing was requested from the addressee of the allegation of violation, Miarosa İncekum Beach Kioxy Otelcilik ve Bilişim Sist. Ltd. Şti., as per the provision of paragraph 2 of Article 18 of Law No. 6701 that states as follows; “*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.*”

4.Miarosa İncekum Beach Kioxy Otelcilik ve Bilişim Sist. Ltd. Şti. submitted its opinion in writing to our Institution with the letter dated 07/01/2022 and Institution number 5561. The addressee stated the following in its opinion in writing; that the applicant's complaint is unjustified, that some hotels make reservations for men or single, double, triple men groups, some hotels limit the accommodation of these guests according to the hotel capacity, commercial policy, and the characteristics of the hotel, and that the reason why hotel operators set a limited number of quotas for the accommodation of only men is that there are some problems experienced in the hotels and that the number available in the hotel is wanted to be kept in a balance, although there is no written rule, it is accepted that this issue is commercially customary and left to the discretion of the parties, that they only provide a limited number of accommodation for men in their hotels, and that the requests for men's accommodation are limited due to their emphasis on family accommodation, that men's accommodation is limited up to and including 22/10/2021, as confirmed by the hotel's pricing list, in accordance with the agreement between their hotel and the tour company agency ...com, men's accommodation is provided in the hotel with a quota limit, as it is fixed with the e-mail sent to them by ... Tur,

another tour company that has an agreement with the hotel, Miarosa İncekum Beach Hotel had a sale of men's accommodation in 2021 and the accommodation sale was closed due to the filling of the quota, that they could not provide service to the applicant due to the fact that their quota was full on the date of the incident due to the limited number of quotas allocated for men's accommodation in their hotels, that it cannot be assumed that there was discrimination solely on the basis of e-mail correspondence, and that the applicant was informed externally that they were not available, that the applicant's allegations of violation of the principle of equality did not reflect the truth, that there was no discrimination, that the complainant was wrong and that the applicant could not prove his allegations.

5. Against the opinion in writing of the addressee, the applicant submitted his opinion in writing to our Institution with a petition dated 09/02/2022. The following were stated in the opinion received; although there is no reasonable and acceptable explanation for the gender-based quota limitation in hotels, it is not acceptable for the addressee to cite "some problems" as the reason, the addressee did not explain what some of the problems were and used general and abstract expressions, which was evidence of discrimination, that men's accommodation is limited because they focus on family accommodation, even if it is accepted for a moment that this is the case, it should be asked whether women's accommodation is also limited, as a matter of fact, there is no such limitation for women, the addressee replied to him by e-mail that there is no men's accommodation in their hotels, this situation clearly shows that there is no men's accommodation in the hotel in question within the limited quota, that there is discrimination based on gender, and in the telephone conversation with the addressee, it was stated that there is no men's accommodation in their hotel, and that discrimination should be determined in the present case and an administrative fine should be imposed on the addressee.

III. RELEVANT LEGISLATION

6. Paragraph 6 of the preamble of the Constitution states: *"That every Turkish citizen has an innate right and power, to lead an honourable 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 of language, race, color, sex, political opinion, philosophical belief, religion, 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 35 of the Constitution, entitled "Property right", states as follows; *"Everyone has the right to own and inherit property. These rights may be limited by law only in view of public interest. The exercise of the right to property shall not contravene public interest."*

9. According to paragraph 1 of Article 683 titled "Content of the Property Right" of the Turkish Civil Code No. 4721; *"Whoever owns something has the authority to use, benefit and dispose of it as he wishes within the limits of the legal order."*

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

11. Article 3 of the aforementioned Law titled "Principle of Equality and Non-discrimination" states as follows:

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

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.

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.

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.”

12. In the 1st 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.”

13. According to the 1st paragraph of Article 5 of the aforementioned Law titled "Scope of non-discrimination"; “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.”

14. Subparagraph (g) of 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 application”.

15. Article 21 of Law No. 6701 titled "Burden of proof" states 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.”

16. Article 65 of the aforementioned Regulation states as follows: “As a result of the examination and research carried out within the scope of the application or ex officio examination, the Institution decides that there is decision of non-examination, decision for justified inadmissibility, decision for submission, violation decision, administrative sanction decision, conciliation decision, rejection decision and decision that there is no room for decision.”

IV. THE BOARD’S ASSESSMENT AND JUSTIFICATION

17. 1st paragraph of Article 17 of the Law No. 6701 on the Human Rights and Equality Institution of Türkiye 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 V.Y, 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.

18. 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 26 of the United Nations (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, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”*

19. 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 (*Willis/United Kingdom, para. 48; Okpiz/Germany, para. 33*). The fact that different treatment is based on objective and reasonable grounds is evaluated by the ECHR within the framework of certain criteria. In this case, the legitimacy must first be assessed in the context of the relationship between the objective of the measure in question and its effects, taking into account the principles applicable in a democratic society. It is not sufficient that the difference in treatment behind the exercise of a right set out in the Convention is solely motivated by a legitimate aim. Article 14 is likewise violated if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised (*Belgian Linguistic Case, para.10*). In its recent jurisprudence, the Court defines discrimination as “a difference in treatment of persons in analogous, or relevantly similar situations” and “based on an identifiable characteristic, or ‘status’ ” (*Zarb Adami/ Malta, para. 71*).

20. According to the ECHR, there may be direct discrimination if there is a difference in the treatment of persons in similar situations based on an identifiable characteristic (*Carson and Others, para. 61*). Direct discrimination, which focuses on the different treatment of an individual, is based on unwanted treatment. Direct discrimination is defined in General Comment No. 20 of the UN Committee on Economic, Social and Cultural Rights as follows: *“Direct discrimination occurs when an individual is treated less favourably than another person in a similar situation for a reason related to a prohibited ground; e.g. where employment in educational or cultural institutions or membership of a trade union is based on the political opinions of applicants or employees. Direct discrimination also includes detrimental acts or omissions on the basis of prohibited grounds where there is no comparable similar situation”* (UN Committee on Economic, Social and Cultural Rights; General Comment 20; ‘Non-discrimination in Economic, Social and Cultural Rights’; UN Doc, E/C. 12/GC/20; June 10, 2009; para. 10).

21. The genetic, physiological and biological characteristics of an individual as male or female are known as the explanation of the word gender. Although there are different views on the content of discrimination on the basis of gender, the common view is that gender discrimination is the distinction between men and women. In general, discrimination on the basis of sex can be defined as preventing a person from enjoying the rights they have because of their gender, and excluding or restricting them for this reason. The discrimination may arise from a one-off act, transaction, rule or policy, or in some cases, the treatment in question may be considered discriminatory even if it is not intentional.

22. In the examination of the discrimination claim put forward by the applicant; first of all, it will be determined whether there is different treatment in the present case within the framework of subparagraph (d) of Article 2 of Law No. 6701, and in this context, it will be determined whether there is a difference between persons in the same or similar situation in terms of interference with the right to benefit from accommodation services. It will then be

concluded whether the different treatment is based on an objective and reasonable basis and whether the different treatment is proportionate.

23. First of all, the subject of the applicant's application is that he was denied accommodation in the addressee's hotel simply because he is a man. According to the documents attached to the application, it is understood that the applicant sent an e-mail to the addressee's info@miarosaincekumbeach.com address on 22/10/2021 stating that he wanted to stay with a male friend in single or double rooms and to learn price information, and that the addressee responded negatively that there is no men's accommodation in the facilities.

24. Considering Article 21 of Law No. 6701 titled "*Burden of Proof*", it has been concluded that the applicant, who claims that he could not receive service from the hotel Miarosa İncekum Beach, which is understood to provide accommodation services for men from the attached documents submitted to our Institution by the addressee, has demonstrated the existence of facts that constitute strong indications and presumptions regarding the reality of his claim. In this case, the addressee has to prove why the applicant was subjected to different treatment and that it did not violate the prohibition of discrimination and the principle of equal treatment.

25. The addressee stated the following in their opinion in writing; that some hotels make reservations for male customers, some hotels limit the accommodation of these guests according to the hotel capacity, commercial policy, and the characteristics of the hotel, and that the reason why hotel operators set a limited number of quotas for the accommodation of only men is that there are some problems experienced in the hotels and that the number available in the hotel is wanted to be kept in a balance, although there is no written rule, it is accepted that this issue is commercially customary and left to the discretion of the parties, that they only provide a limited number of accommodation for men in their hotels, and that the requests for men's accommodation are limited due to their emphasis on family accommodation, therefore, they could not provide service to the applicant due to their full quota on the date of the incident.

26. In the document showing the price and quota information sent by the addressee, the addressee Miarosa İncekum Beach hotel has 3 men's standard rooms, 27 standard land view rooms, 10 standard sea view rooms, excluding family rooms. According to the list of customers staying at the hotel on 22/10/2021, it was understood that the hotel served its customers in a total of 15 rooms on 22/10/2021.

27. In the quota list dated 22/10/2021, it could not be concretized with the existing documents submitted by the addressee whether there are rooms named as men's standard rooms among the 15 rooms that appear to be full, and therefore whether the rooms stated to be reserved for men were full or not. However, it has been evaluated that accommodation services can be provided to male customers in other standard rooms, and in addition, according to the 2nd article titled "quota" of the contract named 2021 summer season quota contract made by the addressee with the agency named ...com, it has been evaluated that single room requests exceeding 10% can be confirmed and invoiced as DBL (Double Room) rooms.

28. In addition, although it was stated in the e-mail sent by the addressee to the applicant that "*there is no men's accommodation*", it was stated in the opinion in writing submitted by the addressee to our Institution that male customers are served within certain quotas. This situation has caused doubt and uncertainty against the addressee. In addition, in the opinion in writing of the addressee dated 07/01/2022, it was understood that the e-mail sent to them by the company named ... Tur with the content that "*there was a sale of men's accommodation in 2021, the accommodation sale was closed on the grounds that the quota given was full*" was not sent to our Institution, although it was stated that it was sent as an attachment to our Institution, and that the addressee did not provide information to our Institution on this issue, although the sample of the e-mail in question was requested again with our Institution letter numbered 6963.

29. In another similar case, the Ministry of Culture and Tourism General Directorate of

Investments and Enterprises sent a letter to our Institution for information regarding the obligations of travel agencies; upon a complaint that a travel agency did not accept a single male customer to the tours organized by a travel agency, as a result of the examination, research and evaluation carried out in accordance with the provisions of the Travel Agencies and Travel Agencies Union Law and the Regulation on Travel Agencies, it was reported that the fact that an agency did not accept a single male guest to the tour program carried out within the scope of tourism services was considered as an operational defect and that this agency was fined in accordance with the provisions of the aforementioned legislation.

30. When all these issues are evaluated together, the addressee's claims that the quota application for male customers is a commercial custom, that it is left to their discretion, and that they could not serve the applicant due to the fact that their quota was full on the date of the incident due to the limited number of quotas for men's accommodation in their hotels were not credited. Considering the fact that the hotel rooms are divided into various classes such as family room, men's standard room, standard room with land and sea view, and that there is no separate room allocation for the accommodation of women as in the case of men, it is undoubted that this situation constitutes different treatment based on sex between similarly situated persons. The factual differences regarding the position of men and women in society and their economic independence and the service policy applied by the hotel do not lead the Institution to a different conclusion and it is concluded that there is no objective and reasonable reason why the applicant was not provided with accommodation in the present case and that it was not proportionate not to admit the applicant to the hotel.

31. Again, although many national and international legislations, especially our Constitution, protect the freedom of contract and the right to property, these rights do not provide unlimited protection to individuals. According to Article 13 of the Constitution titled "*Restriction of fundamental rights and freedoms*", fundamental rights and freedoms may be restricted without infringing upon their essence only for the reasons specified in the relevant articles of the Constitution and only by law. Considering that the principle of equality and the prohibition of discrimination are an integral part of our Constitution, Law No. 6701 and international conventions on human rights, the right to property should be used in accordance with these regulations and dispositions contrary to the public interest should not be made. In this context, the right to property does not give the owner the right to provide accommodation services to whomever they wish, nor does it authorize them to discriminate on the basis of gender in the services they provide. Therefore, in the present case, it cannot be claimed that the addressee did not want to enter into a contract with the applicant on the grounds of his sex within the framework of the authority and freedom of contract provided by the property right it owns.

32. For the reasons explained, it is concluded that the addressee failed to prove why the applicant was in a different situation and subjected to different treatment; the applicant was deprived of the accommodation service due to his gender; therefore, 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 on the basis of gender by preventing the applicant from benefiting from the rights and freedoms recognized by law on an equal basis compared to those in a comparable situation.

V. DECISION

On 07.04.2022, it was UNANIMOUSLY decided as follows;

1. In the application there was A VIOLATION OF THE PROHIBITION OF DISCRIMINATION on the ground of sex,

2. AN ADMINISTRATIVE FINE of 3.000 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 TIRYAKI
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 AYZ
Board Member

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Mehmet Emin GENÇ
Board Member

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Muhammet Ecevit CARTI
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Saffet BALIN
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Att. Zennure BER
Board Member