

HUMAN RIGHTS AND EQUALITY INSTITUTION OF TÜRKİYE

BOARD DECISION

Application Number	:	2022/392
Meeting Date/Number	:	19.7.2022/181
Decision Number	:	2022/487
Applicant	:	M.B.Ö
Applicant's Attorney	:	--
Address	:	---
Interlocutor Institution/Person:		1) Notaries Union of Türkiye 2) İzmir --- Former Notary Ş.Y
Interlocutor Address	:	--

I. SUBJECT OF THE APPLICATION

1. The application is related to claim that applicant's obligation to have two witnesses during the power of attorney process due to visual disability cause direct discrimination on the basis of disability.

II. EXAMINATION PROCESS

2. In her petition, the applicant briefly stated the following;
- She has been working as a lawyer for 23 years in the Ministry of Family and Social Services, and she is also as a mediator and conciliator,
 - On 19/03/2019, she applied to the İzmir --- Notary to issue a power of attorney, however it was stated to her that, in accordance with Article 73 of the Notary Law numbered 1512, proceedings could only be carried out in the presence of two witnesses due to her visual disability,
 - Although she stated that this alleged issue was contrary to general legal regulations, she was rejected and no action was taken; the İzmir --- Notary has cited the Circular dated 21/03/2014 and numbered (2) issued by the Notaries Union of Türkiye as the reason why his request was not accepted; it is stated that according to the Circular it is mandatory to have two witnesses in the transactions that the visually disabled citizens will carry out in the form of regulation, therefore, it is stated that no action will be taken without the presence of witnesses,
 - Therewith, she stated that according to Article 73 of the Law numbered 1512, "the presence of two witnesses in the proceedings of the visually disabled who can read and write depends on the will of the visually disabled", she conveyed her request to the interlocutor notary in writing, and she stated that if her request is to be rejected, she wants it to be rejected in writing,
 - However, it was stated by the interlocutor notary that the process cannot be carried on according to the Circular numbered (2), also it has been refrained from giving a written answer. The written request was given to the document registration unit of İzmir ... Notary by the

applicant and it was registered with the document number 21. The minutes taken on the subject are shared with our Institution in the annex of the application documents,

f. She filed an annulment action at the 8th Administrative Case Division of the Council of State for the Circular dated 21/03/2014 and numbered (2) of the Notaries Union of the Türkiye which includes the regulation that the visually disabled citizens are required to have two witnesses in the proceedings in the form of arrangements to be made at the notaries. About a month after the lawsuit was filed, the Presidency of the Notaries Union of Türkiye changed the name of the same circular into a Circular dated 12/06/2019 and numbered (5), in order to dismiss the case,

g. The aforementioned circular of the Notaries Union of Türkiye and the practice of requesting witnesses against the will of visually disabled individuals in regulatory proceedings constitutes violation against especially the Constitution, the United Nations Convention on the Rights of the Disabled (ECHR), the Law on the Disabled numbered 5378, the Turkish Code of Obligations numbered 6098 and the Law numbered 1512,

h. In the Article 14 of the old Code of Obligations numbered 818, the subject of signature was regulated and in the third paragraph of this article, there was the regulation regarding the signatures of those who could not see. In this paragraph, it was stated that the signature of visually disabled persons must be signed in the presence of two witnesses in order to be considered legally valid. For this reason, it was obligatory to seek witnesses for the visually disabled individuals in official transactions in banks, notary and land offices. The preamble for the article was shown as the protection of visually disabled people against all kinds of dangers they will encounter at the time of signing,

i. The mentioned regulation includes prejudiced discrimination against individuals with disabilities and the practices based on it present a situation that could not be defended in terms of universal legal rules such as human rights and equality and has therefore been repealed by Law numbered 5378. Article 23 of the Law numbered 5378 changed the Article 73 of the Law numbered 1512 into *“If the notary public understands that the relevant person has hearing, speech or visual disability, the proceedings are carried out in the presence of two witnesses, subject to the request of the disabled person. If the relevant person has a hearing or speech disability and does not have the opportunity to communicate in writing, two witnesses and a sworn translator are present.”*

j. Again Article 23 of the Law numbered 5378 changed the second paragraph of the Article 75 of the Law numbered 1512 into *“Although a notary process has signed or made a hand sign replacing the signature, if the notary public deems it necessary in terms of the nature of the transaction, the status and identity of the person who signed or made the hand sign, excluding the visually disabled persons who are able to sign and act on behalf of the person concerned; the finger of the relevant witness, translator or expert is also pressed in the procedural section in the above paragraph. If a seal is used, the finger must also be pressed.”*

k. In the Article 50 of the Law numbered 5378 and in the articles titled signature of the old Obligations and Commercial Laws, the clauses requiring two witnesses in the signatures of the visually impaired have been annulled, the new legal regulations have also come into force,

l. As can be seen in the articles of the law, the obligation to require two witnesses when signing in official transactions carried out by visually disabled individuals and in transactions made in institutions and organizations such as land registry, banks and notaries has been abolished with new legal regulations. This situation was left to the preference of the visually disabled individual. Legal regulations have been put into practice by the land registry directorates with the changes made in the land registry statute. The problems experienced in the

bank directorates are tried to be resolved by Banking Regulatory and Supervision Agency (BRSA) by giving a binding written opinion for all banks and by issuing a regulation that ensures that banking transactions are made accessible to the disabled. The practice ignoring the will of visually disabled individuals and imposing the obligation to have witnesses unlawfully only remained in the transactions made at the notaries,

m. Visually disabled individuals have discernment, also have the competence to take their witnesses with them if they think that there is a possibility of harming themselves in the transactions they will make. The practice of keeping witnesses will find an application area only when the visually disabled people's request is in this direction, the visually disabled need accessibility, not witnesses. Today's technology allows visually disabled citizens to read and examine any document without the need for anyone's help, and besides the opportunities offered by digital technology, texts prepared using Braille alphabet can be easily read by the visually disabled,

n. In accordance with the positive obligation of the state doctrine stated in the case law of the European Court of Human Rights (ECHR), it is an obligation for the state to take the necessary measures for the citizens to enjoy their rights and freedoms, otherwise it is considered as a violation of rights. In the report titled "Final Observations on Türkiye's First Report" published by the Disability Rights Committee on 09/04/2019, recommendations were made to Türkiye due to the unlawful action in notary proceedings.

3. In the reply letter dated 21/04/2022 and numbered 7721 from the Interlocutor Notaries Union of Türkiye, the following was stated;

a. In the Article 72 of the Law numbered 1512, it is stated that notary certifies the legal transactions upon the request of the relevant parties and the notary public is obliged to learn the identity, address, ability, and real wishes of the people who will do business,

b. In the Article 73, it is stated that if the notary public understands that the relevant person has hearing, speech or visual disability, the proceedings are carried out in the presence of two witnesses, subject to the request of the disabled person,

c. Pursuant to the Article 89 of the same Law and the fourth paragraph of Article 18 of the Bylaw on Land Registry, it is obligatory to issue the power of attorney, which requires action in the land office, as a notary-drafted power of attorney. In Article 84, it is stated that a notary with minute will make the transactions in the form of notary-drafted and the minute has the statement about the genuine desire of the relevant person and the signatures of the persons participating in the transaction,

d. In the Article 86 it is stated that the minute will be given to person to read after the statement about the genuine desire of the relevant person is written, the relevant person will read the minute and sign under it if the contents are in accordance with what she/he wants. In the Article 87, it is stated that if the relevant person does not have the opportunity to read and write, she/he will declare her/his intention to the notary public in the presence of two witnesses, the minute will be read after this statement is written and the minute will be undersigned after the statements of the relevant and witnesses are written exactly and this matter is recorded in the minutes,

e. With the Unified Circular numbered (5) of the Notaries Union of Türkiye, it become obligatory to regulate all the transactions of the illiterate, and after this date, all the works of the visually disabled were carried out in the form of regulation and in the presence of witnesses,

f. However, in the meeting of the Board of Directors of the Notaries Union of Türkiye dated 27/02/2018 where the report of the working group consisting of the representatives of the

Federation of the Visually Disabled, the Ministry of Justice, and the Ministry of Family and Social Services on the obligation of the visually disabled to have witnesses in the notary proceedings, it was decided that *“By changing the practice of making all the transactions of the visually disabled, it is not required to have two witnesses in the transactions that can be made in the form of approval for the visually disabled people who can read, write and sign according to the Notary Law.”*,

g. For this reason, witnesses will not be sought for the visually disabled persons who can read and write, and whose approval is sufficient, except for the mandatory arrangements (such as power of attorney, testament, will, immovable sale promise) that must be made in the notary-drafted. If the visually disabled person requests it, it is possible to have two witnesses in the approval process. In this respect, in Article 84 of the Law numbered 1512 it is explained that requirement as to form for notary-drafted, if these requirements are not complied with or left incomplete, a dispute may arise in the future,

h. When the text of the transaction in the Article 86 of the aforementioned Law is read together with the Article 87 of the Law, it is seen that the aforementioned reading condition does not only cover the visually disabled or those who can read and write or illiteracy, limiting the state of “the person concerned does not have the ability to read and write” in the article to being able to read and write would be contrary to the spirit of the Law and the concept of transaction security due to the transactions made in the notary. In the text of the article, it is clearly stated that not having the opportunity to read and write, not the expression of illiterate people. It is clear that people who can read and write but are not visually disabled but cannot actually read due to an operation or illness they have undergone are also included in the scope of the aforementioned article,

i. It would not be right for notaries to implement an application that may cause conflict in the future without a legal regulation, considering that they document the transactions in order to ensure legal security and prevent disputes, in accordance with the Article 1 of the Law numbered 1512,

j. In the Article 535 of the Turkish Civil Code numbered 4721, regarding the adjustment of the will without being read and signed by the legator, it is clearly stated that "Legator cannot read or sign(...)" and it is stated that it is obligatory to have a witness in this case while what is written in Article 86 of the Law numbered 1512 must be read by the relevant person,

k. The applicant is visually disabled and has the ability to read what is written in Braille, but since the transactions in the notary are not yet written in the aforementioned alphabet, the applicant did not have the opportunity to read the writings in their current form, and therefore, it is a legal obligation to carry out the process in the form of arrangement in the presence of two witnesses,

l. Moreover, in accordance with Article 53 of Law numbered 1512, notaries considering that they cannot take action against the provisions of the Law numbered 1512, it would not be appropriate to promulgate a regulation, opinion or circular in violation of the legislative hierarchy without making an amendment/change in Articles 86 and 87 of the Law numbered 1512,

m. Opinion was requested from the Directorate General for Legal Affairs of the Ministry of Justice and if it is accepted, they would like to act together in order to rapidly ensure the legislative change with a joint working group established between the Federation of the Visually Disabled, the Ministry of Justice, the Ministry of Family and Social Services and the Notaries Union of Türkiye.

4. In the reply letter dated 12/05/2022 and numbered 8264 from İzmir ... Notary C.A, the following was stated;

a. Notary do not act arbitrarily regarding the petition, they allocate transactions within the framework of the legislation, and any transaction that has been made or not done should be evaluated in this context,

b. The transaction subject to the complaint was carried out within the framework of laws, regulations and circulars, for this reason there is no special personal responsibility, that a change in legislation is required for a different attitude, behavior and procedure, and that they concluded that it would be more appropriate to file the complaint before the Notaries Union of Türkiye in this context.

5. In reply letter dated 22/06/2022 and numbered 116 from Ankara ... Notary Ş.Y (who was İzmir ... Notary Public, on the date of the transaction), the following was stated;

a. He/she stated that on 19/03/2019 worked in the İzmir --- Notary, and the applicant who stated that she had a visual disability came to the notary with two other people. Among those who were with him Attorney B.S, he told the Attorney B.S that she wanted to have the power of attorney for the sale of the real estate he wanted to arrange, without the presence of two witnesses. Although the applicant was informed that the power of attorney for the sale of immovable, which is required to be notary-drafted in accordance with the circulars numbered 2014/2 and 2018/49 of the Notaries Union of Türkiye, upon the applicant's insistence on making proceedings without witnesses it was stated that legal opinion would be obtained from the Notaries Union of Türkiye. In the opinion letter from the Notaries Union, in summary *“According to the articles 86 and 87 of the Notary Law, the transactions of the business owners who cannot read the minute given to them are required by the law, and that the authorization of the lawyer for the sale of the real estate will be prepared in the form of notary-drafted and given to the relevant person to read it. However, since the visually disabled does not have the opportunity to read the transaction that is not prepared in a special alphabet, the transaction must be carried out in the presence of witnesses”* was declared.

6) In the written opinion of the applicant against the written opinion of the interlocutors the following was stated;

a. The defense petition of the Notaries Union of Türkiye is against primarily to the ECHR, which is a part of the domestic legal rules, to the Law numbered 5378, the Law numbered 1512, the established case-law of the Court of Cassation on the subject, the views of the Ministry of Justice, the Ministry of Family and Social Services and many other legal regulations,

b. In Articles 73 and 75 of the Law numbered 1512 it is clearly regulated that how visually disabled people who can sign when making transactions, without making any distinction between approval and notary-drafted. Despite this, in the defense petition, Article 86 of the Law numbered 1512 and Referencing Article 87 is an interpretation that goes beyond the purpose and goes against the spirit of the law. This situation is contrary to the basic principles of legal interpretation technique. When a special provision conflicts with a general provision, the special provision shall apply. The special provision for the visually disabled is Articles 73 and 75 of the Law,

c. Even if it is accepted that Articles 86 and 87 of Law numbered 1512 are the provisions to be applied to the situation in question, there can be no valid basis for this outdated and

degrading treatment that is tried to be imposed. According to the fifth paragraph of Article 90 of the Constitution, international agreements are applied when there is a conflict between international agreements duly entered into force and laws. CRPD has been approved in accordance with Article 90 of the Constitution and has become a part of the legislation. Witness imposition tried to be made on the grounds of Articles 86 and 87 of Law numbered 1512 constitutes a violation of the articles of CRPD, which cannot even claim to be unconstitutional; the Article 5 titled "Non-Discrimination and Equality", the Article 9 titled "Accessibility", the Article 12 titled "Equal Recognition Before the Law" and the 13 Article titled "Access to Justice",

d. I would like to emphasize once again that these issues are also included in the Final Observation Report of the UN Committee on the Rights of Persons with Disabilities. The Committee is concerned about the fact that despite the amendments made in the Law numbered 1512 in the Article 25 of the aforementioned report, the practice of looking for two witnesses with them for the transactions to be made at the notary for individuals with visual, auditory or speech difficulties. In the Article 26 of the Report, it is suggested that the Law numbered 1512 should be made suitable by amending the recognition of all disabled individuals equally before the law,

e. Visually disabled individuals cannot be counted among those who do not have the opportunity to read and write, visually disabled individuals have the opportunity to read and write in many ways. In the transaction of notary-drafted power of attorney, the problem can be solved easily via a sharing such as an e-mail or message to be sent to the applicant's mobile phone. I can also use technological tools effectively like visually disabled people who can read and write. The Notaries Union of Türkiye continues to avoid making reasonable arrangements for the visually disabled who can sign in accessing rights and services. Failure to make the necessary reasonable arrangements also constitutes discrimination. Despite the opinion of the Ministry of Justice dated 2016 on the subject, the aforementioned practices continue. Efforts have been made for years to bring an honorable solution to life. Our Institution has requested that a binding decision be taken on the Notaries Union of Türkiye, that the notaries should immediately abandon the practice of requesting witnesses from visually disabled individuals, which ignores the honor and dignity of the visually disabled and is carried out in violation of the law.

7) The applicant submitted the legal opinion of the Directorate General for Legal Affairs of the Ministry of Justice dated 06/05/2022 and numbered 15264, regarding the notarial proceedings of the visually disabled, in addition to his/her written opinion.

III. RELEVANT LEGISLATION

8. Article 10 of the Constitution titled "Equality before the Law" is as follows:

“Everyone is equal before the law without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such grounds. (...) Measures to be taken for children, the elderly, disabled people, widows and orphans of martyrs as well as for the invalid and veterans shall not be considered as violation of the principle of equality. State organs and administrative authorities are obliged to act in compliance with the principle of equality before the law in all their proceedings”.

9. Article 17 of the Constitution titled “Personal inviolability, corporeal and spiritual existence of the individual” is as follows:

“Everyone has the right to life and the right to protect and improve his/her corporeal and spiritual existence.”

10. Clause (d) of Article 2 of the Law numbered 6701, titled "Definitions" explains “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” clause (f) “Disabled: An individual affected by attitudes and environmental conditions restricting his/her full and effective participation in the society in equal conditions with other individuals due to varying degrees of loss of physical, mental, psychological and sensory abilities”, and clause (i) “Reasonable Accommodation: Proportional, necessary and appropriate modifications and measures taken to the extent allowed by financial means and needed in a given circumstance to enable the disabled to fully exercise and benefit from their rights and freedoms and in an equally manner to other individuals”.

11. Article 3 of the Law numbered 6701 titled “Principle of Equality and Non-Discrimination” is 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

(...)”

12. In the first paragraph of Article 4 of the Law numbered 6701, titled "Types of Discrimination", the types of discrimination are listed 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. The first paragraph of Article 5th of the Law numbered 6701 titled “Scope of non-discrimination” is as follows:

“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. In subparagraph (g) of the first paragraph of Article 9 of Law numbered 6701 it is regulated that the Institution has duty “*Inquiring into, examining, taking a final decision on and monitoring the violations of non-discrimination principle – ex officio or upon an application”*

15. Article 21 of the Law numbered 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.”

16. According to the paragraph (f) of the Article 3 titled "Definitions" of the Law numbered 5378, *“Accessibility: Buildings, open spaces, transportation and information services, and information and communication technology are safely and independently accessible and usable by people with disabilities.”*

17. Article 4/a of the Law numbered 5378 titled “Discrimination” is as follows:

“All forms of discrimination based on disability, including direct and indirect discrimination is forbidden. Necessary measures are taken to make reasonable arrangements for the disabled to ensure equality and eliminate discrimination. Special measures to be taken to ensure that persons with disabilities enjoy their rights and freedoms fully and equally cannot be considered as discrimination.”

IV. EVALUATION AND JUSTIFICATION

18. In the first paragraph of Article 17 of the Law numbered 6701 titled "Applications", there is a provision stating “Each and every natural person and legal person who claim to have suffered from violations of non-discrimination can apply to the Institution.”. It was concluded that the application made by MBÖ was not clearly unfounded and that there was no reason to decide its inadmissibility. Therefore, it was concluded that the application could be examined on the merits.

19. The prohibition of discrimination is at the core of international human rights law and is specifically regulated in many international human rights conventions. According to the international conventions to which we are a party, everyone has the right to benefit equally from legally recognized rights and freedoms, and to be protected against all forms of discrimination, violence and harassment.

20. The prohibition of discrimination is regulated in Article 14 of the European Convention on Human Rights as follows: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

21. In the decisions of ECtHR, discrimination is defined as treating differently persons in relevantly similar situations, without an objective and reasonable justification (ECtHR, Willis v. the United Kingdom, No: 36042/97, 11/06/2002, para.48 and ECtHR, Okpisz/Germany, No:59140/00, 25/10/2005, para.33). In order to evaluate whether there is a violation of prohibition of discrimination, it is necessary to look at the relationship between the purpose and the result of the action or transaction that is alleged to cause discrimination. According to the decisions of the ECtHR, discrimination occurs if "the difference in treatment does not have an objective and reasonable justification" or if a "legitimate aim" is not pursued (ECtHR, Abdulaziz, Cabales and Balkandali v. the United Kingdom, numbered 9214/80; 9473/81; 9474/81, 25/05/1985, para.72).

22. In Constitutional Court (CC) decisions, different treatments which cannot be objectively and reasonably justified, in other words, which are not based on a legitimate aim or do not have a reasonable proportionality between the chosen instrument and the intended purpose are considered to be discriminatory in the context of the purposes of Article 10 of the Constitution. (CC, Nuriye Arpa Decision, App. No: 2018/18505, 16/6/2021, para.58) For this reason, the principle of equality shall not be violated in cases where different treatment for those with the

same legal status is based on an objective and reasonable reason, different treatment is proportional to the foreseen legitimate purpose, in other words, the person who is subjected to different treatment is not burdened excessively and extraordinarily. (CC Burcu Reis Decision, App. No: 2016/5824, 28/12/2021, para.50)

23. In the first paragraph of Article 4 of the CRPD, titled "General Obligations", to which our country is a party, it is stipulated that States Parties are obliged to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. In accordance with this purpose, it is regulated in subparagraph (b) of the Article 4 that states parties undertake to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities.

24. In this respect, after the signing of the CRPD implemented by the UN, radical changes have occurred both in the legislation and in the field of practice in order to ensure the effective participation of the disabled people in all areas of life on a national scale. With the Law numbered 5378, which was adopted on 01/07/2005 and entered into force after being published in the Official Gazette numbered 25868 on 07/07/2005 and with the other subsequent legal regulations, significant progress has been made in the protection and development of the human rights of the disabled. In this context, Article 50 of the Law numbered 5378 and the additional Article 37 of the Social Security Law numbered 506, the third paragraph of Article 668 of the Turkish Commercial Code numbered 6762, and the last paragraph of Article 14 of the Code of Obligations numbered 818, which is regulated as *"Unless the signatures of the blind parties are duly approved or it is established that they are aware of the text of the transaction when they sign, shall not bind them."* have been repealed. Accordingly, Article 668 of the Law numbered 6762 regulating the signature in the policies, which states *"Statements on the policy must be signed by hand. Instead of a handwritten signature, any mechanical means or a hand-made or certified sign or an official certificate shall not be used. The handwritten signatures of the blind people must be duly certified."* has been repealed and in Article 756 of the Turkish Commercial Code numbered 6102, which regulates the same subject, the regulation seeking the approval of the signatures of the visually disabled was not included and the article was accepted as follows: *"Statements on the policy must be signed by hand. Instead of a handwritten signature, any mechanical means or a hand-made or certified sign or an official certificate shall not be used."* In this way, according to the new regulation stipulated by the law, there is no different form requirement for the visually impaired in the issuance of bills. On the other hand, there are many decisions made by the 12th Civil Chamber of the Court of Cassation on the same issue. (*The Court of Cassation, 12.CC, its decision dated 03.07.2008, numbered 2008/8941,2008/14229, decision of the same Chamber dated 02.04.2013 and numbered 2013/3973, 2013/12509*)

25. In the present case, the applicant, who has been working as a lawyer for 23 years within the Ministry of Family and Social Services and also performing her duties as a mediator and conciliator, has applied to the İzmir Notary Office numbered ... on 19/03/2019 in order to issue a notary-drafted power of attorney to deal with the sale of a real estate she owns. The applicant stated that it was stated by the notary public that she could only take action in the presence of two witnesses, as she was visually disabled, in accordance with Article 73 of the Law numbered 1512. However, although she stated that this alleged issue was contrary to the general legal regulations, the request was rejected and the action was not carried out. She stated that as the reason why her request was not accepted, the İzmir Notary Office numbered ... showed her the Circular dated 21/03/2014 and numbered (2), published by the Notaries Union of Türkiye, which states that it was mandatory to have two witnesses in the transactions that the visually disabled citizens would make in the notary-drafted form. She also stated that, she has filed an action for annulment at the 8th Administrative Case Division of the Council of State for the annulment of Circular. The applicant also claimed that the Circular of the Notaries Union of

Türkiye and the practice of notary offices to request witnesses against the will of visually disabled individuals in notary-drafted proceedings are against the Constitution, CRPD, Law numbered 5378, Law numbered 6098, and Law numbered 1512.

26. In the opinion presented by the addressee Notaries Union of Türkiye, it was stated that the notaries, upon the request of the concerned parties, document the legal proceedings in order to ensure legal security and prevent disputes, and that the notaries are responsible for fully learning the identity, address, ability and real wishes of those who will transact in the notary. It is also stated that form conditions of notary-drafted documents are explained in article 84 of the aforementioned Law, and if these conditions are not complied with or left incomplete, a conflict may arise in the future. Considering the condition of reading the text of the transaction by the relevant persons in Article 86 of the aforementioned Law together with Article 87 of the Law, it does not only cover the visually disabled or literate/illiterate people, and this limitation is contrary to the spirit of the Law and the concept of transaction security due to the transactions made in the notaries. In the text of the article, it is clearly stated that not having the opportunity to read and write, not the term illiterate and it is very clear that people who can read and write but are not visually disabled but cannot actually read due to an operation or illness are also within the scope of the aforementioned article. It would not be right for them to implement an application that may cause conflict in the future without a legal regulation. It is also indicated that since the proceedings in the notary are not written in Braille alphabet, the applicant does not have the opportunity to read what is written, therefore it is a legal obligation to carry out the notary-drafted transaction in the presence of two witnesses; it will not be appropriate to put it into practice with a regulation, opinion or circular, contrary to the hierarchy of norms, without making an amendment in Articles 86 and 87 of the Law numbered 1512.

27. In the case that the visually disabled applicant can only be processed on the condition that two witnesses are present in the process of issuing a power of attorney by the addressee on 19/03/2019, it is necessary to check whether the person is treated differently compared to those who are in a comparable situation in terms of the bases listed in the Law numbered 6701 and whether there is a reasonable proportionality between the vehicle and the targeted legitimate purpose in order to determine whether the action was taken with a reasonable justification.

28. Firstly, Article 73 of the Law numbered 1512, which is *“If the notary public understands that the person concerned is deaf, dumb or blind the operations shall be concluded with the presence of two witnesses upon the request of the person concerned. If the person concerned is deaf or dumb and cannot communicate by writing the operations shall be concluded with the presence of two witnesses and a sworn translator.”* and the Article 75 which is *“If a notary operation is signed or marked in any kind replacing the signature, upon the request of the person concerned or operation made on behalf of the person concerned excluding the blind persons who sign; the notary publics shall took the fingerprints of the person concerned, translator or expert in the notary public office as mentioned-above deem necessary regarding the quality of the operation, the state of the person signed or marked and his/her identity. If he uses the seal he shall also use the fingerprints. Notary publics took the witness, translator and expert oath in accordance with the Legal Proceedings Law.”* includes special regulations regarding the visually disabled people. In Article 86 of the Law numbered 1512, it is emphasized that it is emphasized that the person concerned should read the report and check whether the content is in accordance with his/her request. Article 86 is regulated as *“After writing down the declaration regarding the true intention of the person concerned the minutes is given to the person mentioned before. The person concerned reads the minutes and if the contents are in accordance with his/her intentions he signs it after this matter is written.”* It is seen that there are general provisions regarding the situation of those who cannot sign and those who cannot read and write in the Article 87 of the Law which regulated as *“If the person concerned is illiterate, in the presence of the two witnesses the above-mentioned person*

declares his/her intentions to the notary public. After the notary public writes down this declaration the minutes is read. The provisions of the other laws regarding the execution operation in the presence of the two witnesses are legally guaranteed. Person concerned and witnesses sign this after declaring it is exactly written and this matter is written in the minutes.”. Considering these regulations, it is undoubtedly that Articles 86 and 87 of the Law numbered 1512 are not regulations specific to the visually disabled, while the regulations in Articles 73 and 75 express a special form (*lex specialis*) for the visually disabled. Considering the provisions of the relevant law, it is clearly understood that the legislator has made it a rule that visually disabled people can make binding transactions with their signatures, but that they can have witnesses during the process if they request it. As a matter of fact, rationale of Article 23 of the Law numbered 5378 amending the relevant article: "With this article, it is stipulated that visually disabled people, hearing and speaking disabled people can optionally take action without the need for two witnesses in notary proceedings." supports this idea.

29. When the explanations brought by the addressee Notaries Union of Türkiye are taken into account, it is understood that the provisions in the 86th and 87th articles of the relevant Law are interpreted broadly to include the visually disabled, without taking into account the special regulations stipulated for the visually disabled in the Law numbered 1512. It is considered that it would not be appropriate to apply the articles titled "*Reading the minutes*" and "*The person concerned does not have the opportunity to read and write*" in the 86th and 87th to the visually disabled people due to the existence of special and discrete regulations regarding the notarial transactions of the visually disabled in Articles 73 and 75 of the Law numbered 1512. Because visually disabled individuals who can read and write will be able to read the relevant minutes and be able to understand the content of the minutes if they have the opportunity. In addition, when the ninth part of the Law numbered 1512, titled "The Form of Notary Public Transactions" and its first part titled "General Provisions to be Complied with in Notary Public Transactions" is examined, the articles regulated under the aforementioned title regulate the procedures and principles that must be followed in the notary operations in general, and there is no provision in the form of regulation and approval and it will be understood that there is no distinction made. Therefore, Articles 73 and 75 of the Law numbered 1512 should be applied in all transactions to be made at the notary.

30. Likewise, the second paragraph of the Article 75 of the Law numbered 1512 amended by the Law numbered 5378 states: "*If a notary operation is signed or marked in any kind replacing the signature, upon the request of the person concerned or operation made on behalf of the person concerned excluding the blind persons who sign; the notary publics shall took the fingerprints of the person concerned, translator or expert in the notary public office as mentioned-above deem necessary regarding the quality of the operation, the state of the person signed or marked and his/her identity. If she/he uses the seal she/he shall also use the fingerprints. Notary publics took the witness, translator and expert oath in accordance with the Legal Proceedings Law.*" It is understood that it was once again clearly emphasized that the visually disabled people who can sign are treated differently from visually disabled people who cannot sign with the reuse of the expression "*(...) excluding the visually impaired (...) who can sign (...)*" in the second paragraph of Article 75 of the aforementioned Law.

31. The first paragraph of Article 24, titled "Conditions in which witnesses must be present", of the Land Registry Regulation, which entered into force after being published in the Official Gazette dated 17/08/2013 and numbered 28738, is as follows: "*Two witnesses will be present in cases where one or more of the claimants cannot sign, cannot read or write, have doubts about their identities, contract until death and in other cases stipulated by the legislation*". The second paragraph of the same provision is regulated as follows: "*In case the applicant is hearing, speaking or visually disabled, the proceedings will be carried out optionally in the presence of two witnesses, in case the disabled person does not request witnesses, this matter*

will be stated in the request document or in the official deed, if the person concerned is hearing or speaking disabled and there is no opportunity to communicate in writing, there will be a sworn expert who understands sign language”. According to this regulation, while visually disabled individuals can carry out any title deed transfer process of their own free will, without the presence of two witnesses in line with their preferences, they will not be able to issue a power of attorney, which includes authorization to another person for the deed transfer process, as a result of the current practice of the Notaries Union of Türkiye. In accordance with the general rules of law, while the person himself/herself can do the actual act without a witness, he/she must be able to appoint someone as a proxy for the aforementioned transaction. However, in practice, although a person can transfer an immovable without a witness, he/she cannot authorize another person to transfer. Therefore, considering the case of ensuring the integrity of the application, visually disabled people who can read, write and sign should be excluded a fortiori from having witnesses in the notary-drafted proceedings to be made at the notary. Otherwise, restricting the visually disabled who can sign through the circulars issued by the Notaries Union of Türkiye will also constitute an unfair intervention in the will of these people.

32. It is considered that the justification of documenting the transactions made in order to ensure legal security in the transactions made in the notary public and to prevent disputes that may cause conflict in the future, as claimed by the interlocutor Notaries Union of Türkiye in the written opinion, will lead to the emergence of a structure that does not take the opinion of the disabled individuals and does not allow them to use their legal rights in line with their own wishes and demands. The decision whether the transactions to be performed in the notaries by the visually disabled persons who can sign should be made in the presence of two witnesses should be left to the independent will within the framework of the freedom of the visually disabled person to make his/her own choices in accordance with paragraph 3/a of the CRPD. As a matter of fact, in the legal opinion dated 6/05/2022 and numbered 15264 submitted by the General Directorate of Legal Affairs of the Ministry of Justice, it was underlined that not having the opportunity to actually read and write for a visually disabled individual would not necessarily result in being unable to understand the content of the transaction. Based on the aforementioned assumptions, the practice of obliging the visually disabled to take action in the presence of two witnesses in the proceedings to be carried out at the notary constitutes a different treatment for the visually disabled and without an objective basis. Therefore, it is not possible to talk about the legitimacy of the aim sought to be achieved based on such an assumption, which lacks an objective basis.

33. In the present case, when an evaluation is made within the scope of the personal characteristics of the applicant it is understood that the person is an individual who has been working as a lawyer within the Ministry of Family and Social Services for 23 years, who also performs the duties of mediator and conciliator, who has received training and has a professional career. While the applicant has the authority to make a statement, act and represent someone else in all public and private institutions with the power of attorney she received from her clients, thanks to her attorneyship identity, she cannot allocate a binding transaction in her name and account with her own signature in the presence of a notary, and she is compelled to take action in the presence of witnesses, although she does not have such request. In this context, the important point is that it should be understood that individuals with disabilities are not “objects of pity” but subjects of rights who have decisions over their own lives. Besides, considering the visually disabled as people who do not have the opportunity to read other than Braille also includes stereotypes. Although it is seen that the public institutions and organizations do not have detailed information about the situation of the visually disabled, it is understood that there is no real search for the solution of the problems due to the lack of awareness in this area. Disabled people should not be approached with the perception that they

are in constant need of protection; prejudices and stereotypes against disabled people should be eliminated.

34. Claims that the applicant did not have the opportunity to read what was written since the transactions in the notaries are not written in Braille alphabet should also be evaluated in terms of accessibility. Accessibility constitutes one of the basic principles on which both CRPD and Law numbered 5378 are based. The Committee on the Rights of Persons with Disabilities, the oversight body of the CRPD, makes the following statement regarding accessibility in its General Comment numbered 2: *“Accessibility is related to groups, whereas reasonable accommodation is related to individuals. This means that the duty to provide accessibility is an ex ante duty. States parties therefore have the duty to provide accessibility before receiving an individual request to enter or use a place or service. States parties need to set accessibility standards, which must be adopted in consultation with organizations of persons with disabilities, and they need to be specified for service-providers, builders and other relevant stakeholders. Accessibility standards must be broad and standardized.”* (Committee on the Rights of Persons with Disabilities General Comment numbered 2, para.25)

35. As stated in Article 17 of the Constitution, everyone has the right to improve their corporeal and spiritual existence. In this context, accessibility should be established in all areas of life so that disabled individuals can exercise these rights equally with all individuals. As a matter of fact, in accordance with Article 3 of Law numbered 5378, accessibility means that buildings, open spaces, transportation and information services, and information and communication technology are safely and independently accessible and usable by the disabled. All actors with responsibility for the realization of equality are obliged to take the necessary measures. In order to ensure that disabled people have equal opportunities in terms of benefiting from their fundamental rights and freedoms, it is important to make reasonable accommodations by considering accessibility and the needs of different disabled groups. (HREIT, Board Decision numbered 2021/253, para.20-21)

36. In the case that is the subject of the application, the applicant demands that the visually disabled need accessibility, not the witness, that the texts to be prepared by making use of the opportunities offered by digital technology can be read by the visually disabled and in this context, accessibility should be provided for the visually disabled. It is seen that the applicant claims that it is obligatory to take action in the presence of a witness because the applicant does not have the opportunity to read the written documents in the current form because the procedures for the applicants with visual disability are not yet written in Braille alphabet. As stated in the defense in the written opinion of the interlocutor, "in order to ensure legal security in the transactions made in the notary and to prevent disputes that may cause conflict in the future", it is necessary to provide services that will provide the opportunity to read and write in the transactions to be carried out by the visually disabled in the notary proactively without seeking a request. This situation should especially be considered within the scope of the duty of public authorities to provide all kinds of infrastructure and opportunities for the disabled to live independently and to encourage their active participation in all areas of life.

37. It is clear that alternative possibilities offered by digital technology such as text message, e-mail, memory card, which will enable visually disabled people performing a transaction in the notary to be aware of the content of the transaction and access the information exactly, can be used apart from the use of the Braille alphabet. Failure to provide equipment that will enable visually disabled people to be familiar with the content of the procedures they will perform in notaries, failure to make necessary accommodations that can meet the accessibility requirements by ignoring the needs of visually disabled people constitute a discriminatory treatment on the basis of disability.

38. As it is known, the CRPD has been in force for thirteen years without any reservation or declaration of our country. In the Article 25 (b) of the final observation report dated 9 April

2019 prepared by the UN Committee on the Rights of Persons with Disabilities, which carries out the international supervision of the implementation process of the CRPD, it is evaluated as a concerning matter that *“The reported ongoing practice of having two witnesses for notarial acts for persons with visual, hearing or speech impairments, despite amendments in 2005 to the notary proceedings prohibiting it”*. In its general comment numbered 1 on the right to equality before the law, the Committee recommended "Ensuring compliance with the Notary Law, which has been amended to ensure that all persons with disabilities are recognized equally before the law". This recommendation should be taken into account.

39. In conclusion, it is clearly regulated in the law that the presence of witnesses in the transactions to be carried out by the visually disabled is only necessary if the visually disabled person requests. It is concluded that the imposition of the presence of witnesses as an obligation in the procedures to be carried out by the visually disabled person is not based on a reasonable and legitimate reason for the different treatment of the visually disabled person who can read and write, and that the principle of equality and the prohibition of discrimination are violated since it imposes an excessive and extraordinary burden on the visually impaired person who is subjected to different treatment.

V. DECISION

On 19.07.2022, it was unanimously decided as follows:

1. In the application there was A VIOLATION OF THE PROHIBITION OF DISCRIMINATION on the basis of disability,
2. AN ADMINISTRATIVE FINE of 40,000 TL shall be imposed on the interlocutors,
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.