Third Party Intervention

In the Case of Tezcan KARAKUŞ CANDAN and TMMOB v. Turkey (no. 28749/18)

by

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1. İfade Özgürlüğü Derneği ("İFÖD") would like to submit its observations about the legal status of the second applicant, the Ankara Branch of the Union of Chambers of Architects and Engineers ("**TMMOB**") in Turkish Law and whether the Union can be considered as a non-governmental organisation within the meaning of Article 34 of the Convention. Furthermore, it will be considered whether the Union's access to information request should be considered as a right protected under Article 10 of the Convention in the light of the criteria established by the Court in its decision of *Magyar Helsinki Bizottság v. Hungary* ([GC], no. 18030/11, November 8, 2016).
2. Subject to Article 34 of the Convention "*the Court may receive applications from any person, **non-governmental organisation** or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto....*" Accordingly, only non-governmental organisations as legal entities have standing before the Court as an applicant. The "governmental organisations", as opposed to "non-governmental organisations" are not entitled to make an application on the basis of Article 34. Nevertheless, the *Court* interprets the concept of non-governmental organisation autonomously *considering the legal status of an organisation and, where appropriate, the rights that status gives it, the nature of the activity it carries out and the context in which it is carried out, and the degree of its independence from the political authorities* (*Radio France and Others v. France* (dec.), Application No. 53984/00, § 26).
3. The Court found that a national company, namely, Radio France is a "non-governmental organisation" within the meaning of Article 34 of the Convention although it was entrusted with public-service missions and depended to a considerable extent on the State for its financing. The Court reached this conclusion on the basis of the fact that the legislature had devised a framework which was plainly designed to guarantee its editorial independence and its institutional autonomy. In this respect, the Court emphasized that there was little difference between Radio France and the companies operating "private" radio stations, which were themselves also subject to various legal and regulatory constraints and the Act did not confer a dominant position on Radio France (*Radio France and Others v. France* (dec.), Application No. 53984/00, § 26).
4. Similarly, the Court found that the applicant company in *Islamic Republic of Iran Shipping Lines v. Turkey* (no. 40998/98) was a non-governmental organisation, despite the fact that it was wholly owned by the Iranian State and that a majority of the members of the board of directors were appointed by the State. The Court noted that the applicant company was legally and financially independent from the State and was run as a commercial business (§ 79). In the same vein, the Court found in *Österreichischer Rundfunk v. Austria* (Application No. 35841/02, 07.12.2006) that Austrian Broadcasting, a public law foundation, qualified as a "non-governmental organisation" within the meaning of Article 34 of the Convention and was entitled to lodge an application on the ground that Austrian legislator had devised a framework

which ensures the Austrian Broadcasting's editorial independence and its institutional autonomy (§§ 46-54).

5. İFÖD therefore suggest that the question of the Ankara Branch of the Union of Chambers of Architects and Engineers of Turkey (TMMOB)'s *locus standi* is to be assessed in the light of the principles set forth by the Court in above mentioned cases considering the legal status of it under Turkish law.

a. Legal Status of Public Professional Organisations in Turkish Law

6. The second applicant Ankara branch of (TMMOB) is a quasi-public body in Turkish Law and considered as a public professional organisation. The Constitution defines public professional organisations (PPOs) as public corporate bodies established by law with the objectives to meet common needs of the members of a given profession, to facilitate their professional activities, to ensure the development of the profession in keeping with common interests, to safeguard professional discipline and ethics in order to ensure integrity and trust in relations among its members and with the public (Art. 135 of the Constitution). According to the Constitution, organs of the public professional organisations to be elected by secret ballot by their members in accordance with the procedure set forth in the law, and under judicial supervision.
7. Those organisations are such as Bars, chambers of medical doctors, chambers of architects and engineers, chambers of commerce, chambers of industry, associations of tradesman and craftsman etc. They regulate private professions. In order to exercise those private professions like lawyer, medical doctor, architect, engineer, accountant etc individuals should register with their respective PPOs.
8. The public professional organisations are highly autonomous entities with vast administrative powers. They are self-governing organisations and all organs of them are elected by their members. Their finance is also provided by their members. But they are subject to administrative tutelage and supervision by their superior organisations and central administration. The Constitution stipulates that the rules concerning the administrative and financial supervision of these professional organizations by the State should be prescribed by law. It should be noted that administrative and financial supervision of PPOs by state does not extinguish their autonomy. On the contrary, their autonomous decision-making mechanisms are guaranteed by their founding laws.
9. The Union of Chambers of Architects and Engineers was established by Law No. 6235 dated 27 January, 1954. The Union is a superior organisation of chambers of engineers and architects. The purpose of the Union is set forth in Article 2 of the Law no 6235 as a) separation of engineers and architects into different specialization branches and determining establishment of chambers for each branch; b) fulfilling the common necessities of the members of engineer and architect professions, expedition of the occupational activities, development of the professions in accordance with general interests, engaging in all initiatives and activities deemed necessary to protect occupational discipline and ethics and to establish honesty and trust with members of the profession in the relations

with each other and public; and c) cooperation with official bodies regarding with the profession and interests to provide necessary assistance and proposals, analysing entirety of legislation norms and technical specifications regarding profession and providing observations and opinions to those concerned.

10. Organs of the Union is regulated in articles 3 and 11 and its revenues in Article 12 of the Law no 6235. Examination of the Law No. 6235 shows that the Union does not exercise governmental powers, its organs are elected by member chambers among their senior members for two years and financially it does not depend on state funds. As a result, the law ensures institutional autonomy of the union and it is independent from political organs. Therefore, İFÖD is of the opinion that legal framework regulating the structure and functioning of the applicant Union complies with the criteria established by the Court to qualify as non-governmental organisation within the meaning of Article 34 of the Convention.
11. İFÖD also observe that the approach of the Turkish Constitutional Court to the *locus standi* of the applicant before the Turkish Constitutional Court does not comply with the standards established by the ECtHR. Article 46 of the Law on Establishment and Rules of Procedure of the Constitutional Court (Law No. 6216) regulates that public legal persons cannot lodge individual application to the Constitutional Court and the Constitutional Court interprets this provision very strictly. It finds applications inadmissible on the ground that it does not have jurisdiction *ratione personae,* if it establishes that the applicant has a public legal personality in domestic law without considering whether the applicant exercised public power or whether it acted independently of the government. The Constitutional Court ruled in *İhsan Doğramacı Bilkent Üniversitesi application,* that private foundation universities do not have standing before the Constitutional Court since they have public legal personality in Turkish law (B. No. 2013/1430, 21/11/2013; B. No. 2014/5377, 16/3/2016 [kk]). Dissenting member of the Court in that case argued that article 46/2 of the Law No. 6216 should not be interpreted categorically, and all applications should not be rejected automatically on the basis that the applicant has public legal personality. He argued on the contrary, that the provision should be applied considering the purpose of it and the nature of the right claimed to be violated under special circumstances of each case. He emphasized that in the case at hand, private foundation university did not exercise public power and it enjoys right to a fair trial and right to property in domestic law, therefore it should have the right to lodge an individual application (see dissenting opinion of Erdal Tercan B. No. 2013/1430). Nevertheless, the Constitutional Court interpreted and applied article 46/2 of the Law No 6216 very strictly and categorically rejected all applications filed by public professional organisations like bar associations (*Günay Dağ ve diğerleri* [GK], B.No: 2013/1631, 17/12/2015), and chambers of commerce (*Doğubayazıt Ticaret ve Sanayi Odası,* B. No: 2012/743, 5/3/2013; B. No: 2014/11574, 24/2/2015 [kk]).
12. It should be noted that this approach of the Turkish Constitutional Court is not compatible with the case-law of the European Court of Human Rights regarding *locus standi* of public entities established in the case of *Radio France*

and Others (dec.) and followed consistently in other cases. Therefore, the ECtHR should consider this incompatibility when evaluating the right of standing of the applicant Union.

13. In *Bursa Barosu Başkanlığı and Others v. Turkey* (no. 25680/05, 03.12.2018) case the ECtHR made the following observations in terms of the victim status of the Bursa Bar Association:

> *"112. La Cour observe tout d'abord que le barreau de Bursa, en tant qu'organisation professionnelle ayant le caractère d'établissement public, constitue une personne morale de droit public (paragraphe 105 ci-dessus). Par conséquent, le barreau de Bursa saurait difficilement être qualifié d'organisation non gouvernementale ou de groupement de personnes ayant un intérêt commun, au sens de l'article 34 de la Convention (voir, mutatis mutandis,Le Compte, Van Leuven et De Meyere c. Belgique, 23 juin 1981, §§ 63-65, série A no 43). En tout état de cause, la Cour rappelle que le statut de « victime » peut être accordé à une association – mais non à ses membres – si elle est directement touchée par la mesure litigieuse (voir, notamment, Association des amis de Saint-Raphaël et de Fréjus et autres c. France (déc.), no 45053/98, 29 février 2000, et Dayras et autres et l'association « SOS Sexisme » c. France (déc.), no 65390/01, 6 janvier 2005). Une association ou un syndicat ne sauraient se prétendre eux-mêmes victimes de mesures qui auraient porté atteinte aux droits que la Convention reconnaît à leurs membres ; il en va de la sorte alors même que l'association ou le syndicat dont il est question ont pour objet statutaire la défense des intérêts de leurs adhérents (Ordre des avocats défenseurs et avocats près la cour d'appel de Monaco c. Monaco (déc.), no 34118/11, 21 mai 2013).*
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> *113. Dans le cas du barreau de Bursa, la Cour note que, dans son arrêt du 26 mai 2008, la Cour de cassation a considéré que ce barreau ne pouvait se prétendre victime d'un quelconque dommage résultant de la non-exécution des jugements en question (paragraphe 78 ci-dessus). Elle rappelle également que, selon sa jurisprudence constante, la notion de « victime » doit être interprétée de façon autonome et indépendante des notions internes telles que celles concernant l'intérêt ou la qualité pour agir. Au vu de l'ensemble des considérations qui précèdent, la Cour conclut que, le barreau de Bursa ne pouvant prétendre avoir la qualité de victime au sens de l'article 34 de la Convention (voir, mutatis mutandis, Ordre des avocats défenseurs et avocats près la cour d'appel de Monaco, précité, §§ 61-62), cette partie de la requête est incompatible ratione personae avec les dispositions de la Convention et elle doit être rejetée, en application de l'article 35 §§ 3 a) et 4 de celle-ci."*

14. However, it is considered that the status of the Ankara Branch of the Union of Chambers of Architects and Engineers is different from the Bursa Bar Association for a number of reasons. In the Bursa Bar Association case the applicant claimed that it had become victim due to non-implementation of decisions of administrative courts. In domestic proceedings, the Turkish Court of Cassation considered that the Bar could not claim to be victim of any

damage resulting from the non-execution of the judgments in question in relation to third parties, as it was not directly affected by non-implementation.

15. The Union of Chambers of Architects and Engineers, however, is directly affected by the decision of the Constitutional Court. Firstly, consistent jurisprudence of the Turkish administrative courts recognises the right to information of the Union in several cases. Secondly, the Union exercised its right to information exactly as described by the ECtHR in its Magyar Helsinki Bizottság v. Hungary decision. The Union has for many years prepared reports about construction, city of Ankara, regional planning and the environment. In order to exercise this public watchdog role, the Union needs to access relevant information held by public authorities subject to Right to Information Act. There's no doubt that the requested information is subject of public interest. Therefore, even if the Union is not deemed a non-governmental organisation in general terms, with regards to its role and activities as a watchdog in observing developments relating to construction, city, regional planning and environment it cannot be seen as a legal person of public law. Indeed, while the Union's activities relating to the regulation of the profession of architects and engineers fall within the public law domain, when it acts as a public watchdog to monitor and report the activities of public authorities it is recognised as private entity under Turkish law.

b. The Right to Freedom of Information

16. The case involves the second ever application to the European Court in relation to Turkey's Right to Information Law No. 4982 (see for the other case Cangı v. Turkey, no. 24973/15) about a request by the applicants (Ankara branch of TMMOB (Union of Chambers of Architects and Engineers of Turkey) (second applicant) and its President (first applicant)) to obtain information about the cost of materials used in the construction of the new Presidential Palace from the Ankara Chamber of Commerce. The applicants were denied that information.
17. The Turkish Constitution guarantees a right to obtain information for everyone in Article 74/3. Similarly, the Turkish Law on the Right to Information (Law No.4982) provides that everyone has the right to information (Art. 4) and all natural and legal persons could apply to the public authorities to exercise their right to information.
18. All public authorities have a legal obligation to provide access to information and documents (subject to the exceptions set out in the Act) requested under article 5. The public authorities may turn down the requests for any information or document that require a separate or special work, research, assessment or analysis (Art.7). The object of the Law is defined as to regulate the procedure and the basis of the right to information according to the principles of equality, impartiality and openness that are the necessities of a democratic and transparent government (Art.1). The scope of the Law comprises "*the activities of the public institutions and agencies and the professional organisations which qualify as public institutions*." (Art. 2).

19. The exceptions are regulated in articles between 15 to 28 of the law. Among them there are trade secrets stipulated in Article 23 which reads as follows.

> ***"Article 23-*** *The information and documents that are qualified as commercial secret in laws, and the commercial and financial information that are provided by the institutions and agencies on the condition that they are kept secret from natural or legal persons, are out of the scope of this law."*

20. The Ankara Chamber of Commerce, which is a public professional organisation, denied the request of the applicants on the ground that requested information constitutes trade secrets. However, that decision lacks any reasoning and apart from the reference to article 23, the authority's reply does not explain why the requested information falls within that category.
21. The European Court of Human Rights revised its caselaw about the right to freedom of information in the case of Magyar Helsinki Bizottság v. Hungary [GC] (no. 18030/11, 08.11.2016. The Court stated that (it) is satisfied that a broad consensus exists within the Council of Europe member States on the need to recognise an individual right of access to State-held information so as to enable the public to scrutinise and form an opinion on any matters of public interest, including on the manner of functioning of public authorities in a democratic society. The Court clarified the classic principles stating that "*the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him*." Moreover, "*the right to receive information cannot be construed as imposing on a State positive obligation to collect and disseminate information of its own motion*". The Court further considered that Article 10 does not confer on the individual a right of access to information held by a public authority nor oblige the Government to impart such information to the individual. However, such a right or obligation may arise, **firstly**, where disclosure of the information has been imposed by a judicial order which has gained legal force (which is not an issue in the present case) and, **secondly**, in circumstances where access to the information is instrumental for the individual's exercise of his or her right to freedom of expression, in particular "the freedom to receive and impart information" and where its denial constitutes an interference with that right (§ 156).
22. The Court established that whether and to what extent the denial of access to information constitutes an interference with an applicant's freedom-of-expression rights must be assessed in each individual case and in the light of its particular circumstances considering following elements: the purpose of the information request, the nature of the information sought, the role of the applicant and the availability of the requested information. Firstly, in order for Article 10 to come into play, the purpose of the information request should be exercising freedom to receive and impart information and ideas to others. Gathering of information must be a relevant preparatory step in journalistic activities or in other activities creating a forum for, or constituting an essential

element of, public debate. In this context, considering the 'duties and responsibilities' inherent in the exercise of the freedom of expression, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the *proviso* that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism. **The same considerations would apply to an NGO assuming a social watchdog function** (§ 157 -59).

23. Secondly, the information sought should be subject of public interest and disclosure of it should contribute to public debate. The Court emphasised that the definition of what might constitute a subject of public interest will depend on the circumstances of each case and the Court considered that there exists a need to reach information under Article 10 where, *inter alia*, disclosure provides transparency on the manner of conduct of public affairs and on matters of interest for society as a whole and thereby allows participation in public governance by the public at large. The Court found that the denial of access to information constituted an interference with the applicants' right to receive and impart information in situations where the data sought was "factual information concerning the use of electronic surveillance measures" (*Youth Initiative for Human Rights v. Serbia,* no. 48135/06, 25 June 2013, § 24), "information about a constitutional complaint" and "on a matter of public importance" (*Társaság a Szabadságjogokért v. Hungary,* no. 37374/05, § 14, April 2009, §§ 37-38), "original documentary sources for legitimate historical research" (*Kenedi v. Hungary,* no. 31475/05, 26 May 2009, § 43), and decisions concerning real property transaction commissions (*Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria,* no. 39534/07, 28 November 2013, § 42), attaching weighty consideration to the presence of particular categories of information considered to be in the public interest. According to the Court's approach the public interest cannot be reduced to the public's thirst for information about the private life of others, or to an audience's wish for sensationalism or even voyeurism. In order to ascertain whether a publication relates to a subject of general importance, it is necessary to assess the publication as a whole, having regard to the context in which it appears (*Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, §§ 97 to 103, ECHR 2015 (extracts), with further references).
24. Thirdly, the particular role of the seeker of the information in "receiving and imparting" it to the public assumes special importance. Thus, in assessing whether the respondent State had interfered with the applicants' Article 10 rights by denying access to certain documents, the Court previously attached particular weight to the applicant's role as a journalist (*Roşiianu v. Romania* (no. 27329/06, 24 June 2014, § 61) or as a social watchdog or non-governmental organisation whose activities related to matters of public interest (*Társaság,* § 36; *Österreichische Vereinigung*, § 35; *Youth Initiative for Human Rights,* § 20). While Article 10 guarantees freedom of expression to "everyone", considering the essential role played by the press in a democratic society, the Court attributed a special importance to the safeguards to be afforded to the press. The Court also acknowledged that the function of creating various platforms for public

debate is not limited to the press but may also be exercised by, among others, non-governmental organisations, whose activities are an essential element of informed public debate. The Court accepted that **when an NGO draws attention to matters of public interest, it is exercising a public watchdog role of similar importance to that of the press and may be characterised as a social "watchdog" warranting similar protection under the Convention as that afforded to the press**. The Court recognised that civil society makes an important contribution to the discussion of public affairs and it is in the interest of democratic society to enable NGOs scrutinising the State. Given that accurate information is a tool of their trade, it will often be necessary for persons and organisations exercising watchdog functions to gain access to information in order to perform their role of reporting on matters of public interest. Obstacles created in order to hinder access to information may result in those working in the media or related fields no longer being able to assume their "watchdog" role effectively and their ability to provide accurate and reliable information may be adversely affected. Thus, the Court takes into the account whether the person seeking access to the information in question does so with a view to informing the public in the capacity of a public "watchdog". But this does not mean that a right of access to information ought to apply exclusively to NGOs and the press. **A high level of protection also extends to academic researchers, authors of literature on matters of public concern, internet bloggers and popular users of social media** (§§ 164-68).

25. Finally, the requested information must be "ready and available" and do not necessitate the collection of any data by the Government. However, the government authorities cannot rely on the anticipated difficulty of gathering information as a ground for its refusal to provide the applicant with documents, where such difficulty is generated by the authority's own practice (§ 169).
26. Considering these criteria, it should be noted that **right to freedom of information has been recognised by Turkish Constitution and by Turkish law and there is no provision exempting public professional organisations from enjoyment of this right**. Turkish courts recognised right of access to information of public professional organisations in numerous cases (see among others İstanbul Bölge İdare Mahkemesi 10. İdari Dava Dairesi, E. 2017/415, K.2017/485, K.T 22.03.2017; Ankara 16. İdare Mahkemesi, e.2008/1328, K.2009/911, K.T. 27.02.2009; Ankara 2. İdare Mahkemesi, E.2008/2092, K.2017/485, K.T. 05.06.2009). Therefore, it should be considered that public professional organisations are also entitled to right to obtain information. It should also be considered that TMMOB and its Ankara branch played an important role in the struggle against unlawful usage of Atatürk forest farm (AOÇ) and protection of environmental values. Atatürk forest farm was entailed by Mustafa Kemal Atatürk to the state treasury on the condition that it is used for agricultural development. The applicant union filed a case against construction of the Presidential Palace in AOÇ arguing that it was contrary to the will of Atatürk. The applicant filed numerous administrative cases in order to stop the construction of the presidential palace because the construction plan was not compatible with conservation plans and regulations. In doing so, the

applicant acted as a public watchdog and the applicant's right to information request is also related to the Union's on-going legal action with the regards to the construction of the new Presidential Palace.

27. Within this context, it should also be noted that the requested information was related to the cost of material used in the construction of Presidential Palace. The applicant wanted to contribute to public debate about whether tax payers' money was spent properly by public authorities and whether the expenditure was necessary and in compliance with the law. Transparency of government is one of the most significant issues in democratic states governed by the rule of law. The applicant as a public professional organisation sought to contribute to the debate about the cost of the Palace for taxpayers which was a very controversial and debated issue during the construction phase. The applicant needed accurate information about the cost of materials in order to contribute public debate and to assume watchdog role properly. Withholding the requested information by public authorities, hindered the applicant's exercise of its right to freedom of expression. The role of the applicant as a public professional organisation in public debate became more important in Turkey considering that free media is almost extinguished and civil society and dissent voices are silenced. Therefore, the role of the applicant in contributing to public debate as an independent watchdog should be taken into the consideration.
28. Lastly, it should also be noted that the sought information was ready and available when the applicant requested it. The cost of materials used in the construction of a public building cannot be considered as a trade secret since the construction is subject to public procurement and open to public scrutiny.

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İfade Özgürlüğü Derneği (İFÖD) has been set up formally in August 2017 protect and foster the right to freedom of opinion and expression. The new Association envisions a society in which everyone enjoys freedom of opinion and expression and the right to access and disseminate information and knowledge.