AN EVALUATION OF TİHEK'S M.I.A. DECISION

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INTRODUCTION

§1. This report was written at the request of the Monitoring Association for Equal Rights. The focus of the report is *the M.I.A.* decision [1](in which the applicant's identity was kept secret), which is highly significant in terms of the prohibition of race-based discrimination . The reasoning of the decision in this case, where the HREIT concluded that there was no violation, is flawed due to the fact that some points related to the incident were conveyed implicitly and other aspects were presented superficially. y. Therefore, the analysis will be conducted within the limits of these deficiencies.

§2. According to the plan of the decision, firstly (i) an objective explanation of the events will be provided, then (ii) a summary of the HREIT decision will be included and finally (iii) an evaluation will be carried oute.

I) EVENTS

§3. M.I.. is a Somali person. (Hereinafter referred to as "applicant".) He left his country due to violence in Somalia, such as internal conflicts , bomb attacks by terrorist organizations and other violent incidents in Somalia and came to Turkey legally in 2012.

§4. The applicant first studied and graduated from Samsun 19 Mayıs University, Faculty of Theology (07/12/2012-30/09/2016) . During this period, he studied at Eskişehir Anadolu University, Department of Labor Economics and Industrial Relations , and then lived with a student residence permit during his education at Bursa Uludağ University (29/09/2016-09/09/2020), where he started his master's degree. The applicant then started living with the short-term residence permit (03/07/2020-17/05/2021) offered to foreigners who will stay in Bursa for tourism purposes, and then moved to Ankara and received another residence permit there (17/05/2021-17/05/2022).

§5. The applicant, along with his two Somali friends, established a company registered in the trade registry of the Ankara Chamber of Commerce on 15/03/2019 and opened a restaurant (hereinafter

[1] *M.I.A. decision* , TİHEK, App. No: 2021/11752, K. 2022/492, 09/08/2022. For the text of the decision, see https://www.tihek.gov.tr/kategori/pages/kararlar (Access date: 06/11/2023).

referred to as “restaurant”) in Ankara. This is Turkey's first Somali restaurant. The applicant has a business and working license issued by Çankaya Municipality on 20/11/2019 . The applicant applied for four different work permits until 2022, but these applications were rejected.

§6. The applicant served as the project consultant and translator of a documentary about Somalia on the TRT Belgesel channel that received worldwide awards. In addition, a work that the applicant translated from Somali to Turkish was published by Türkiye Diyanet Vakfı Yayınları.

A) EVENTS BETWEEN 08/09/2021 - 13/09/2021

§7. According to the applicant, although he had not encountered any problems with law enforcement for approximately ten years , for the first time on 08/09/2021, a group of officers, including the police and the constabulary, came to the restaurant and spoke in a very harsh tone, shouting that they wanted to see the tax registration certificate and other official documents . After a while, they left the restaurant upon complaints from customers. . A few hours later on the same day, the police informed the applicant that he should come to the police station with them. The applicant, along with other Somalis in the car, was driven around in the hot weather for a while (there is no specific data for this duration) and taken to the police station, where they were kept in an airless and dirty room for about three hours. The police officers at the police station threatened to deport the applicant and the Somalis with him and confiscate their earnings and at the end they were released.

§8. According to the applicant; During the week following 08/09/2021, law enforcement officers came t to the restaurant at least 10times and conducted identity checks on the d customers. According to the applicant, this situation created a perception among customers and neighbors that the applicant and his partners were criminals, and also caused economic damage on the days when law enforcement officers came to the restaurant.

§9. The applicant hasfiled a complaint on this matter and also announced it on his social media account on 11/09/2023.

§10. According to the applicant; on 13/09/2021, two plainclothes police officers came to the restaurant and explained in a softer manner

compared to the previous police officers that if a complaint was made against the restaurant, there would be serious sanctions and their licenses would be revoked.

§11. The Police Department has not made any statement regarding these events that allegedly occurred between 08/09/2021 - 13/09/2021.

B) EVENTS REGARDING THE ADMINISTRATIVE DETENTION AND DEPORTATION DECISION PROCESS

§12. On 15/09/2021, at around 18.30, the police came to the restaurant and informed the applicant that he should come to the police station due to the suspicion that he was "working without a work permit " . The applicant, along with sixteen foreign nationals, most of whom were Somali, was taken to the Çankaya Crime Prevention and Investigation Bureau by a police car, and at 20.30, the decision to take the applicant to the "Counter Migrant Smuggling" was documented in the report. The Ministry of Interior confirmed that inspections were carried out in the aformentioned area on 15/09/2021 and that people of different nationalities without working permits, including the applicant, were handed over to the Counter Migrant Smuggling And Border Gates Department , and it was claimed that the entire process from this point until the decision to deport the applicant was in accordance with the law.

§13. According to the applicant's claim, his request to pray was denied while the procedures in question were being carried out. Neither the Ministry of Interior s nor the Police Department has made any statement on this matter.

§14. The applicant was taken to Ankara Gazi Mustafa Kemal State Hospital (hereinafter referred to as the "Hospital"), where a report was prepared at 22:17 stating that there was no sign of battery or force.

§15. According to the claim of the applicant, who was taken to the Counter Migrant Smuggling And Border Gates Department on the same day, there was no ventilation, fan and toilet water in this place. Again, according to the applicant; Some people sleep on chairs because there is no place to sleep; There are no equipment such as quilts or blankets in this place; Moreover, the detainees were not provided with food, and it was stated to them that if they requested food, they could order it at their own expense. The Police

Department denied these allegations, citing medical reports, and claimed that all food and beverage needs were met.

On 16/09/2021, police officers from the Counter Migrant Smuggling And Border Gates Department asked the applicant, accused of "working without a permit," for his statement on this matter. The applicant stated that he could not present the work permit when asked and that this was why he was brought there. This was documented at 13:00.

§16. On 17/09/2021 upon the decisions of deportation and administrative detention to be imposed on him for six months, the applicant was taken to the Hospital again and a report was prepared at 11:00 am, stating that there was no sign of battery or force.

§17. The belongings of the applicant,including mobile phone, were taken into custody upon his arrival to Akyurt Removal Center from the Hospital, and this was documented in the report at 13.30. According to the applicant's claim, at this stage he requested to meet with his lawyer or family, but this request was rejected. Following the allegations that the applicant was not allowed to meet with his lawyer, the Ankara Chief Public Prosecutor's Office conducted an investigation; It has been determined that (i) the identity verification procedures were continuing at the mentioned hours and the lawyer had to wait due to staff shortage, (ii) the authorities informed the lawyer that he would be allowed to meet with his clients, (iii) then attempts were made to arrange a meeting with the lawyer later, it was found that the lawyer had left . The Ankara Chief Public Prosecutor's Office, which determined the records showing the lawyer's arrival, waiting and departure times, decided not to process the complaint petition. It is understood from the lawyer meeting report annexed to the opinion letter submitted by the Ministry of Interior that the applicant was later allowed to meet with his lawyer at the Akyurt Removal Center. There is no statement or information regarding the applicant's contact with his family.

§18. On 21/09/2021, a deportation decision against the applicant, the decision to abolish the administrative detention decision, an invitation letter to leave the countrywithin thirty days, and an exit permit valid for the period from 21/09/2021 to 21/10 2021 document was prepared and notified to him. The applicant was released at 15.20.

C) EVENTS BETWEEN 27/09/2021 AND 17/06/2022

§19. On 27/09/2021, the owner of the real estate where the restaurant operated by the applicant is located (hereinafter as the " property owner") was summoned to Necati Bey Police Station. The law enforcement officers here informed the property owner that the restaurant would be closed. The property owner stated that he was satisfied with his tenant. At the police station, the Chief Inspector said , *“I do not want Somalis in the Kızılay . "I will Turkify these areas and destroy them."* and expressed that he instructed his officers under his command to go and check every day.

§20. The applicant sent the video recording containing the aforementioned statements to the Presidency of Migration Management via email. These videos were also submitted to the HREIT. The applicant also submitted petitions revealing various video footages of their attitudes towards Somalis, footage of signs claiming that the names of signs were forcibly changed by the police forces, interviews with him and neighboring shopkeepers regarding his allegations, and testimonies of neighbors that the practices in question were discriminatory.In the response letter from the Presidency of Migration Management, it was claimed that an email was received from the email account allegedly belonging to the applicant, but this raised doubts in terms of data security, and it was reiterated that that the applicant was found working without a work permit.

§21. On 17/06/2022, law enforcement officers came to the restaurant and asked for the applicant's business sign to be erased , leaving the business name . The applicant painted the business sign in white as requested. Later in the evening, law enforcement officers called him and demanded that the business name also be covered with paint t, threatening to take him into custody if the applicant did not comply. The applicant then painted the name on the sign white. The police recorded video during this process. The applicant also submitted images of the signs regarding the changes. The Ankara Provincial Security Directorate stated that the procedure regarding the signboard was carried out within the scope of the inspection conducted by law enforcement authorities, according to TS 13813 standard determined by the Turkish Standards Institution, in which

was emphasized that in signboards containing foreign language expressions, the foreign language expressions should be written with font sizes not exceeding 25% of the size of the Turkish expressions..

§22. The applicant also continued to stay in Turkey during this period; On 09/12/2021, he was taken to the Counter Migrant Smuggling And Border Gates Departmentby law enforcement forces and released; He was stopped on 20/01/2022 and released after being subjected to identity control and taken to the police station.

II) HREIT **DECISION**

§23. The applicant brought the case in question to HREIT. In the concrete case, HREIT concluded, by six votes to five, that there was no violation in the context of the prohibition of ill-treatment and discrimination. The majority that led to this result was formed by the votes of Alişan Tiryaki (2nd president), Burhan Erkuş, Harun Mertoğlu, İsmail Ayaz, Mehmet Emin Genç, Saffet Balın. On the other hand, Muharrem Kılıç (chairman), Dilek Ertürk, Muhammet Ecevit Carti, Ünal Sade and Zennure Ber voted against. According to this grouping, the decision can be discussed under two headings: (a) majority opinion and (b) minority opinion.

A) MAJORITY OPINION

The majority has separately addressed the issue in terms of the prohibition of ill-treatment and discrimination.

1) Prohibition of ill-treatment

§24. The remaining members in the majority repeated the statement that *"In order to establish the reality of the alleged events, there must be reasonable evidence beyond doubt based on an abstract allegation" and reminded that "they must present signs and evidence showing that they may have been treated in a serious manner that falls within the scope of the prohibition of ill-treatment* . " In this context, the issue has been addressed in the context of two different types of intervention.

a) Interventions dated 08/09/2021

§25. The majority concluded that there is no concrete evidence presented regarding the applicant's claim that he and several Somalis were driven around in the hot weather in the police car on 08.09.2021, and that they stayed in a stuffy and dirty room for about

three hours when they arrived at the police station. The majority based this conclusion on the following two reasons:

§26. ***(i) First*** ; Although the applicant claimed in his application petition that he was kept waiting for three hours at the police station, the assertion in the statement dated 03.03.2022 that they were detained for more than five hours has introduced a contradiction and inconsistency.

§27. ***(ii) Second*** ; In the images submitted in addition to the application, there are laughing sounds in the selfie video showing the process in which the applicant claims to be held, and in the photographs that he claims are related to this process, it is observed that the applicant appears ready to be photographed with a posed attitude and accessories.

b) Interventions dated 15/09/2021-17/09/2021

§28. The majority also addressed the applicant's claim that between 15.09.2021 and 17.09.2021, they were held at the Ankara Counter Migrant Smuggling And Border Gates Department, where they were not allowed to meet with their lawyer, and where there was no ventilation, fan, or toilet water available. They stated that there was no place to sleep, and some individuals slept on chairs, and that there were no amenities such as blankets or pillows. Additionally, they claimed that no food was provided, and when they requested food, they were told it could be ordered at their own expense.

§29. The majority concluded that the allegations of ill-treatment could not be proven beyond reasonable doubt because of the lack of concrete evidence and proof. This conclusion is based on two reasons:

§30. ***First*** ; It has been determined that in the investigation initiated as a result of the complaint submitted to the Ankara Chief Public Prosecutor's Office, identity verification procedures were ongoing, and it was indicated that if the lawyer waited for a while due to the absence of staff, they would be able to meet with their clients. Shortly after, when it was attempted to arrange a meeting with the lawyer, it was found that the lawyer had left, and records were found indicating the times of the lawyer's arrival, waiting, and departure. (This data is also included in the lawyer's meeting report, which is part of the

documents submitted by the applicant and indicates that they met with their lawyer at the Akyurt Removal Center.)

§31. ***Second*** ; There is a contradiction because of the fact that, although the applicant stated that the conditions of detention at the Ankara Counter Migrant Smuggling And Border Gates Department, were inadequate, he stated that a commissioner at the branch approached them positively and that people from the embassy and the association were interviewed on their behalf.

2) Prohibition of Discrimination

§32. The majority analyzed the applicant's allegations in three categories: (i) measures during the deportation process, (i) identity checks and (iii) forced painting of the business sign, and concluded that there was no violation for each of them on the following grounds.

§33. ***Measures regarding the deportation process*** ; The decision to deport the applicant for "not meeting the requirements stipulated by the relevant legislation to obtain a work permit, hence not being able to obtain a work permit, starting a business in Ankara instead of residing in Bursa as required by law, and actively working in the restaurant owned by the company of which they are a partner without a work permit, resulting in a decision for their deportation in accordance with the legislation due to working without a work permit" is lawful and does not constitute discrimination.

§34. ***Identity checks*** ; identity checks were performed in order to ensure public order in accordance with the the Article 4/A/8. of Police Duties and Powers Law No. 2559.,Workplace inspections aim to *"protect public security (...) in terms of detecting whether there are people entering the country illegally, considering that the business mostly serves foreign nationals" and* do not create discrimination.

§35. ***Forced painting of the business sign*** ; As an extension of the requirement determined by the Turkish Standards Institution through the TS 13813 standard, in signboards where expressions in a foreign language are present, it has been implemented that the size of the font for foreign language expressions should not exceed 25% of the size of the Turkish expressions.[2]

[2]For the standard in question, see. https://intweb.tse.org.tr/ (Access date: 06/11/2023).

B) MINORITY OPINION

§36. Among the minority members, Muharrem Kılıç (chair), Dilek Ertürk, Ünal Sade and Zennure Ber wrote the opposing votes jointly ; Muhammet Ecevit Carti wrote a different reason for voting against. But the members' approach is essentially common.

§37. Those in the minority did not make a statement regarding the allegations of ill-treatment, but in terms of the prohibition of discrimination, they concentrated on the statements of law enforcement officers (that Somalis are not wanted in this region, that they are asked to go to other regions, etc.), video recordings containing interviews, including the statements of employees at the workplace, and the signed statements of neighboring tradesmen and employees. Those in the minority who think that this situation reveals the existence of strong indications and presumption facts regarding the reality of the discrimination allegations concluded that the authorities were unable to refute this presumption in the face of the shifting burden of proof.

§38. In terms of the forced painting of the business sign, the minority concluded that "from the images and records, this practice is a continuation of the practices that are considered to impose a disproportionate burden on the applicant, and that the inspections are not in reasonable balance with the aim to be achieved in this aspect."

§39. The normative basis of the minority in this inference was the following rule contained in Article 21 of the Turkish Human Rights and Equality Institution Law No. 6701:

> "In applications made to the Institution solely alleging violation of the prohibition of discrimination, if the applicant presents strong evidence and factual circumstances constituting a presumption regarding the truthfulness of their claim, it is incumbent upon the opposing party to prove that they did not violate the prohibition of discrimination and the principle of equal treatment."

III) EVALUATION

§40. The focus of the decision in question is related to the prohibition of discrimination and the prohibition of ill-treatment. However, upon closer examination of the incident, it is seen that both the majority and the minority members handle the examination of these prohibitions in a limited and narrow scope. On the other hand, besides the mentioned rights in the specific case, there are also aspects related to the right to liberty and security, the right to visit relatives and freedom of religion and conscience. For this reason, the decision will also be evaluated in terms of overlooked aspects of the examined rights and rights that have not been addressed.[3]

A) PROHIBITION OF DISCRIMINATION

§41. The prohibition of discrimination is the primary focus of HREIT. In this context, the concept that should be particularly focused on , especially in the specific case should be the "prima facie test". Whether this test is applied or not in the concrete case is of vital importance in terms of the prohibition of discrimination. Therefore, firstly the prima facie test will be explained and then the possibility of its application in the concrete case will be discussed.

1) Key Concepts

§42. Key concepts related to the subject (a) prima facie testing, (b) racial profiling, and (c) effective investigation.

a) Prima Facie Test

§43. Traditionally, in legal proceedings, the burden of proof belongs to the person making the claim (*affirmanti incumbit probation*). In the direct application of this principle, a person alleging differential treatment and discrimination would need to prove it. Typically , this burden of proof entails both the presentation of evidence (burden of production) and the persuasion of the court (burden of persuasion). However, this universal principle is not deemed fair, especially for those who are not on equal situation. Therefore, the principle should

[3]Although the TİHEK Law No. 6701 clearly mentions the prohibition of discrimination and the prohibition of torture and ill-treatment regarding the powers of TİHEK, "protecting and developing human rights based on human dignity" and "preventing discrimination in the enjoyment of legally recognized rights and freedoms and operating in line with these principles" Their authority on the issue of "allows for an examination of other rights that may be associated with discrimination." On the other hand, this broad perspective is primarily valid for "persons deprived of their freedom".

not be rigidly applied in some contexts. [4]Treating those in [5]disadvantaged positions or differing circumstances equally, based on power dynamics, a is not consistent with the essence of the prohibition of discrimination. Rules regarding the burden of proof require taking into account the conditions of advantages and disadvantages within the context of prohibition of discrimination.

§44. Discrimination in human rights law is based on specific references to certain groups. For instance , Article 10 of the Constitution of 1982(hereinafter as the "Constitution") indicates that "All individuals are equal without any discrimination before the law, irrespective of language, race, color, sex, political opinion, philosophical belief, religion and sect, or any such considerations. No privilege may be granted to any individual, family, group or class. ." or Article 14 of the European Convention on Human Rights states that "The enjoyment of the rights and freedoms set forth in this Convention(hereinafter referred to as "ECHR")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." It is possible to observe to certain classifications are specifically mentioned. Although these classifications are left open-ended, especially with the expressions "or any such considerations " or "like other statuses" [6], there is a meaning in their being specifically listed. Instead of including a formula like "no restriction can be made for any reason," the mention of categories referred to as "suspect classifications" in these regulations is intended to reflect the traditional grounds on which people have been discriminated against. This explicit listıng is a reflection of the fact that people in these categories have historically and commonly been more likely to be discriminated against, and are therefore potentially disadvantaged. Undoubtedly, individuals within the mentioned classifications can also be treated differently, but in such cases, "very

[4]Ex. see *Orhan v. Turkey* , App. No: 25656/94, 18/06/2022, §266.

[5]See *Thlimmenos v. Greece* , App. No: 34369/97, 06/04/2000, § 44.

[6]example, for a ECHR decision that includes the "ancestry" classification within this scope, see. *Marckx v. Belgium* , App. No: 6833/74, 13/06/1979. For a Constitutional Court decision that includes the classification of "sexual orientation" in this scope, see. *Fetullah Gülen* [GK], App. No: 2014/12225, 14/7/2015, § 40.

weighty reasons " are required for the different treatment to be *considered* as legitimate and objective.

§45. In terms of burden of proof , the aforementioned fact prevents the strict application of "the one who alleges must prove" rule and requires the disadvantaged party to be strengthened. Taking into consideration that discrimination largely occurs among people under unequal conditions , the allocation of the burden of proof becomes a necessity.[7]

§46. ECHR has adopted a regime of proof called the " *prima facie test"* when it comes to examining violations of the prohibition of discrimination. Accordingly, the "burden of proof" still lies with the claimant. In other words, it is not sufficient for the applicant to merely assert that they have been discriminated against by referring to a certain suspicious category; they must provide evidence beyond the assertion. [8]However, the standard of proof in this requirement is lower compared toclassical criminal law standards. In other words, the person making the claim is not expected to fully prove their claim; it is considered that if the evidence, based on life experiences, carries the seriousness that prima facie discrimination can be presumed, this constitutes a "presumption of discrimination." In such a case, the burden of proof shifts, and it is then expected from the respondent to refute this presumption.[9]

§47. The European Commission against Racism and Intolerance (ECRI), in the updated version of its General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination, adopted on December 13, 2002, states that, *"The law should provide that, if persons who consider themselves wronged because of a discriminatory act establish before a court or any other competent authority facts from which*

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[7]For a reflection of this fact in international human rights law, see, for example. European Union *Council Directive 97/80/EC of 15 December 1997 on the Burden of Proof in Cases of Sex-Based Discrimination* . For the texts, see https://www.tihek.gov.tr/upload/file_editor/2019/03/1551818880.pdf (Access date: 06/11/2023).

[8]See *Velikova v. Bulgaria* , Case No. 41488/98, 18/05/2000, 94; *Anguelova v. Bulgaria,* App. No. 38361/97, 13/06/2002, 167-168.

[9]See for example. *Chassagnou and Others v. France* [GC], No. No: 25088/94 28331/95 28443/95, 29/04/1999, §§ 91-92, *Timishev v. Russia* , No. No: 55762/00, 55974/00 , 13/12/2005, § 57.

it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no discrimination. " (§11) and the party states, including the Republic of Turkey, stated that " They Recognized the "test at first glance" (prima facie test) and deemed its implementation a necessity.[10]

§48. This approach is found in the 21st article of the HREIT Law. According to this:

> "In applications made to the Institution exclusively alleging violation of the prohibition of discrimination, if the applicant reveals the existence of strong indications and presumptive facts regarding the reality of his claim, the other party must prove that he has not violated the prohibition of discrimination and the principle of equal treatment."[11]

b) Racial Profiling

§49. Another standard of review specific to race-based discrimination is "racial profiling " . The" Racial profiling", addressed in General Policy Recommendation No. 11 (CRI[2007]39) of The European Commission against Racism and Intolerance of Council of Europe(hereinafter simply "Commission") related to combating racism and racial discrimination in law enforcement activities, dated June 29, 2007 is defined as " [12]*the use of grounds such as race, colour, language, religion, nationality or national or ethnic origin by the police in control, surveillance or investigation activities without an objective and reasonable justification."*

§50. Based on this definition, the Commission requires member states, including the Republic of Turkey, *to "ensure that cases of racial discrimination alleged to have been committed by the police or ill-treatment committed with racist motives are effectively investigated and, when necessary, those who commit these acts are appropriately punished"* and *to "assign an independent body, separate from the police and prosecution authorities, to investigate allegations of racial discrimination and racially motivated abuses allegedly committed by the police." This guidance is also elaborated upon in the Explanatory Memorandum of the Recommendation (§34/iii).*

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[10]For the text, see https://tinyurl.com/bde3uv4p (Access date: 06/11/2023).

[11]The text of the Human Rights and Equality Institution of Türkiye Law No. 6701 can be read at: https://tinyurl.com/bde4znje (Access date: 06/11/2023).

[12]For the text, see https://tinyurl.com/ys28csee (Access date: 06/11/2023).

> "Research has shown that racial profiling has significant negative effects. Racial profiling creates a sense of humiliation and injustice among certain groups, leads to stigmatization and alienation of these groups, and also leads to deterioration of relations between these groups and the police and a decrease in trust in the police."

§51. Racial profiling has also been reflected in ECHR jurisprudence. ECHR has noted that in its recent jurisprudence, [13]while identity checks are not carried out for other people, the claim that some people are subjected to this measure due to their certain physical or ethnic characteristics can be considered within the scope of the prohibition of discrimination in the context of the right to respect for private life. Accordingly, if there is evidence of any environmental condition that could suggest hostility by the police towards citizens sharing the ethnicity of the applicants or indicate the existence of any racial or ethnic profiling, it is accepted that the burden of proof shifts

c) Obligation to Effective Investigation

§52. The European Convention on Human Rights and the Constitution impose not only a negative obligation on the State regarding race-based discrimination, but also a positive obligation in the context of effective investigation. Accordingly, if there is an allegation of discrimination, State authorities have an obligation to take all reasonable measures to establish whether there were racist motives and to determine whether ethnic hatred or prejudice played a role in the events. The authorities must do everything reasonable in the circumstances to collect and secure evidence, explore all practical means to establish the truth, and make fully reasoned, impartial and objective decisions, without ignoring suspicious facts that may be indicative of racially motivated violence.[14]

§53. For an investigation to be effective, the institutions and individuals responsible for conducting the investigation must be independent from the people targeted by the investigation. This means not only the absence of hierarchical or institutional affiliation, but also

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[13]See for example. *Basu v. Germany* , App. No: 215/19, 18/10/2022, *Muhamad v. Spain* , App. No: 34085/17, 18/10/2022.

[14]See *BS/Spain* , App. No: 47159/08, § 58, 24/07/2012; *Boacă and Others v. Romania* , App. No: 40355/11, §§ 105-06, 12/01/2016; *Burlya and Others v. Ukraine* , App. No: 3289/10, 06/11/2018, § 128; and *Sabalić v. Croatia* , App. No: 50231/13, §§ 94 and 98, 14/01/2021.

practical independence. [15]Again, according to the Court; The authorities' responsibilities under Article 14 to ensure that a fundamental value is respected without discrimination may also come into play in the context of Article 8 where possible racist attitudes lead to the stigmatization of the person concerned.[16]

2) Reflections of Key Concepts in Concrete Events

§54. The concrete application of the key concepts outlined above (in other words, general principles) needs to be addressed in the specific case at hand.

a) Prima Glance Test

§55. The fact that the applicant is Somali and black-skinned shows that he is different from the majority in Turkey in terms of race, color and ethnicity. These three characteristics are traditionally and widely grounds for discrimination, not chosen by the applicant himself. Therefore, the fact that the applicant is in a "suspect classification" requires a more sensitive examination of the measures taken against him. This requirement manifests itself especially in the context of allocating the burden of proof. If the applicant shows at first glance that he or she has been treated differently in connection with the aforementioned qualities, it will be accepted that the burden of proof shifts to the competent authorities.

§56. Video recordings and witness statements in the concrete incident are strong evidence that the intervention in question is related to questionable classifications such as race, color and ethnicity. Within all the data, the statements of law enforcement officers , " *I don't want Somalis in the Kt. I will Turkify these places and destroy them." along with the testimonies presented by neighboring shopkeepers, create an inference that the measures are related to the applicant's suspicious classification, whether or not they are accompanied by other legal purposes. Therefore, the burden of proof shifts, requiring the competent authorities to prove that these measures did not occur based on race, color, or ethnic origin.*

§57. Moreover, it should have been questioned whether the practice of forcibly painting over signs, which the applicant who alleged

[15]See *Burlya and Others v. Ukraine* , § 127.

[16] *Basu v. Germany* , § 33.

discrimination belonged to a "suspect classification," was also applied to signs in Turkish or other foreign languages (e.g. English) in the specific case.

§58. Despite the clear provisions related to rules of proof in Article 21 of the HREIT Law, the majority members did not address the issue within this evidentiary framework. . Moreover, the majority focused on whether the interventions in the incident were lawful (the legality element) and overlooked the purpose of implementation of the law in question (the causality element) and the way it was interpreted and implemented (the proportionality and the necessity in a democratic society order). However, whether the measures are in compliance with the law or not is a matter independent of the purpose of the law's application. The problematic implication of this approach is that even if a measure that is formally lawful is carried out with a racist intent, it would not violate the prohibition of discriminationThis approach, which confines the prohibition of discrimination to a simple formalism, has no place in human rights law.

§59. The minority members, acting in accordance with the law, took into account Article 21 of the HREIT Law and, although they did not explicitly mention it, essentially applied the prima facie test to the issue. Once this test was applied, it was not difficult for them to conclude that the prohibition of discrimination had been violated.

b) Racial Profiling

§60. In the concrete case, the fact that the applicant's restaurant was visited approximately ten times, and that the applicant and those accompanying him were asked for identification at different times and places, also necessitates consideration of the concept of "racial profiling" in the matter."

§61. The applicant's allegations in this context also provide evidence that could shift the burden of proof, given the explanations above. Furthermore, the frequency and arbitrariness of identity checks solely focused on the applicant's restaurant in the overall context of the incident, the claim that Somalis are disproportionately affected by these checks, and/or the perception among customers and

neighbors that those subjected to checks in the restaurant are perceived as guilty, and finally, the statement made by a law enforcement official in the presence of the applicant "I don't want Somalis in Kızılay. I will Turkify these areas, I will destroy them.", indicate a plausible claim that the applicant and his customers were targeted due to certain physical or ethnic characteristics. In other words, in the specific case, there are "external conditions" that could suggest or reverse the burden of proof regarding the existence of any racial or ethnic profiling, which might lead to the presumption that identity checks were motivated by hostility towards citizens sharing the applicant's ethnic background. Therefore, although it could be argued that the issue of incidental racial discrimination constitutes a secondary aspect in the application, the racial motive behind identity checks must be thoroughly questioned. [17].

§62. Those in the majority have not clearly made this questioning with this terminology and methodology. However, considering that "the business mostly serves foreign nationals" in the justification of the decision, the conclusion that "identity checks are aimed at determining whether there are people entering the country illegally" can be considered relevant to this point. [18]However, the majority refrained from allocating the burden of proof on this issue.Additionally, the decision does not include an explanation of where the determination regarding the business's customer portfolio was derived from. This absence may suggest that the authorities, in order to legitimize their intervention, have relied on their own assumptions, attributing them to law enforcement officials. Furthermore, the question of why subsequent checks were conducted after the initial identity check specific to the applicant remains unanswered. The fact that whether similar checks were conducted in different parts of the city was not addressed, as well as the lack of inquiry into the connection between these checks and the statement "I don't want Somalis in Kızılay. I will Turkify these areas, I will destroy down.", indicates that a sensitive examination regarding racial profiling was not conducted.

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[17] *Muhamad v. Spain* , §99.

[18] *M.I.A. decision* , §34

§63. For those in the minority, the fact that this aspect of the issue has not been addressed at all deserves criticism.

c) Obligation to Effective Investigation

§64. In the concrete case, the measures taken regarding the applicants' commercial activities, especially in conjunction with the statement "I don't want Somalis in Kızılay. I will Turkify this place and destroy them." and the testimonies of neighboring shopkeepers, raise more than mere suspicion that there are racial motives behind some interventions that appear lawful in form. This situation aligns these behaviors with the elements of Article 122 of the Turkish Penal Code titled "Hatred and Discrimination." According to this:

> "Any person who prevents a person from engaging in ordinary economic activities due to hatred arising from differences in language, race, nationality, colour, gender, disability, political thought, philosophical belief, religion or sect (...) shall be sentenced to imprisonment from one to three years. "

§65. The crime in question is not subject to complaint. Considering the reflection of the mentioned statements in the press, it can be assumed that the investigation authorities were aware of the incident. Moreover, when it is kept in mind that TİHEK's authority to "examine, investigate, decide and follow up on the results" of human rights violations in general and specifically violations of the prohibition of discrimination, is valid "ex officio" (Art. 9/1/fg), even under conditions not raised by the applicant, this situation should be addressed.

§66. Another issue in terms of effective investigation is that the Board ,in this case, did not use the authority to hear witnesses given to it by the HREITLaw In a case where the board members werw tied 6 to 5 6 to 5, the property owner had to be heard as a witness, especially regarding the allegations made in the application that the owner being be called to the police station. In this case, resortingthe testimony of the local tradesmen and the owner is important in terms of both conducting an effective investigation and determining the general attitude of the law enforcement towards the incident.

§67. Similarly, according to the provision in Article 8/1 of the Police Disciplinary Regulation, "Discriminating on the base of language, race, gender, political thought, philosophical belief, religion, and sect in the performance of duties, engaging in acts contrary to secularism or separatist behavior, or adopting discriminatory attitudes and behaviors among the police personnel in this regard," is regulated as a "reason for dismissal from the profession." HREIT did not question whether an administrative investigation was carried out in accordance with this provision. This situation is incompatible with the requirements of the obligation to effective investigation in the context of the prohibition of racial and/or ethnic or color-based discrimination.

B) PROHIBITION OF ILL-TREATMENT

§68. In the concrete case, what needs to be considered regarding the prohibition of ill-treatment has two dimensions. The first of these is that racism itself constitutes ill-treatment, and the second is that the conditions of detention may constitute ill-treatment.

1) Conditions of Detention and Ill-Treatment

§69. One of the important aspects of the prohibition of ill-treatment relates to the conditions in which people are detained. In this regard, especially the "European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment t" (CPT, with its commonly known abbreviation in English) has set some standards. For example:

> "In certain countries, CPT delegations have found immigration detainees held in **police stations** for prolonged periods (for weeks and, in certain cases, months), subject to mediocre material conditions of detention, deprived of any form of activity and on occasion obliged to share cells with criminal suspects. Such a situation is indefensible.
>
> The CPT recognises that, in the very nature of things, immigration detainees may have to spend some time in an ordinary police detention facility. However, conditions in police stations will frequently - if not invariably - be

inadequate for prolonged periods of detention. Consequently, the period of time spent by immigration detainees in such establishments should be kept to the absolute minimum

In the view of the CPT, in those cases where it is deemed necessary to deprive persons of their liberty for an extended period under aliens legislation, they should be accommodated in centres specifically designed for that purpose, offering material conditions and a regime appropriate to their legal situation and staffed by suitably-qualified personnel. The Committee is pleased to note that such an approach is increasingly being followed in Parties to the Convention.

Obviously, such centres should provide accommodation which is adequately-furnished, clean and in a good state of repair, and which offers sufficient living space for the numbers involved. Further, care should be taken in the design and layout of the premises to avoid as far as possible any impression of a carceral environment. As regards regime activities, they should include outdoor exercise, access to a day room and to radio/television and newspapers/magazines, as well as other appropriate means of recreation (e.g. board games, table tennis). The longer the period for which persons are detained, the more developed should be the activities which are offered to them.(...) The conditions of detention of illegal immigrants should consist of a regime of limited restrictions and diversified activities reflecting the nature of the restriction of their freedom. For example, the freedom of movement of illegal asylum seekers deprived of liberty… within the institution in which they are detained should be restricted as little as possible." (§§27-30, 79)[19]

§70. The Constitutional Court, which takes into account these standards and other decisions given by the ECHR and the UN, emphasizes that

[19]For Turkish translations, *see Rıda Boudraa* , §27-29.

the conditions of detention of asylum seekers or refugees must be compatible with human dignity. According to the Constitutional Court:

> In assessing the compliance of detention conditions with Article 17, in addition to the calculation of space per person, issues such as the daily use of open air by detainees, the daylight and ventilation of closed spaces, the cleanliness of the place of stay and the health services provided to detainees must also be taken into account. In the standards adopted by the CPT regarding "monitoring immigration detention ", in cases where it is deemed necessary to deprive people of their freedom for a long period of time in accordance with the aliens legislation, these people should be kept in centers with a program suitable for their legal status, physical conditions and suitably qualified personnel, especially prepared for this purpose. It is important that such centers are adequately equipped, clean and well-maintained, and provide adequate living space for the people staying there. The impression of a prison environment should be avoided as much as possible and programmed activities should include access to outdoor exercise, a room to spend time during the day, radio/television, newspapers/magazines, and other appropriate means of recreation; It is accepted that the longer these people are detained, the more comprehensive the activities offered to them should be. In this context, the CPT accepts that all prisoners, without exception - including those in solitary confinement as punishment - should be given the opportunity to exercise outdoors every day and that places for outdoor exercise should be of reasonable size and designed to protect them from bad weather conditions as much as possible. It is clear that this standard, which is accepted for prisoners, is primarily valid for 'immigrants under detention'.[20]

§71. The Constitutional Court, with this perspective, has examined the cases brought before it and reached conclusions on some violations.. 21 In these decisions where the Constitutional Court found a violation, it referred to and adopted an approach consistent with the report based on the findings during the visits of the CPT.

[20]In the context of the ECHR, e.g. see *Yarashonen v. Turkey* , § 73

[21]See *AV and Others* , App. No: 2013/1649, 20/1/2016; *FK and Others* , App. No: 2013/8735, 17/2/2016; TT, No: 2013/8810, 18/2/2016; *IS and Others* , App. No: 2014/15824, 22/9/2016; *RM and Others* , App. No: 2015/19133, 17/4/2019. Most of the cases in which the Constitutional Court did not conclude a violation were due to the fact that ordinary legal remedies were not exhausted. Because, according to the Constitutional Court, the management, supervision and operation of administrative detention facilities is a public service carried out by the Ministry of Internal Affairs. Therefore, these conditions may be subject to a full jurisdiction lawsuit in accordance with Article 2 of the Administrative Procedure Law No. 2577. See for example. BT [GK], App. No: 2014/15769, 30/11/2017.

[22]However, [23]it is observed that in cases where such a report is not used, the applications can be rejected, but these cases can result in judgments against Turkey before the ECtHR. . [24]This situation is noteworthy, inter alina, in terms of the determinative aspect of visits to detention places in cases where allegations regarding detention conditions exist. Bearing this fact in mind, the HREIT Law (Article 9/1/j) has granted HREIT the authority to conduct visits. According to this:

> "To conduct regular visits, whether announced or unannounced, to the places where individuals deprived of their liberty or under protection are located, to transmit the reports of these visits to relevant institutions and organizations, to disclose them to the public if deemed necessary by the Board, to examine and evaluate reports on visits conducted by monitoring boards of penal institutions and detention centers, provincial and district human rights boards, and other individuals, institutions, and organizations to such places.."

§72. In addition, the Law (Art. 9/2 and Art. 19/2) also regulates that public institutions and organizations and officials are obliged to provide the necessary assistance and facilities for visits to be made within this scope.

§73. Another important issue regarding the subject is again related to the burden of proof. As mentioned before, under normal circumstances, the burden of proof is on the person making the claim. This also applies to the prohibition of torture and ill-treatment. However, in cases where people claim that they were tortured or ill-treated while under surveillance and supervision, the burden of proof shifts to the extent that the applicants are able to concretely express the situation they complain about and present their seemingly defensible claims. The authorities must now demonstrate that there was no torture or ill-treatment. -The European Court of Human Rights tends to draw conclusions from the state's failure to provide evidence in cases where the applicant is in the custody of the competent authorities. In resolving such issues, health reports obtained upon entry and exit from the detention facility, as well as continuous camera recordings

[22]All violation decisions are related to Kumkapı Removal Center.

[23] *Rıda Boudraa* , App. No: 2013/9673, 21/1/2015. The case in question concerns the conditions of detention at the Foreigners Branch of Yalova Police Department.

[24] *Boudraa v. Turkey* , App. No: 1009/16, 28/11/2017.

maintained within the facility and unscheduled visits by independent committees, become of paramount importance.

§74. As mentioned earlier, the principle that "the burden of proof belongs to the person making the claim" is not strictly applied in some contexts. Although it applies a standard of proof such as "beyond all reasonable doubt" or "au-delà de tout doute raisonnable" when allegations regarding the material and moral integrity of the person come to the fore , this *proof* is based on sufficiently solid, precise and compatible inferences. and it should be kept in mind that it can be reached by the coexistence of equally irrefutable material presumptions. [25]It should not be forgotten that the Government's failure to present the information it has without providing a satisfactory explanation may lead to the conclusion that the allegations have a basis.[26]

§75. In the concrete case, the applicant stated that he was " *kept in a stuffy and dirty room* " at the police station, and that at the Counter Migrant Smuggling And Border Gates Department, *"there was no ventilation, no fan, no toilet water, some people slept on chairs because there was no place to sleep, there were no equipment such as quilts or blankets, and no food was given."* and he claimed that *"when they wanted to eat, they could have ordered it at their own expense."* This claim was rejected by HREIT with the following argument:

> "(...) [Although the applicant stated in his statement that he shared footage of the incident; "It was determined that in the selfie video and his photos taken in the police station during the time was claims that he had been detained, there were laughter sounds in the video and in the photos the applicant was appeared with his accessories in an attitude ready to be photographed therefore she appeared with her accessories in a ready manner and therefore there was no suspicion that the applicant was ill-treated."[27]

§76. The determining factor in HREIT's rejection of the allegations t is (i) "the presence of laughter sounds in the selfie video" and the fact that (ii) "the applicant appears with her accessories in an attitude ready to be photographed". In the decision, no reference was made to the statements of the competent authorities on this issue, nor were their

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[25] *Ireland/United Kingdom* , App. No: 5310/71, 18/01/1978, §161.

[26] *Volkan Özdemir/Turkey* , App. No: 29105/03, 20/10/2009, §40.

[27] *M.I.A. decision* , §22.

obligations regarding the issue included. In this context, the problem is twofold;

§77. ***Firstly*** , The presence of laughteror the wearing of accessories while taking images at the detention center does not provide answers to questions such as whether there is "ventilation, a fan, toilet water", "whether there is no place to sleep and if some people sleep on chairs", "the availability of bedding such as blankets and pillows", "whether the detainees are provided with food", or "whether they can order food for payment when desired". Wearing accessories or laughing in challenging conditions does not necessarily mean that one has not been subjected to ill-treatment.***Secondly*** , HREIT showed an inadequate approach in terms of the burden of proof. It is problematic that HREIT left it entirely to the applicant to prove the negative nature of the detention conditions. However, a detailed explanation on this issue should have been expected from the competent authorities, continuous camera recordings should have been requested, and if this could not be provided, the reasons for this should have been questioned. As a matter of fact, in the Çankaya District Police Department Detention Centers Visit Report published by HREIT in 2023 after this incident, it was stated that "Considering that the retrospective camera records could not be viewed due to the problem in the security camera system on the date of the visit, the error in the system should be corrected to prevent the risk of ill-treatmentand to ensure healthy access to the camera records." It is noteworthy that he gave advice on the subject. [28]It is an inconsistency that this consistent recommendation was not put forward in the concrete case. On the other hand; Another problem in terms of the rules of proof is that HREIT did not visit the mentioned place. It is seen that the Çankaya Counter Migrant Smuggling And Border Gates Department (Çankaya) is not among the places where HREIT exercised its visitation authority between 2020-2023. [29]However,

[28] https://www.tihek.gov.tr/public/images/kararlar/lm2mbf.pdf

[29]In 2020, Akyurt Repatriation Center, Tem Branch Directorate custody rooms, Elmadağ Closed CİK, Saray Children's Houses site, Child Support Center were visited. In 2021, Gölbaşı District Police Department detention centers (Osman Tan Police Station Headquarters and İncek Şehit Hayati Tokgöz Police Headquarters Headquarters), Sincan Women's Closed Penitentiary Institution, Sincan Yenikent No. 1 F Type Penal Institution and Elmadağ Nursing Home Elderly Care and Rehabilitation Center were visited. In 2022, Ankara Courthouse Prisoner Waiting Area, Ankara West Courthouse Prisoner Waiting

the most accurate conclusion on the subject would be made through the use of this authority. The place was not visited before the incident, nor was it visited after this complaint was made. This point also deserves criticism.

2) Racism and Mistreatment

§78. In the European Convention on Human Rights system, racism is not only a matter of discrimination but also of ill-treatment. The European Court of Human Rights revealed this fact [30]for the first time in its *East African Asians/United Kingdom decision,* finding that racism itself can be *"degrading treatment"* beyond the Convention's prohibition of discrimination. According to the report published by the European Commission on Human Rights on this particular subject :

> "The Commission considers in this context that, as is generally accepted, special attention should be paid to discrimination on grounds of race; whereas openlysingling out a group of people for differential treatment on the basis of race may in some cases constitute a special affront to human dignity; Therefore, it is a reminder that while treating a group of people differently based on race may not pose a problem when compared to treating them differently on another basis, it can be considered degrading treatment."[31]

§79. Later, in another decision, the Court reaffirmed and reinforced this approach by indicating that objectification of a human being is a degrading treatment:

> Even if the applicant had not been subjected to serious or long-term physical effects, sanctions aimed at treating someone as an object in the hands of authorities constitute an attack on human dignity and physical integrity, which are fundamental purposes of Article 3 of the European Convention on Human Rights."[32]

Area, Sincan No. 1 L Type Closed Penal Institution, Çankaya District Police Department Detention Centers, İncek CBD Private Nursing Home and Elderly Care Center, Mamak District Police Department Detention Centers, Esenboğa Airport. Transit Area, Dr. Abdurrahman Yurtaslan Ankara Oncology Training and Research Hospital Psychiatry Service and Community Mental Health Center, Sincan Juvenile Closed Penitentiary Institution were visited. See TİHEK, 2021 Annual Report, p. 89-91; TİHEK, 2021 Annual Report, p. 91-93. For reports, see https://www.tihek.gov.tr/kategori/rapor/uom-raporlari

[30] *East African Asians/United Kingdom* , No. 4403/70-4419/70, 4422/70, 4423/70, 4434/70, 4443/70, 4476/70-4478/70, 4486/70, 4501/70 , and 4526/70-4530/70, 06/03/1978.

[31]Commission Report of December 14, 1973, DR 78-A, § 207, p. 5

[32] *Tyrer/United Kingdom* , App. No: 5856/72, 25/04/1978, §33.

§80. Approaching the issue through the lens of human dignity, this attitude is also consistent with Article 17 of the Constitution, which states that "no one shall be subjected to penalty or treatment incompatible with human dignity" Therefore, the matter should have been examined not only in the context of the prohibition of discrimination but also in terms of the prohibition of treatment incompatible with human dignity. In the concrete case, although HREIT considered the application in terms of ill-treatment, its examination was limited to the conditions of detention. This point is open to criticism.

C) RIGHT TO LIBERTY AND SECURITY

§81. The concept of "deprivation of liberty", as an autonomous concept, is a safeguard against individuals being deprived of their freedom without their consent (subjective factor) and being deprived of freedom of movement in a narrow space in all directions (objective factor). The concept of "deprivation of liberty" occurs not only when official procedures are initiated but also from the moment when both the subjective and objective factors manifest. Therefore, deprivation of liberty can occur not only in places like detention centers, police stations, etc., but also in situations such as being in a car, airplane, or on a street surrounded by law enforcement officers..[33]

§82. The Constitution considers the legitimate deprivation of liberty permissible when to "when a person who attempts to enter or enters the country unlawfully, or against whom a decision of deportation or extradition has been made, is apprehended or arrested", and in this context, it allows deprivation, provided that the form and conditions are specified in the law. In a decision given in 2015, the Constitutional Court accepted the allegation of unlawful detention of the applicant who was deported on the basis of the fact that “there is no clear legal regulation *regarding administrative supervision conditions, duration, extension of the period, notification to the person concerned, avenues of appeal against the administrative supervision decision, access to a lawyer for the person under administrative supervision,*

[33]For all these explanations and related references, see. Tolga Şirin, *The Right to Freedom and Security* , (Ankara: Council of Europe Publishing, 2018), p. 24 ff.

and access to interpreter assistance.”." [34]Following this violation decision, some regulations (art. 57) were introduced in the Foreigners and International Protection Law No. 6458. According to the part of this provision that is relevant to the topic:

> “(1) If foreigners within the scope of Article 54 [35]are caught by law enforcement, they are immediately reported to the governorship to make a decision about them. For those who are deemed to require a deportation decision, the deportation decision is taken by the governorship. The evaluation and decision period cannot exceed forty-eight hours.
>
> (2) Among those for whom a deportation decision was taken; The governorship is responsible for those who are at risk of escaping or dissapering, who violate the rules of entry or exit to Turkey, who use forged or unfounded documents, who do not leave Turkey within the given time period without an acceptable excuse, who pose a threat to public order, public security or public health. An administrative detention decision is taken or alternative obligations to administrative detention are imposed in accordance with Article 57/A. Foreigners for whom an administrative detention decision has been taken are taken to repatriation centers within forty-eight hours by the law enforcement unit that made the arrest.”

§83. In the concrete case, the allegations that the applicant was repeatedly "taken to the police station", "kept waiting at the police station", "driven around by car", "held at the Ankara Counter Migrant

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[34] *Rıda Boudraa* , App. No: 2013/9673, 21/1/2015, §79.

[35]The following foreigners may be deported: (a) Those who have been sentenced to imprisonment for the crime they committed, who are decided to be deported by the Ministry of Internal Affairs after the execution of their sentence or conditional release is decided by applying a probation measure, and in any case, after the execution of their sentence is completed, (b) Those who are members of a terrorist organization Those who are managers, members, supporters or managers, members or supporters of a profit-oriented criminal organization, (c) Those who use unreal information and forged documents in transactions for entry to Turkey, visas and residence permits, (d) Those who earn their living during their stay in Turkey. Those who provide it through illegitimate means, (d) Those who pose a threat to public order or public security or public health, (e) Those who exceed their visa or visa exemption period for more than ten days or whose visas have been cancelled, (f) Those whose residence permits have been cancelled, (g) Those whose residence permits have been cancelled. Those who have a permit but violate the residence permit period for more than ten days without an acceptable justification after its expiration, (ğ) *Those who are found to be working without a work permit* , (h) Those who violate the provisions of legal entry into or legal exit from Turkey, or those who Those who attempted to violate the provisions, (i) Those who were found to have come to Turkey despite a ban on entry to Turkey, (i) Those whose international protection applications were rejected, who were excluded from international protection, whose applications were evaluated as unacceptable, who withdrew their applications, whose applications were deemed to have been withdrawn. , those whose international protection status has expired or been cancelled, and those who do not have the right to stay in Turkey in accordance with other provisions of this Law after the last decision made about them. In the concrete case, there is a response in terms of clause (ğ).

Smuggling And Border Gates Department" and "held at the Akyurt Removal Center" are all interventions against the right to liberty and security.

§84. In the context of the process related to administrative supervision and deportation decisions, the measures are clear. On 15/09/2021 around 18:30, the applicant, who was deprived of his freedom, was taken to the Çankaya Crime Prevention and Investigation Bureau on the same day, and at 20:30, it was decided to take the applicant to the n Counter Migrant Smuggling And Border Gates . The applicant, taken to Ankara Gazi Mustafa Kemal State Hospital, was then taken to the Counter Migrant Smuggling And Border Gates e after obtaining a report there at 22:17. The statements of the applicant, who spent the night there, were recorded on 16/09/2021 at 13:00, and a deportation decision was made for the applicant on 17/09/2021. This indicates that the 48-hour evaluation period has been complied with.

§85. The administrative detention decision for the applicant was taken on 17/09/2021 and he was taken to the Removal Center on the same day. Therefore, there is legality in the provision that foreigners who are subject to administrative detention will be taken to deportation centers within forty-eight hours by the law enforcement unit that made the arrest. There is no arbitrariness in terms of the reasonableness of the retention period.

§86. However, the constitutionality of the legislation in question is debatable. Because, in accordance with the Constitutional provision (Art. 19/2) that applies to the concrete case, the deprivation of liberty of persons may occur when *" a person who attempts to enter or enters the country unlawfully, or against whom a decision of deportation or extradition has been made, is apprehended or arrested"* . However, in the concrete case, the fact that the applicant was " *found to be working without a work permit"* does not correspond to these conditions. Because, as of 15/09/2021, the applicant is not " a person *who wants to enter or entered the country illegally"* or " *a person about whom a deportation or extradition decision has been made"* . The Constitution states that *"Fundamental rights and freedoms may be restricted(...) only based on the specific reasons set forth in the relevant Articles of the Constitution.*

§87. *(...)."* The constitutionality of the regulation is questionable. On the other hand, in the concrete case, it is observed that there is no relevant and sufficient justification regarding which of the reasons for administrative supervision provided for in Law No. 6458 (Article 57/2) applies to the applicant, such as risk of "escaping and disappearing," "violation of rules of entry or exit of Turkey," "use of forged or unfounded documents," "failure to leave within the time granted for leaving Turkey without a valid excuse," "posing a threat to public order, public security, or public health." This situation makes the constitutionality of the detention questionable.

§88. In addition, it is unclear for what purpose the applicant was kept in the category between 08/09/2021 - 13/09/2021 and the category between 27/09/2021 and 17/06/2022 among the interventions in question. This situation can be noted as a problem in terms of the legality of the detention.

§89. Finally, allegations of being driven around in a car can be considered as "keeping no record" and can be handled in terms of "personal security", if the necessary data is presented and even an effective investigation is carried out.

§90. TİHEK has not elaborated on these points in depth.

D) RIGHT TO MEET/INFORM RELATIVES

§91. The right to visit one's relatives, Article of the Constitution. It is directly related to the provision of 19/6. European Convention on Human Rights art. This guarantee, which is not included in Article 5, was included in the Constitution in 2002. The Constitutional Court cannot deepen the guarantee this regard in constitutional complaint examinations due to its restrictive jurisprudence on the "common protection area". [36]This guarantee, which can be considered within the scope of physical and moral integrity and respect for family life depending on the circumstances of the concrete case, is indeed binding for TİHEK.

§92. In the concrete case, the applicant complains about not being allowed to meet with his lawyers and family. [37]Of these complaints, TİHEK focused only on the element of meeting with lawyers. In this

[36] *Osman Karaca* , App. No: 2019/41752, 13/1/2021, § 79-80.

[37] *M.I.A. decision* , §2ç.

focus, there was no in-depth examination of why the meeting with the lawyer was delayed, and no answer was sought to the question of whether the person was allowed to meet with his family or whether his relatives were informed that he was being held. These deficiencies, Art. It weakens the assurances of 19/6.

E) FREEDOM OF RELIGION AND CONSCIENCE

§93. The Constitution, Article 24 of the Constitution, guarantees that everyone has "has the right to freedom of conscience, religious belief and conviction. " (Art. 24/1), and also by stating that the "Acts of worship, religious services, and ceremonies shall be conducted freely, provided that they do not violate the provisions of Article 14. ” provides the practical manifestations of this freedom. s. In fact, to quote directly from the jurisprudence of the Constitutional Court:

> Freedom of religion, as envisaged in Article 24 of the Constitution, covers the inner scope of religious freedom by ensuring that a person has or does not have any belief, that he can freely change his belief, that he is not forced to declare his belief, that he is not condemned or oppressed for these, and that he is not subjected to teaching, practice, alone or It has also recognized and protected the external area of freedom of religion with the right to reveal one's religion or belief through collective worship and rituals.[38]

§94. The Court noted that these guarantees apply to those held in prison as much as to anyone else, and even in these circumstances; It found that the rejection of the requests to provide the Holy Quran to the person through the institution administration, with the fee covered from the escrow account, and to allow the person to keep the Holy Quran with him at all times, was contrary to this assurance.[39]

§95. Praying is a worship ritual of the Islamic faith. The applicant claimed that when he wanted to pray at the police station, he was not allowed to do so. However, there is no direct and/or indirect (in the sense of *obiter dictum* justification) questioning on this issue in the TİHEK decision.

GENERAL EVALUATION

§96. Although racial discrimination is a widespread problem all over the world and naturally in Turkey, it is often a difficult phenomenon to

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[38] *Tuğba Arslan* [GK], App. No: 2014/256, 25/6/2014, § 57).

[39] *Ahmet Sil* , B. No: 2017/24331, 9/5/2018; *Furkan Aktaş* , B. No: 2017/27587, 11/12/2019; *Ahmet Ünver* , B. No: 2018/20787, 19/10/2022.

prove. Since authorities generally do not openly reveal their racist motives when enforcing the laws,it is difficult to ascertain the motivation behind measures.d. For this reason, there is a considerable accumulation of jurisprudence regarding race-based discrimination. [40]In the concrete case, it has been established that the legal practice has a racially discriminatory motive, with some statements, video recordings and witness statements that arouse strong suspicion. Despite this bare reality , the fact that the majority of HREIT cannot see any discrimination in the incident makes the reason for the existence of the Institution questionable.

§97. In addition, there are at least ten special problems with the decision in question.

- ***Firstly*** , HREIT has refrained from using the standards regarding the burden of proof, reflected in the HREIT Law (Art. 21) concerning discrimination law and has not explained the conditions for avoiding this. This arbitrariness leads to the erosion of a criterion embodied in law, and places an institution that should contribute to the slow-progressing discrimination law in Turkey in a regressive position
- ***Second*** ; HREIT has focused all its attention on whether the interventions of the authorities are in compliance with the law. According to this approach, if a measure is lawful, it is automatically concluded that it does not violate the prohibition of discrimination. However, while a seemingly neutral law may not be effectively applied to some people, the strict application of the same law to others may create discrimination depending on the situation. Likewise, discrimination may occur in cases where it is understood that a measure that is applied to everyone and formally complies with the law is implemented by the authorities with racist motives, as evidenced by external indications. This situation, which we refer to as l "legal discrimination", directly corresponds to the concrete case. In this context, it is an important problem that the applicant does not question the sign changing

[40]For example, as of November 2023, there is no race-based discrimination decision against Turkey in the decision data banks of the Human Rights Court (HUDOC) and the Constitutional Court. However, it is also true that there is racism in Turkey.

practice, which does not include foreign names in Turkey and is not strictly implemented for Turkish signs.

- ***Third*** ; In the concrete case, it appears that the spatial dimensionsof racially motivated differential treatment has not been sufficiently questioned. Specifically; While legal measures for people "working without a work permit" are applied flexibly in some other provinces and districts, it is understood that in the concrete case the rule has been tightened specifically for the Kızılay. This aspect of "legal discrimination" remains unquestioned.[41]
- ***Fourth*** ; Both the majority and the minority of HREIT appear to be distant from the "racial profiling" jurisprudence. This situation shows that the Institution remains far from current human rights law developments and international standards.
- ***Fifth*** ; The majority or minority of HREIT ignored the possibility that allegations of racism could be counted within the scope of the prohibition of ill-treatment beyond the prohibition of discrimination.
- ***Sixth*** ; HREIT dismissed the complaints about the conditions of detention based on formal criteria such as "only laughter sounds in the place and wearing accessories" and did not use its visitation authority. This is a highly concerning issue. Because the conditions in which a person is held may be inhumane, even if those around them are smiling. There is no place for such a criterion in human rights law.
- ***Seventh*** ;HREIT did not substantially address the allegations of violation in the context of the right to liberty and security, and ignored the claims of unlawful, unregistered or excessive detention at different times. In this context, it has not been examined whether the administrative detention decision (Article 57/2 of Law No. 6458) had relevant and sufficient justification, Additionally, the compliance with the Constitution regarding the reasons for the applicant's detention from the time of arrest until

[41]Legal discrimination can occur directly or indirectly. Since compliance with the law presents a neutral image at first glance, the concept comes close to indirect discrimination.

the administrative detention decision was made, despite the applicant being found to be working without a work permit, has not been discussed. However, at first glance, there is an inconsistency here.

- ***Eighth*** , HREIT majority or minority did not examine the application in terms of freedom of religion and conscience and the right to meet with their lawyer and inform relatives s. However, conducting such an examination and at least drawing attention to the potential issues at this point (*obiter dictum*) could have an "educational effect".
- ***Ninthly,*** *the Art. 20/3 of the* HREIT Law states that HREIT has the authority to hear witnesses. According to the file, it is claimed that the property owner property was summoned to Çankaya District Police Department and made some statements to him. Local tradesmen also made some statements. Despite this remarkable and strong pieces ofevidence, it is a great flaw that HREIT did not listen to these witnesses.
- ***Tenth,*** *According to Art. 9/f and g of the* HREITLaw art. , HREIT is granted the authority to conduct ex officio examinations. In the past, HREIT has exercised this authority, especially in cases that have been covered by the media. However, despite the specific incident being widely reported and extensively discussed in the public sphere, the failure to initiate an ex officio examination should also be recorded as a negative indicator against HREIT.