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| **strategic litigation guidelines** |
|  |
| Belgrade, September 2018 |

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All words/terms used in this report in the masculine gender are to be understood as including persons of both male and female gender they refer to.

# **I. Introductory notes**

Equality is a fundamental value of modern society and a universal moral and legal principle. Being ‘equal’ entails civilizational progress embodied in the acknowledgement that every human being, different in their characteristics and abilities, potentials, goals, and ambitions, is born free and equal in their rights. Even though it is eminently clear that people differ from one another and that not all share the same attributes or starting positions in society, equality means that the same rights and freedoms belong to all, and that everyone is equal before the law. However, in practice members of a social group are often treated differently or discriminated against only because of a personal (protected) characteristic. Since there is no society entirely free of discrimination, development of legal frameworks to ban discrimination has proceeded in parallel with the creation of mechanisms to protect from it.

The Serbian **Anti-Discrimination Law** 2009 allows the Office of the **Commissioner for Protection of Equality** (‘the Commissioner’) to bring **legal action for protection from discrimination** (also referred to as ‘strategic litigation’).

To date, the Commissioner has launched such action in cases of frequent and widespread discrimination, especially those with particularly serious consequences on persons from vulnerable and marginalised groups. Various cases of discrimination may be deemed to have strategic importance if they hold potential to achieve the objectives of strategic litigation. **In other words, strategic litigation means representing individual interests to attain a broader social objective: it is a method for using court judgments to effect broader social change, influence case law and public policy, and improve the position of social groups that are discriminated against.**

The primary purpose of these Guidelines is to clarify what is meant by strategic litigation, what criteria can be used to assess strategic litigation, provide an overview of strategic litigation pursued to date, and highlight the challenges faced by the Commissioner in this area.

These Guidelines were developed as part of the project ‘Strengthening capacities of Serbian institutions and organisations for the proper enforcement of human rights and anti-discrimination legislation’, supported by the UK Government through its Good Governance Fund (GGF), of which the beneficiary is the Commissioner for Protection of Equality. This project will contribute to strengthening the rule of law and democratic accountability, and its expected outcome is improved implementation of the Anti-Discrimination Law.

# **II. Global and national anti-discrimination legal framework in Serbia**

## 2.1 International anti-discrimination standards

Before World War II, the prohibition of discrimination was only dealt with in the so-called minority treaties, entered into with nations defeated in World War I.[[1]](#footnote-1) The Charter of the United Nations (UN Charter)[[2]](#footnote-2) introduced the **principle of equality** as a fundamental doctrine of international law. Nevertheless, this principle only applied to countries as the main subjects of international law, and it entailed the sovereign equality of UN members.[[3]](#footnote-3) It was only in the Universal Declaration of Human Rights that this principle was introduced and elaborated on, after which it was enshrined in numerous conventions adopted under the auspices of the UN.

### 2.1.1 UN anti-discrimination standards

As the successor state of the Socialist Federal Republic of Yugoslavia, Federal Republic of Yugoslavia, and the State Union of Serbia and Montenegro, the Republic of Serbia is a member of the UN. As a member, and as the successor state of these countries, Serbia is a signatory of the UN Charter (1945), the Universal Declaration of Human Rights (1948), and eight fundamental international human rights treaties, including the International Covenant on Civil and Political Rights (1966)[[4]](#footnote-4) and the International Convention on the Elimination of All Forms of Racial Discrimination(1965).[[5]](#footnote-5)

1. The 1945 UN Charter, in its Article 55(c), requires all members to promote ‘universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion’.
2. In its Articles 1 and 2, the 1948 Universal Declaration of Human Rights stipulates that ‘all human beings are born free and equal in dignity and rights’, ‘without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.
3. Article 20 (2) of the 1966 International Covenant on Civil and Political Rights states that ‘[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law’. According to its Article 26, ‘[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.
4. Article 2 (2) of the International Covenant on Economic, Social and Cultural Rights,[[6]](#footnote-6) adopted in 1966, guarantees the exercise of all rights envisaged under the Covenant ‘without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.
5. The 1965 International Convention on the Elimination of All Forms of Racial Discrimination is the UN’s principal document directed against racism and discrimination. The Convention states that the ‘States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form’.

There are also other important UN conventions that are relevant to anti-discrimination efforts, including the Convention on the Elimination of All Forms of Discrimination against Women,[[7]](#footnote-7) Convention on the Rights of Persons with Disabilities,[[8]](#footnote-8) and Convention on the Rights of the Child.[[9]](#footnote-9)

All of these international treaties have resulted in the establishment of treaty bodies, committees charged with monitoring compliance by states parties. In addition to their general competences, some of these committees are empowered to hear individual complaints. Serbia has accepted the jurisdiction in these terms of the UN Human Rights Committee, UN Committee on the Elimination of Racial Discrimination, UN Committee on the Elimination of Discrimination against Women, UN Committee on the Rights of Persons with Disabilities, and the UN Committee on Enforced Disappearances.[[10]](#footnote-10)

### 2.1.2 Council of Europe instruments and special bodies

The State Union of Serbia and Montenegro joined the Council of Europe on 3 April 2003, when it also signed the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, 1950).[[11]](#footnote-11). The ECHR was ratified on 26 December 2003 and became effective on 3 March 2004, when the ratification instrument was deposited with the Council of Europe. Following the 2006 demise of the State Union, Serbia retained a seat on the Council of Europe as the successor state.

Discrimination is prohibited under Article 14 of the ECHR, but this provision had only subsidiary effect as it banned discrimination only with respect to the enjoyment of rights guaranteed by the ECHR. However, Protocol No. 12 to the Convention, signed in 2000, resolved this issue by envisaging a general ban on discrimination. The Protocol entered into effect on 1 April 2005, providing more comprehensive protection from discriminatory action.

Another two key documents of the Council of Europe are the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (the so-called Lanzarote Convention),[[12]](#footnote-12) ratified by Serbia in 2010, and the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention)[[13]](#footnote-13) of April 2011, ratified by Serbia in 2013.

On 22 March 1994, the Council of Europe created a special body – the European Commission against Racism and Intolerance (ECRI) – devoted to tackling racism, xenophobia, antisemitism, and intolerance that jeopardise human rights and democratic values in Europe. The ECRI monitors the state of play in Council of Europe member states and adopts non-binding recommendations that member states nevertheless take seriously and generally put into practice.[[14]](#footnote-14)

### 2.1.3 EU instruments prohibiting discrimination

Even though Serbia is not an EU member state, it is a candidate for membership and accession to the EU is its strategic orientation. As such, the EU’s *acquis communautaire* must also be taken into account.

There are three key EU Directives that prohibit discrimination:

* Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin;
* Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; and
* Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

Directive 2000/43/ЕC is important in that it requires Member States to establish special watchdog bodies to promote equal treatment between persons. It mandates that Member States designate a body or bodies to promote equal treatment without discrimination, irrespective of racial or ethnic origin, where these bodies may also be part of national bodies tasked with defending human rights or protecting the rights of individuals (these are most commonly Ombudsperson institutions).

Directive 2000/78/ЕC bans discrimination in five aspects: religion or belief, disability, age, and sexual orientation, with a view to putting into effect in the Member States the principle of equal treatment. Chapter I of the Directive defines ‘discrimination’ as including direct and indirect discrimination and harassment. The Directive then goes on to establish its scope, differences of treatment that are not deemed to be discrimination, justification of differences of treatment on grounds of age, positive action, and the like. Chapter II covers remedies and enforcement of the ban on discrimination and contains provisions for judicial, administrative, and other procedures that must be provided for in national law to promote the prevention and protection from discrimination. The Directive devotes particular attention to the **burden of proof,** which it places on the respondent rather than the victim of discrimination. This piece of legislation also devotes particular attention to the notion of **victimisation:** its final provisions stipulate how Member States are to ensure equal treatment, sanctions for non-compliance with this principle, enforcement, and reporting by Member States to the European Parliament and the Council.[[15]](#footnote-15)

2.2 Serbian legal framework against discrimination

The principles of equality and non-discrimination are constitutionally guaranteed.[[16]](#footnote-16) Article 21 of the Constitution of Serbia prohibits discrimination, stipulating that: (1) All are equal before the Constitution and law; (2) Everyone shall have the right to equal legal protection, without discrimination; (3) All direct or indirect discrimination based on any grounds, particularly on race, sex, national origin, social origin, birth, religion, political or other opinion, property status, culture, language, age, mental or physical disability shall be prohibited.

The same Article goes on to assert that ‘[s]pecial measures which the Republic of Serbia may introduce to achieve full equality of individuals or group of individuals in a substantially unequal position compared to other citizens’ are not deemed discrimination.

Many other provisions of the Constitution of Serbia also ban discrimination, either directly or indirectly. For instance, Article 76 prohibits discrimination against national minorities: ‘Persons belonging to national minorities shall be guaranteed equality before the law and equal legal protection’. Any discrimination on grounds of ethnicity is prohibited, save for positive action. Article 77(1) of the Constitution, which pertains to equality in public administration, envisages that national minorities are entitled to participate in the administration of public affairs and serve in public office. A number of other articles are also notable in the context of discrimination: 48 (‘Promotion of and respect for diversity’), 49 (‘Prohibition of inciting racial, ethnic and religious hatred’), and 50 (‘Freedom of the media’), which allows courts to suppress information in the media ‘only when this is necessary in a democratic society to prevent inciting to violent overthrow of the system established by the Constitution or to prevent violation of territorial integrity of the Republic of Serbia, to prevent propagation of war or instigation to direct violence, or to prevent advocacy of racial, ethnic or religious hatred enticing discrimination, hostility or violence’. Article 44 of the Constitution, which deals with churches and religious communities, permits the Constitutional Court to outlaw a religious community ‘only if its activities infringe the right to life, right to mental and physical health, the rights of child, right to personal and family integrity, public safety and order, or if it incites religious, national or racial intolerance’. Similar restrictions apply when it comes to the freedom of thought, conscience, and religion (Article 43) and freedom of association (Article 55).

### 2.2.1 Specific legislation and anti-discrimination mechanisms incorporated into the Serbian legal system

Many new sectoral laws enacted as part of Serbia’s legislative reforms pursued after 2000 contain anti-discrimination provisions. Some of these proved successful, whilst others remained inoperative due to the lack of a systemic approach, which was finally implemented through a comprehensive set of anti-discrimination measures and instruments contained in the Anti-Discrimination Law, enacted in March 2009. Nevertheless, the practice of other laws being enacted with anti-discrimination provisions was not discontinued after the adoption of this piece of legislation, so further strengthening the framework to tackle discrimination.

Although discrimination is still a fact of life in Serbia, especially against members of some groups, it is not a systemic occurrence.

Discrimination is prohibited by many laws regulating particular fields.

In **healthcare,** an anti-discrimination clause is present in the Healthcare Law,[[17]](#footnote-17)which ‘governs the health care system, organization of the health service, social care for the health of the population, general interest in health care, the rights and obligations of patients, health care of foreigners, setting up of the Agency for Accreditation of Health Care Facilities of Serbia, supervision over the enforcement of this Law, as well as other issues of importance for the organization and implementation of health care’. Discrimination is here prohibited under the ‘Principle of Equity of Health Care’, enshrined in Article 20, which stipulates that ‘[t]he principle of equity of health care shall be realized by the ban on discrimination while providing health care on the grounds of race, sex, age, national affiliation, social origin, religious beliefs, political or other affiliations, income scale, culture, language, kind of disease, mental or bodily disability’. In addition, Article 4 of the Mental Health Law,[[18]](#footnote-18) which sets out key principles for mental healthcare, organisation and delivery of mental healthcare services, institutional mental healthcare and involuntary commitment, states that mental healthcare is to be provided without discrimination on the basis of race, gender, birth, language, nationality, ethnicity, religion, political or other conviction, education, legal or social status, financial situation, age, disability, or any other personal characteristic. This piece of legislation also bans discrimination on grounds of mental disability.

The primary piece of legislation in **social welfare** is the Social Protection Law,[[19]](#footnote-19) which governs social protection activities, objectives, principles, rights, and services; procedures for exercising entitlements to social protection; rights and obligations of beneficiaries; establishment and operation of social protection institutions; delivery of social protection services by other organisations; oversight of social protection institutions; inspections of social security activities; the Social Protection Chamber; support and for and enhancement of social protection practices; financing for social protection; and other connected issues. Its Article 25 sets out a non-discrimination principle that bans discrimination of beneficiaries of social protection on grounds of race, gender, age, ethnicity, social origin, sexual orientation, religion, political affiliation, trade union membership or other orientation, financial situation, culture, language, disability, nature of social exclusion, or other personal characteristic. This piece of legislation has also significantly improved the position of the most marginalised social groups, such as persons with disabilities and the Roma, and has done much to ensure the full equality and non-discrimination of beneficiaries of social protection.

The umbrella law in the **education** sector is the Education Law,[[20]](#footnote-20) which sets out the framework for early childhood, elementary, and secondary education (principles, objectives, and standards in education; delivery of early childhood, elementary, and secondary education; types of curricula; establishment, organisation, funding, and oversight of educational institutions; and other connected issues). This law was the first Serbian piece of legislation to introduce inclusive education, which marked a watershed in the prevention and prohibition of discrimination in this field. Article 3 of the Education Law stipulates that the education system must deliver to all children, students, and adults equal entitlement and access to education, without discrimination or exclusion on grounds of gender, social, cultural, ethnic, religious, or other affiliation; place of residence; financial status; health; disability; or any other grounds. The same article allows children, students, and adults with developmental disabilities to access institutional education at all levels, regardless of their financial situation. Persons accommodated in social protection institutions and children, students, and adults who are hospitalised or receiving healthcare at home are also ensured access to education. The Law sets out measures to reduce drop-out, especially for socially vulnerable categories of the population and residents of underdeveloped regions, persons with developmental or physical disabilities, and persons with learning difficulties, and provides instruments to support their re-integration into the education system, in line with the principles of inclusive education. The Education Law stipulates that everyone is entitled to education; Article 6 states that Serbian citizens are equal in terms of being able to exercising their right to education, regardless of gender, race, ethnic or religious affiliation, language, social or cultural background, financial situation, age, physical or mental health, developmental or physical disability, political orientation, or any other personal characteristic. The Education Law and other education-related legislation entitles persons with developmental or physical disabilities to receive standard instruction with specific reference to their needs; standard instruction with additional support offered to individuals or groups; or instruction in special early childhood or school groups.

The Higher Education Law[[21]](#footnote-21) regulates ‘the higher education system, conditions and manner of carrying out higher education activities, financing and other matters of importance for the performance of these activities’. Its Article 4 introduces ‘respect for human rights and civil liberties, including prohibition of all forms of discrimination’, as a fundamental principle of higher education. Article 8 elaborates on this principle by stipulating that higher education is available to ‘all persons who have completed their secondary education irrespective of the race, colour, gender, sexual orientation, ethnicity, national origin or social background, language, religion, political or any other opinion, birth, existence of a sense or movement handicap or property’.

Discrimination in the area of **labour and employment** is prohibited by the Labour Law,[[22]](#footnote-22) whose Article 18 bans ‘[d]irect and indirect discrimination of persons seeking employment, as well as the employees, for reasons of sex, birth, language, race, color of skin, age, pregnancy, health condition, i.e. disability, ethnic origin, religion, marital status, family obligations, sexual orientation, political or other belief, social background, financial status, membership in political organizations, trade unions, or any other personal characteristic’. Article 19 defines ‘direct discrimination’ as ‘any conduct caused by some of the reasons specified in Article 18 of the present Act whereby a person seeking employment, as well as an employed person, is placed in a more disadvantageous position comparing to other persons in the same or similar situation’, and ‘indirect discrimination’ as being present where ‘a specific, seemingly neutral provision, criterion or practice, places or would place in a more disadvantageous position comparing to other persons – a person seeking employment, as well as an employed person, because of a specific characteristic, status, orientation or belief referred to in Article 18 of the present Act’. Article 20 of the Labour Law bans discrimination in relation to ‘employment conditions and choice of candidates for performing a specific job’; ‘conditions of work and all the rights deriving from employment’; ‘education, vocational training and specialization’; ‘job promotion’; and ‘termination of the employment contract’, stipulating that ‘[t]he provisions of an employment contract providing discrimination on any of the grounds specified in Article 18 of the present Act are null and void’. Article 21 bans harassment and sexual harassment. For the purposes of the Employment Law, ‘harassment’ means ‘any unwanted conduct that has causes in grounds specified in Article 18 of the present Act, aiming at or amounting to the violation of dignity of a person that seeks employment, as well as of an employed person, and which causes fear or creates a hostile, degrading or offensive environment’, whilst ‘sexual harassment’ means ‘any verbal, non-verbal or physical behavior aiming at or amounting to the violation of dignity of a person seeking employment, as well as of an employed person in the sphere of sexual life, and which causes fear or creates a hostile, degrading or offensive environment’. However, Article 22 provides an exception to this general rule by stipulating that ‘[m]aking a distinction, exclusion or giving priority regarding a specific job is not considered as discrimination, where the nature of a job is such, or where a job is performed in such conditions, that the characteristics relating to some of the grounds specified in Article 18 of the present Act do amount to the real and decisive condition for performing the job, and where the purpose intended to be achieved through the above is justified’.

Further, ‘[p]rovisions of the law, bylaw and employment contract relating to special protection and assistance to specific categories of employees, and particularly those on the protection of persons with disabilities, women in the course of maternity leave and leave for tending the child, special care for the child, as well as the provisions relating to special rights of parents, adoptive parents, guardians and foster parents - are not considered to be discrimination’.

The Labour Law goes on to stipulate that, ‘[i]n the events of discrimination in terms of […] the present Act, a person seeking employment, as well as an employed person, may file a lawsuit against the employer for damages before a competent court, in conformity with the law’, as well as that ‘[i]f in the course of the proceedings the complainant made it probable that discrimination in terms of this Act took place, the burden of proof that there was no conduct that constitutes discrimination lies with the defendant’.

The Law on Employment and Unemployment Insurance[[23]](#footnote-23) regulates ‘employment-related activities and institutions competent for employment affairs, rights and obligations of the unemployed person and employer, active employment policy, unemployment insurance and other matters relevant to employment, raising employment and preventing long-term unemployment in the Republic of Serbia’. Its Article 5 envisages ‘prohibition of discrimination’ as a principle of the Law.

Article 6 of the Volunteering Law, [[24]](#footnote-24) which sets out key definitions in respect of volunteering, principles of volunteering, volunteering agreements, and rights and obligations of volunteers and volunteering organisers, bans any unjustified differentiation between or unequal treatment of volunteers, or failure to take action by organisers with regard to volunteers that constitutes discrimination as defined by law, except where required by the nature of the volunteering activity or the abilities of each individual volunteer, or where otherwise regulated by the Law. Organisers and volunteers are also required to treat individual recipients of volunteering activity in accordance with this principle.

Several significant anti-discrimination provisions are present in **media and freedom of information** laws. The Law on Public Information and the Media[[25]](#footnote-25) governs ‘the manner in which the freedom of public information is to be exercised, including, in particular, freedom to gather, publish and receive information, freedom to form and express ideas and opinions, freedom to print and distribute newspapers and freedom to produce, provide and publish audio and audiovisual media services, freedom to distribute information and share ideas via the Internet and other platforms, and freedom to publish the media and perform activities pertaining to public information’. Its Article 4 stipulates that ‘[a]ny direct or indirect discrimination of programme editors, journalists or other persons involved in the public information sector based, in particular, on their political choices and beliefs or other personal characteristics is forbidden’. The Law goes on to mandate that the ‘free flow of information through the media or the editorial autonomy of the media, especially by putting pressure, threatening or blackmailing editors, journalists or sources of information, shall not be jeopardised’, and envisages penalties for ‘physical assault on an editor, a journalist or other persons involved in gathering and publishing information through the media’. This piece of legislation also stipulates that the ‘freedom of public information shall not be violated by abuse of office or public powers, ownership or other rights, or by exerting influence or control over the means of printing and distribution of papers or over electronic communication networks used for the distribution of media content’.

The Law on Free Access to Information of Public Importance[[26]](#footnote-26) regulates ‘rights of access to information of public importance held by public authorities, with a view to exercising and protecting the public interest to know and attaining a free democratic order and an open society’. Article 6 of this piece of legislation states that ‘[e]veryone shall be able to exercise the rights in this Law under equal conditions, regardless of their nationality, temporary or permanent residence or place of establishment, or any personal characteristic such as race, religion, national or ethnic background, gender, etc.’. Further, Article 7 specifically prohibits discrimination against journalists and media outlets and stipulates that a ‘public authority shall not give preference to any journalist or media outlet in cases where more than one applicant applies for the same information by singling out one of them or by allowing one of them to exercise the right to access information of public importance before other journalists or media outlets’.

Anti-discrimination is present in legislation governing **sports and youth issues.** The Sports Law[[27]](#footnote-27) regulates the rights and obligations of athletes and other natural persons involved in sports; legal position, organisation, and registration of sole traders and legal persons involved in sports; public interest and the needs and interests of members of the public in connection with sports; financing and categorisation of sports; national sports development strategy for Serbia; sports in schools and universities and early childhood physical training; sports facilities; organisation of sports events; national honours and awards for special contribution to the development and promotion of sports; and record-keeping and oversight of sports organisations. Article 4 of this piece of legislation bans any direct or indirect discrimination, including hate speech, on any grounds, against athletes, sports professionals, sports organisations, and other persons involved in sports, either open or covert, that is based on an actual or assumed personal characteristic; the prohibition of discrimination also extends to professional or aspiring professional athletes, who may not be discriminated against in terms of employment, earnings, or working conditions. The Sports Law also mandates that both disabled and non-disabled athletes are treated equally where national honours are concerned.

Principles of equality and non-discrimination are also enshrined in the Youth Law.[[28]](#footnote-28) This piece of legislation expressly stipulates that ‘[a]ll young people shall be equal’, and that ‘[a]ny unjustified difference made between or any unequal treatment of young people, direct or indirect, on any grounds, in particular on the grounds of race, gender, nationality, religious belief, language, social background, financial standing, affiliation with political, trade union or other organizations, mental or physical disability, health, physical appearance, sexual orientation, gender identity, or other actual or assumed personal trait shall be prohibited’.

Numerous laws also prohibit discrimination against classes of individuals, based on personal characteristics of individuals or groups of persons.

Discrimination of **national minorities** is prohibited under the Law on the Protection of the Rights and Freedoms of National Minorities:[[29]](#footnote-29) this statute bans any discrimination against national minorities based on nationality, ethnicity, race, or language. National, sub-national, and local authorities may not enact regulations or take measures contrary to this ban.

Discrimination on grounds of religion is banned under the Law on Churches and Religious Communities*,*[[30]](#footnote-30) whilst discrimination against prisoners is prohibited in the Law on the Enforcement of Criminal Sanctions*.*[[31]](#footnote-31)

Discrimination against children and minors is dealt with in the Family Law,[[32]](#footnote-32) Education Law, and Law on Juvenile Offenders and Criminal Protection of Minors.[[33]](#footnote-33)

**As such, the Anti-Discrimination Law has not been the foundation for other legislation, nor has its enactment removed the need for specific legislation or anti-discrimination standards in sectoral laws, such as those that concern particularly vulnerable social groups. Legislation of this kind has already been enacted.**

For instance, the **Law on the Prevention of Discrimination against Persons with Disabilities** 2006[[34]](#footnote-34) is unique in being the first anti-discriminatory piece of legislation enacted in Serbia, and a major step forward in promoting equality and achieving equal rights for persons with disabilities. It governs the general framework to prevent discrimination on grounds of disability; action in specific cases of discrimination against persons with disabilities; protection of individuals exposed to discrimination; and measures to promote equality and social inclusion of persons with disabilities. The shortcomings of this law – primarily its lack of burden of proof rules and the limited number of persons permitted to bring legal action on behalf and with the consent of persons with disabilities in the event of their rights being violated – were remedied by the general Anti-Discrimination Law. It contains **specific rules on the burden of proof** and stipulates that, apart from a person whose rights have been infringed, an action for protection from discrimination can also be brought by their legal representative or personal assistant, by **the Commissioner for Protection of Equality, a human rights organisation, or any other person.**

Amendments to this Law made in 2015 were aimed at enhancing protection from discrimination and facilitating the exercise of disabled persons’ rights. New Paragraphs 2 and 3 of Article 34, and new Articles 34a and 52a, were introduced that allow disabled persons whose disability prevents them from signing their names to use stamps containing personal information or facsimile signatures. This is expected to prevent frequent instances of discrimination on grounds of disability faced by these individuals in their daily lives, mainly in their dealings with banks, public authorities, tourist facilities, and other places that required these persons to sign documents, a demand they were unable to comply with.[[35]](#footnote-35)

### 2.2.1 Legal framework for anti-discrimination litigation

The Anti-Discrimination Law introduced a specific anti-discrimination procedure that invokes the Law on Civil Procedure.[[36]](#footnote-36) Article 42 of the Anti-Discrimination Law stipulates that, [i]n proceedings initiated for the purpose of protection against discrimination, apart from the local court of general jurisdiction, the court situated in the area where the plaintiff’s head office or residence is located shall also have jurisdiction over the proceedings’.

An action may be brought by **a person exposed to discrimination,** who may seek:1) prohibitory injunctive relief with respect to discriminatory action; 2) a finding of fact that the respondent had discriminated against the complainant; 3) redress for the consequences of discriminatory treatment; 4) compensation for material and non-material damage; and 5) publication of the judgment rendered in any of the actions referred to above.

An anti-discrimination action may also be brought by **a human rights organisation** or **a person having consciously exposed themselves to discriminatory behaviour** with the intention of directly testing the application of regulations prohibiting discrimination in the case in question (referred to as a ‘tester’). These may not seek damages, however, as their actions are designed to prove discrimination exists and so protect persons or groups exposed to it.

The complainant may also seek temporary injunctive relief, for as long as the court ruling remains unenforced, seeking to prevent discrimination to remove the risk of violence or irreparable damage. An application for a temporary injunction must prove, on the balance of probabilities, that the injunction sought is required to prevent violence due to discriminatory behaviour, use of force, or irreparable damage. The court must rule on the injunction without delay, and at the latest within three days from the application being made.

The Law provides additional avenues for victims of discrimination to obtain protection. First and foremost, it envisages that these issues are dealt with as a matter of urgency,[[37]](#footnote-37) whilst review of judgments in these cases is always permitted. Secondly, the burden of proof is shared between the parties in anti-discrimination cases:[[38]](#footnote-38) in practice, this means that that complainant must prove that the respondent’s actions constituted discrimination, and if they are able to do so, the respondent must prove that those actions did not infringe on the principle of equality of rights and responsibilities.

The Commissioner has standing to bring anti-discrimination actions. This will be treated in greater detail below.

# **III. Role of the Commissioner in bringing anti-discrimination legal action**

The Commissioner was established under Anti-Discrimination Law 2009 as an independent and autonomous public authority tasked with combating all forms and types of discrimination.

The Commissioner has broad powers to both react to cases of discrimination and prevent discriminatory actions and promote equality.[[39]](#footnote-39)

The Anti-Discrimination Law empowers the Commissioner to bring legal action where it determines discrimination has occurred and where the case may be suitable for so-called **strategic litigation.**[[40]](#footnote-40) The Law gives the Commissioner ‘standing’, which means that the Commissioner can bring an action in its own name but with the consent and on the behalf of the person discriminated against, on condition that a court case involving the same matter has not been opened or that a final judgment has not been rendered.

In its statement of claim, the Commissioner may seek 1) prohibitory injunctive relief with respect to discriminatory action; 2) a finding of fact that the respondent had discriminated against the complainant; 3) redress for the consequences of discriminatory treatment; and 4) publication of the judgment rendered in any of the actions referred to above.

**The Commissioner initiates and pursues strategic litigation in the public interest: it brings legal action in its own name and with the consent of the person discriminated against, excepting where a group of individuals are involved.**

The Commissioner may decide which cause of action to advance in its statement of claim. It may freely combine legal requirements in the interest of ensuring comprehensive and effective judicial relief against the consequences of discriminatory action and preventing continued or repeated discrimination.

As has already been noted, where a named individual is exposed to discrimination, the Commissioner requires their consent in writing to bring legal action. This consent must precede the action itself but does not constitute a formal power of attorney, as the Commissioner brings action in their own name and in the public interest, rather than in the name of the individual. Consent to bring legal action is needed only for actual named individuals who believe they are discriminated against, but not in the event that discrimination was directed against a group of individuals who cannot be individually identified.[[41]](#footnote-41)

The Commissioner is a party to the case and must prove on the balance of probabilities that discrimination had indeed occurred in the particular situation.

# **IV. Strategic litigation**

## 4.1 Notion and importance of strategic litigation

It has already been noted that strategic litigation is a mechanism used to achieve a particular desired outcome. It seeks to attain broader social goals, enhance case law, raise awareness of discrimination, and improve the position of social groups that are discriminated against. There are many and varied reasons why strategic cases can be initiated and pursued, and these may evolve over time together with the development of society in a broader sense. Nevertheless, the strategic litigation is always directed at addressing widespread and/or systemic discrimination and eliminating legal shortcomings for the protection of vulnerable groups.

**A strategic litigation case may have any one or more of these objectives:**

* Clarifying a particular legal rule and seeking the court’s interpretation of it;
* Seeking to amend regulations so as to enhance the overall legal framework;
* Establishing relationships between several anti-discrimination regulations;
* Determining whether anti-discrimination regulations apply to a particular situation that is not expressly cited in statute;
* Highlighting a serious issue that appears when a public policy or practice has an adverse impact on a large group of people based on their personal characteristics, as part of a broader campaign for legal and social change; and
* Ensuring that anti-discrimination regulations are applied.

Strategic litigation is particularly important for advancing case law, which remains underdeveloped in many countries.

## 4.2 Criteria for selecting strategic litigation cases

Global practice has resulted in the development of criteria that equality bodies use to select strategic litigation cases. These guidelines have been developed, added to, and honed over time as anti-discrimination practice has improved.

There are various types of strategic litigation criteria, but, at their broadest, they can be divided into case selection and decision-making factors.

**Case selection criteria** include the following considerations:

* The case is able to improve the national statutory framework and promote compliance with relevant international law;
* The case can lead to greater alignment between legislation;
* The case can shed light on a particular issue;
* Discrimination in the particular case is widespread and may have serious consequences;
* There is sufficient evidence that discrimination has taken place;
* Care is taken to distinguish between strategic litigation and legal aid, since legal aid is focused on the individual client rather than on broader social interest.

**Decision-making criteria** involve looking at the following factors:

* Is there a disputed matter of law that could, if solved, contribute to filling a legal void;
* Could a court ruling in the case alter case law and as such have broader impact;
* Would the media and general public understand the case and remain interested in following developments, which would promote understanding of the notion of discrimination, the harm it causes, and the fact that it is prohibited;
* Whether there other options, apart from legal action, to attain the desired objective, and, if so, how effective they are compared to a court case.

The **Commissioner** has also developed a set of selection criteria for strategic litigation cases:

* Discriminatory behaviour has affected particularly vulnerable groups;
* The type of discrimination is particularly widespread;
* The discriminator is a powerful social actor or is able to influence large numbers of people;
* The disproportion in stature between the victim and perpetrator of discrimination justifies strategic litigation;
* Tackling particular types of behaviour has also been identified as a strategic objective;
* The action stands a high chance of succeeding;
* The benefits outweigh the risks.

## 4.3 Considerations for and challenges to strategic litigation

A number of key questions must be answered before a strategic action is brought if it is to properly serve its purpose. These include:

* **What actually happened?** Answering this question requires access to all the relevant facts, which must be backed up by sufficient evidence. It should particularly be understood that the perception of someone who believes they were discriminated against may not always be realistic and may be exaggerated.
* **What caused the unequal treatment?** Here, appropriate comparators must be identified, or statistical data must be available to determine whether the treatment involved was unjustifiably unequal due to a protected characteristic. Some cases are unjust but are not discrimination. Moreover, if discrimination was actually present, potential legitimate objectives should also be considered that, if proportional, may justify unequal treatment.
* **Why was the event problematic from a legal standpoint?** The issue may not have been examined by a Serbian court, so legal interpretation is needed, or it may have been interpreted inappropriately, where the strategic case will endeavour to alter existing case law by presenting coherent, reliable, and convincing arguments. Even if it fails, the complainant may continue public advocacy to bring about a change in practice over time.
* **Which policies should be considered?** The social context must be well understood. There are many challenges to pursuing strategic litigation, and they may evolve over time, so case law must be closely followed – not just for the Commissioner’s strategic litigation, but also for all other cases as well.

Due to the sensitivity of the issues involved and frequent unexpected complications inherent in these cases, all facts, evidence, claims, and matters of court jurisdiction ought to be accessed and carefully examined before an action is brought. Here the following questions should be answered:

* Which regulations are relevant to the case? Are they clear, implemented in practice, and understood appropriately?
* How well corroborated are the claims from a legal perspective? How will they affect the court and the legal system?
* What are the chances of the action succeeding in view of past case law?
* Does the case focus on protecting the rights of only one person or collective rights?
* What is the best interest of the minority group for which protection is sought?
* Has the issue been recognised within that minority group?
* What is the objective of the action?
* Can other cases being heard by courts affect this process either positively or negatively?
* Has the cause of action been defined appropriately and does it lead to the desired outcome?
* How much time will it take to render a judgment and will it have effect once rendered? (The length of a case may put persons affected by discrimination under additional pressure and re-victimise them.)

## 4.4 Case law of Serbian civil courts

Anti-discrimination actions were introduced only under the Anti-Discrimination Law, so case law remains underdeveloped. Grievances made to the Commissioner have shown themselves as a rapid and effective means of countering discrimination, which is why those exposed to discriminatory behaviour choose to contact the Commissioner rather than bring lawsuits. It should also be noted that the Commissioner’s procedure is free of charge and that the time limits are more restrictive.

The judiciary has also seen reforms since the adoption of the Anti-Discrimination Law: November 2013 **amendments to the Law on the Organisation of Courts** gave High Courts jurisdiction over anti-discrimination actions, previously within the remit of Basic Courts. Differing interpretations arose of Article 23.1.7 of this Law, one being that it allowed High Courts to hear only cases of discrimination in the workplace and in relation to employment, with Basic Courts retaining jurisdiction in all other discrimination-related matters. Nonetheless, the issue was resolved so as to permit High Courts to hear all discrimination cases. There also appeared the issue of standing in anti-discrimination cases: lawsuits filed by human rights organisations were rejected by courts under rules of the Law on Civil Procedure wherever the organisation was not represented by a lawyer, without (appropriately) invoking the Anti-Discrimination Law as a *lex specialis*. Finally, provisions requiring the burden of proof to be shared also caused uncertainty.

Another likely issue in the enforcement of laws is understanding the notion of discrimination, and acknowledging that the existence of ‘protected characteristics’ is a mandatory element of discrimination. In this context, some court rulings did not take protected characteristics into account when explaining why discrimination was deemed to have taken place. In other cases, gender-based discrimination was mischaracterised as harassment in the workplace.

In one case the court found direct discrimination as an employer had treated one staff member less favourably than other employees because of the staff member’s ethnicity.[[42]](#footnote-42) Here the employer had insulted and threatened the employee using ethnic slurs, prevented them from receiving continuous professional training and development, withheld mandatory salary supplements and remuneration for overtime work, refused the staff member the right to a daily rest period at work, and denied the right to use the company canteen as available to other employees. By contrast, in a number of High Court cases – the above one included – the courts ruled that staff had been exposed to a climate of fear in the workplace but stopped short of making a finding of discrimination, as ‘a protected characteristic was not present in the complainant’.[[43]](#footnote-43) Evidence presented in court did not prove that the employer treated the employee differently due to the employee’s ethnicity. The courts reached this conclusion by comparing analogous groups of staff members working for the same employer, taking into account only statements made by employers who denied dissimilar treatment of workers of different ethnicities. In recent years, judges have been insisting on the presence of protected characteristics when making findings of discrimination in any particular case.[[44]](#footnote-44)

Difficulties have at times appeared with the implementation of procedural rules laid down by the Anti-Discrimination Law and the Law on the Prevention of Discrimination against Persons with Disabilities **in connection with discrimination arising from disability as a protected characteristic.** The greatest part of these cases involved persons with disabilities being insulted and mistreated by bus drivers when using public transportation; in most of them, the courts found discrimination and awarded compensation for material damage, but either did not deem it appropriate to order compensation for non-material damage or awarded only a token amount relative to other cases.[[45]](#footnote-45) In one case, the claimant, a blind woman aged 77, and her companion, were legally entitled to a fare discount but the driver insisted on the two paying full fare and accused them of fare evasion. He also insulted them and threatened to eject them from the vehicle and call the police, so causing all other passengers to become hostile to the pair. Although the court found that the driver’s threats lasted for the entire duration of the outward journey, and that they were so intense as to discourage the claimants from attempting to claim their fare discount on the return trip, the court did not characterise this as an instance of discrimination arising from disability.[[46]](#footnote-46) Another disabled claimant, a wheelchair user, was refused an airline ticket to the Netherlands, with the airline invoking an alleged internal rule that required disabled passengers to be accompanied.[[47]](#footnote-47) The claimant insisted that she had been travelling by air within Yugoslavia/Serbia and abroad since 1996 and that she had never faced any similar requirements before the event alleged in her complaint, which occurred in October 2008, including travelling to London for a seminar alone one month previously. The court rightly found that the airline could not cite security reasons, as the claimant was clearly able to travel safely on her own, as well as that it was not true that international regulations mandated the airline to require that such passengers be accompanied. The court also considered the fact that the policy had not been published on the airline’s web site nor made available in its offices, and awarded the claimant compensation for non-material damage. This case was significant in particular for the approach the court took to refute the respondent’s defence which cited a seemingly justified reason, that of safety.

Case law is also dominated by the view that the significant expense of making public buildings and areas accessible is justification for why many institutions remain inaccessible to persons with disabilities, or why these individuals face restrictions on freedom of movement in public spaces. In one case, for instance, the view taken was that installing dropped kerbs required time and money, although there was a clear statutory requirement to make streets and pavements accessible promptly. In a case heard by the Supreme Court of Cassation, the complainant alleged they were not able to navigate most kerbs in their wheelchair, forcing them to take alternative routes, which cost them time. The Supreme Court of Cassation took the view that this did not constitute discrimination as there was reasonable and objective justification for the difference in treatment: the court held that the failure to repair damage to footpaths and pavements and remove barriers and kerbs was not intended as discrimination against persons with disabilities, but was rather ‘a lengthy process conditioned by the finance available to the local community, meaning that the respondents’ actions had to be viewed in proportion to the legitimate objectives sought to be attained by these measures’.[[48]](#footnote-48)

By contrast, in one case the court found that the City of Belgrade had acted in a discriminatory fashion because it organised transportation only for persons with disabilities who were members of five associations and prevented the complainant from using this transportation service because of membership in a different organisation.[[49]](#footnote-49)

The High Court rendered its first judgment for **hate speech,** made an offence under Article 11 of the Anti-Discrimination Law, due to comments posted by readers to an article published by the on-line edition of a daily newspaper. It was found that the paper discriminated against LGBT persons by allowing highly derogatory comments to be published. The court ordered a temporary injunction to prevent the publication of these comments on the web site and ordered that the judgment be published in full, but denied the claim for damage compensation.[[50]](#footnote-50) This ruling was upheld by the Court of Appeal. A more recent case provided illustration for opposing views of hate speech taken by first-instance and higher courts. Here, a human rights charity sued a politician over a statement made to print and broadcast media. The first-instance court rejected the lawsuit, claiming that the politician had made the statement on behalf of a political organisation advocating ‘a healthy family where children are born in a marriage between a man and a woman, rather than to a “surrogate family” where two persons of the same sex impersonate mum and dad’, as well as that they were entitled to their opinion as a political party.[[51]](#footnote-51) The court stated that freedom of expression was a fundamental value of democratic society and that case law of the European Court of Human Rights affirmed that democratic pluralism required tolerance of ideas that were offensive, shocking, or disturbing. The explanatory statement for the judgment added that ‘at a time when hate speech and open advocacy of various forms of discrimination have become commonplace in Serbian politics and media, this statement does not meet the standard of discrimination under the Anti-Discrimination Law’. When ruling in this case on appeal, the Belgrade Court of Appeal took the view that providing relief to the complainant constituted neither censorship nor a restriction of the freedom of speech, but, rather, ‘prohibition of discourse used to convey ideas conducive to discrimination that may harm democratic processes and the development of society as a whole’, and so found that the respondent had indeed perpetrated an act of discrimination.[[52]](#footnote-52)

Practice has also revealed issues with interpreting provisions on **positive (affirmative) action.** In one case, for instance, the court found no discrimination in a job advertisement where the prospective employer stated they were only looking for girls. The court ruled that ‘by favouring women for these counter service jobs the respondent did not discriminate against men, as it is well-known that men […] could access an incomparably larger number of jobs due in large part to the natural childbearing role of women, who were in this case not denied jobs in the employer’s food business’.[[53]](#footnote-53) The Court of Appeal, however, rejected allegations by the respondent (a chain of pizza restaurants) that this was a case of positive action: in its view, employers were not given free rein in instituting gender equality measures, which are not considered discriminatory if adopted ‘in order to eliminate and prevent inequality between women and men and ensure equal opportunities for both genders’ (Gender Equality Law, Article 7). Rather, such positive action policies could only be put into effect pursuant to a specific enactment by a public authority that sets out the required structure of the workforce by gender for employment in a particular type of work. In the absence of such enactment by a public authority, any measures of this kind would constitute arbitrary action by the employer pursued without a serious assessment of the labour market that would preclude proper determination of the percentage in which a particular group of persons ought to be represented. The Belgrade Court of Appeal upheld the complaint and overturned the first-instance judgment.

# **V. Examples of strategic litigation cases pursued by the Commissioner for Protection of Equality**

**As of August 2018, the Commissioner for Protection of Equality had brought a total of 17 cases, most of which have been resolved by final and enforceable judgments.** Eight of these cases involved discrimination on grounds of Roma ethnicity as a protected characteristic, three were brought for gender-based discrimination, one each involved discrimination on grounds of sexual orientation, and a final four related to multiple discrimination (one on grounds of birth and marital and family status; one on grounds of having a criminal record, gender, marital and family status, and health; one on grounds of gender and sexual orientation; and one on grounds of health and disability).

Of the 17 strategic cases:

* Judgments came down in favour of the Commissioner in seven cases;
* The Commissioner’s complaints were rejected in two cases;
* The Commissioner withdrew two complaints after the discriminator remedied the violations in question;
* One case was suspended as the respondent had been struck off the business register;
* Final judgments are yet to be issued in five cases (in three cases the courts rendered first-instance judgments in favour of the Commissioner, and first-instance judgments are yet to be issued in another two cases).

## 5.1 Strategic litigation for discrimination on grounds of gender

The first action for discrimination on grounds of gender was brought against the Serbian Football Association (SFA) for discriminating against women’s football clubs based on the players’ gender. The complaint focused on the SFA’s Player Registration, Status, and Transfer Rules,[[54]](#footnote-54) which, amongst other issues, regulated how money invested into training a player could be recouped by a club when the player transfers from one side to another. Clubs were entitled to reimbursement for transfers to SuperLiga and First League sides at the end of the competition season for the year when the player turns 23, and the costs covered pertained to player training and development from ages 12 to 21.[[55]](#footnote-55) The reimbursement was payable to the last club the player had been registered with, as well as to any sides the player had played for or had been registered with over the preceding 30 months, if these had not been entitled to such reimbursement at the time of the player’s previous transfers. Article 79 of the Rules stipulated that a women’s club was entitled to 15% of the reimbursement payable to a men’s club. A women’s football club petitioned the Commissioner alleging this provision constituted direct discrimination against women’s football clubs. The Commissioner found discrimination on grounds of gender and recommended measures to remedy the situation.[[56]](#footnote-56) The SFA indicated it would adopt a new set of rules to prevent any form of discrimination, but nevertheless introduced the amended Article 79, which was directly discriminatory to women’s sides. This prompted the Commissioner to initiate strategic litigation. In its complaint, the Commissioner particularly noted that the SFA was a single body and that its regulations could not apply selectively, as well as that it was entirely irrelevant that the SFA had both men’s and women’s leagues with different competition levels. This view was substantiated by the fact that all other issues applied equally to both men’s and women’s sides. The respondent opposed this view, claiming that the reimbursement provision of Article 79 had been agreed to by the SFA Women’s Football Commission and the Conference of Women’s Football Clubs of the Serbian Women’s First League. The provision was designed, it was alleged, with regard to clubs’ financial statues and regional practice. It was underlined that some financial requirements had been waived for women’s clubs to aid their development and ensure these sides did not disappear. Finally, the respondent contested the allegations of discrimination in this case, as entitlement to reimbursement and its amount were not linked to the gender of the club, but rather to the level of competition, training and playing costs, and the like. The Basic Court of Belgrade found that Article 79 was discriminatory to women players.[[57]](#footnote-57) This ruling was upheld by the Court of Appeal of Belgrade.[[58]](#footnote-58) In its judgment, the Court of Appeal particularly noted that, according to Article 7 of its Articles of Association, the SFA was a single entity and that its rules could not apply selectively. The difference in treatment, the Court found, was discriminatory and not motivated by any objective or reasonable considerations. Surprisingly, the Supreme Court of Cassation set aside both of these judgments and returned the case to the first-instance court for retrial.[[59]](#footnote-59) The Supreme Court did not approach the matter as an issue of discrimination, but rather felt the lower courts did not appropriately assess the legal nature of the contested regulation. In other words, if it was a general enactment serving as an autonomous source of law and made public in the appropriate manner, the Constitutional Court was competent to assess its compliance with the Constitution and law. If, however, it was an isolated enactment, protection could be sought in civil proceedings only if a discriminatory action occurred. The SFA repealed Article 79 on 10 July 2013, and the Commissioner withdrew her administrative complaint. The contested provision was however subsequently reinstated, so the Commissioner applied for a review of its compliance with the Constitution and law before the Constitutional Court of Serbia.

In another case, the Commissioner brought a suit against a bank for demoting a female employee after she returned from maternity and childcare leave following the birth of her third child. Before taking leave, she had served as Branch Manager with a monthly salary of RSD 80,114.12. Pursuant to Addendum 2 to her employment contract, she was demoted to the position of Client Advisor, a post entailing a monthly salary of RSD 57,517.83. The woman claimed she consented to sign the Addendum but notified the bank manager she would seek redress in court. She also claimed the manager had explained she was being demoted as this had been agreed between himself and the Chairman of the Bank’s Executive Committee. During her absence, the branch had been managed by another female employee, aged 52 and the mother of two adult children aged 24 and 26, respectively, who had previously been Client Advisor, and who was formally promoted to the post of Branch Manager after the complainant’s return from leave. The complainant also claimed she had greater banking experience than her co-worker, which made her a better choice for the position. The first-instance court found the complaint unfounded.[[60]](#footnote-60) The Court was of the opinion that no indirect discrimination had taken place as the claimant was replaced by another woman and mother of two adult children. The Court cited Article 20 of the Anti-Discrimination Law, which stipulated that discrimination existed if action was taken contrary to the principles of gender equality and respect for family life. The Court found no discrimination on grounds of the complainant’s family status, as the other female employee was also a mother of two. The Court concluded that the respondent (the bank) had ‘assigned staff to particular positions in accordance with its operational needs; precedence had been given to [the other woman, rather than the complainant] in appointment as Branch Manager due to the nature of the position, where personal characteristics constituted the key and decisive requirement for performance, with a view to attaining justified objectives.’[[61]](#footnote-61) The Court thus found that the complainant had not been re-assigned to a position out of keeping with her educational qualifications; it also ruled that an employer was entitled to ‘assign staff in accordance with its own needs and interest; the employer bears sole responsibility for any consequences of appointing staff to managerial positions; and, in this particular case, the employer also bears sole responsibility for appointing the manager of its branch and may select appropriate staff both when hiring and when assigning them.’[[62]](#footnote-62) The Court of Appeal of Belgrade rejected the Commissioner’s appeal as unmerited.[[63]](#footnote-63) The Court rejected the allegation that it was the bank’s practice to demote employees after their return from maternity leave, finding that the complainant was re-assigned primarily ‘for operational reasons, and [that] the complainant was replaced by a person who had occupied her position whilst she was on leave. The fact that the complainant was re-assigned to a lower-paid position (which is however perfectly compatible with her educational qualifications) after returning from maternity leave does not automatically constitute discrimination on grounds of gender.’[[64]](#footnote-64) The Commissioner applied for judicial review, which the Supreme Court of Cassation rejected and upheld both previous judgments.[[65]](#footnote-65) According to the Supreme Court, the lower courts were justified in finding that the complainant had failed to prove beyond reasonable doubt that the respondent had discriminated against the complainant by not reinstating her as branch manager after she returned from maternity leave but rather posting her to a lower-paid position. The Court did not contest the right to an employee to return to her previous position after maternity leave, but noted that an employer was entitled to ask am employee to sign an amended employment contract requiring their re-assignment to a different but appropriate position (defined as a position requiring the same type and level of educational qualifications) due to operational considerations.[[66]](#footnote-66) The Court highlighted the fact that it was in the interest of every employer, and every employee, ‘for operations to be arranged so that managerial positions are filled by people best able to respond to the needs of those positions; it is not discrimination to require stricter criteria in terms of knowledge, organisational skills, practical experience, ability to deal with clients and the public, communication skills, etc., regardless of formally identical educational and professional qualifications. The Court finds these criteria subject to change; it is incumbent upon the employer to assess how best to organise operations at any given time and to select employees for each particular position.’[[67]](#footnote-67) The Court ruled that the complainant was demoted not because the bank felt she would be unable to meet the requirements of the position because of her obligations as the mother of small children, but, rather, because this was the best course of action for the bank branch at the time. It was particularly interesting to see the Court deduce an absence of discrimination from the fact that the complainant had served as Branch Manager before going on maternity leave when she was already a mother of two children.

A lawsuit was also brought against a chain of pizza restaurants for placing a vacancy advertisement in its outlets that read, ‘Would you like to become a member of the C Team? Girls wanted for counter service jobs.’ This advertisement was displayed from March to May 2012 at three locations. Situation testing was undertaken at all three locations in Belgrade after the advertisement was first noticed. The male tester was told he could not be hired because it was company policy to employ only women due to previous poor experiences with men; the female tester was offered a job. The first-instance court rejected the Commissioner’s complaint as unfounded.[[68]](#footnote-68) The Commissioner alleged that the respondent (the restaurant chain) had directly discriminated against prospective male employees. The respondent contested this view, countering that women were the most vulnerable group in the labour market and that this was a form of ‘positive action that could not be penalised’.[[69]](#footnote-69) When ruling in this matter, the Court did not admit evidence obtained during situation testing, as the testers had failed to notify the Commissioner of the testing exercise in due time. The Court found that there was no discrimination in this case as it was well-known that men ‘could access an incomparably larger number of jobs due in large part to the natural childbearing role of women, who were in this case not denied jobs in the employer’s food business’.[[70]](#footnote-70) The Court of Appeal amended the ruling and found that the respondent had in fact perpetrated direct discrimination on grounds of gender with regard to employment.[[71]](#footnote-71) The Court ruled that the advertisement distinguished between men and women by offering work only to women, which constituted direct discrimination. The Court rejected allegations that such behaviour was justified as it was not proven that ‘men were excluded from employment in counter service work at the employer not because of the particular nature of the work involved, where personal characteristics could be deemed key and decisive requirements for performance, where this was done for an appropriate purpose, or where doing so constituted a safeguard for a particular category of person’, in which case no discrimination would have been found. The Court also rejected allegations that the respondent had been applying special measures, as such measures ‘cannot be instituted by employers of their own accord, but rather only pursuant to a specific enactment by a public authority that sets out the required structure of the workforce by gender for employment in a particular type of work. In the absence of such specific enactment by a public authority, any such measures would constitute arbitrary action by the employer pursued without a serious assessment of the labour market, that would preclude proper determination of the percentage in which a particular group of persons ought to be represented.[[72]](#footnote-72) Finally, the Court ruled that the wording of the advertisement (which offered work only to women) constituted discrimination in itself; the fact that the testers had previously notified the Commissioner of their intention to voluntarily expose themselves to discriminatory behaviour did not influence the adoption of the decision in this case. The respondent was banned from taking further discriminatory action, on grounds of gender or any other protected characteristic, with regard to advertising vacancies and hiring staff. The respondent was also ordered to make the judgment public in one daily newspaper with national coverage. The Supreme Court of Cassation rejected an application for review of the judgment of the Court of Appeal and upheld the second-instance judgment.[[73]](#footnote-73) The Supreme Court reiterated the finding of the second-instance court whereby individuals or firms could not take positive action arbitrarily on their own initiative. The Court found that the respondent had not proven it had acted to ensure gender balance or that there were justified reasons for unequal treatment of one category of persons.

## 5.2 Strategic litigation for discrimination on grounds of ethnicity

In one case, a suit was brought against an individual who, after learning that a Roma woman and her five children would move into their block of flats, said: ‘It’s not really to our advantage to have a Roma woman move into our building. She’s got a lot of kids, five kids, she… I don’t know. There’s the mess. The Roma are Roma… You know what it’s like, they always have their own neighbourhoods apart, separate, that sort of thing.’ The Commissioner sued, claiming that this statement constituted direct discrimination since the statement showed open animosity towards the Roma. The respondent did not deny having made the statement, but claimed he had not meant what he said and that he had been mindful of the fact the block of flats was occupied by elderly persons used to peace and quiet. He claimed this was what he had been referring to when he said ‘it’s not really to our advantage’, rather than having intended to act against the Roma woman about to move in and her children. He particularly underlined that it had not been his intention to discriminate against anyone, and submitted a written apology to the court whilst also offering to make an oral apology to the Roma woman for his imprudent statement. The first instance court took into consideration the numerous comments and public censure caused by the contentious statement in public and the media.[[74]](#footnote-74) The Court held that the statement constituted a serious form of direct discrimination against a member of the Roma community. The Court particularly highlighted the fact that the complainant had been opposing the arrival of a Roma woman and her five children in his block of flats; ‘if it had been a Caucasian person, a white or Serbian woman, who was moving in (…) the respondent (…) would neither have reacted in the way he did nor would he have been against her moving in’.[[75]](#footnote-75)

In 2017, a judgment was handed down in a case pursued by the Commissioner against a fast food restaurant that denied entry to Roma children aged five and eight, respectively, who had wanted to come inside with a woman who offered to buy them food. A security guard stopped them, saying that the children could not accompany her inside, whereupon the woman entered alone, bought the children the food they wanted, which they ate on the restaurant’s forecourt. The Commissioner filed a lawsuit alleging direct discrimination. Through his action, the security guard openly demonstrated that he considered Roma children undesirable in the restaurant and showed intolerance towards them. The first-instance court rejected the suit for procedural reasons,[[76]](#footnote-76) whereupon the High Court rejected the allegations of the claim and upheld the first-instance judgment.[[77]](#footnote-77) These two rulings were set aside by the Supreme Court of Cassation, which ordered the first-instance court[[78]](#footnote-78) to conduct a retrial. Finally, the High Court handed down a judgment that found the respondent had directly discriminated against the children.[[79]](#footnote-79) The respondent proposed a number of witnesses, who said in court that children would often come into the restaurant and beg, and, if the guests refused to give them money, would often take food from tables, resulting in complaints by patrons. By contrast, the woman who bought the children food said that a concert had been taking place on the day in the town’s main square, and that she had seen three Roma children aged between four and seven playing; she had asked them, she said, whether they were hungry and where they wanted to eat. The security guard would not allow them into the restaurant, and, when asked why, answered ‘those are the house rules’. The guard refused them entry even when she offered to pay for any food the children ate. Whilst waiting and, afterwards, as they ate, the children caused no incident. Considering the facts of the case, the Court found that the respondent had failed to present sufficient evidence to prove the Roma children were denied entry to the restaurant for any reason other than their ethnicity. The Court particularly noted that, if the children had been harassing other guests or restaurant staff, they were required to notify the authorities and the local Centre for Social Work, rather than arbitrarily deciding to allow or deny access. As argued by the Commissioner in her 2017 Annual Report, this case is important for two reasons: it encourages victims of discrimination to bring anti-discrimination litigation and sensitises the public to discrimination and other harmful practices that ought to be penalised, whilst at the same time contributing to the advancement of case law and appropriate interpretation and application of anti-discrimination rules. This case also set two important precedents: it was established that the High Court had in rem jurisdiction to hear all discrimination cases, and the Supreme Court of Cassation adopted the opinion that the Commissioner did not require the injured parties’ consent when filing suit to establish discrimination against a group of persons, since the children in this case remained unidentified.

A suit was also brought against the owner of a bakery for preventing a Roma girl, whom she had insulted and disparaged, from undertaking work placement in her shop due to her Roma ethnicity. The respondent had entered into an agreement with a local secondary school to provide work placement positions in her shop, and (under Article 3 of the agreement) undertook to take the students in, allow them to undertake practical coursework, introduce them to the arrangements in effect in her establishment, and provide any and all assistance during their stay on the premises and in practical coursework. After the agreement took effect, two girls came to the bakery on work placement. Whilst they were changing into their uniforms, the owner entered the changing room and and began to insult them, telling them they ‘stank’, were ‘Gypsies’, that they ‘should go home and take a bath’ and ‘stop coming to the shop because they are driving away customers’. Both girls left the shop and returned home. The father of one of them notified the local police of the incident, and the school sent both girls to a different establishment to complete their work placement. The Court found that, by refusing to permit the student ‘to undertake practical coursework in her shop and, in doing so, using words and expressions offensive to the student’s dignity’, the respondent had perpetrated an act of direct discrimination in the form of harassment and degrading behaviour.[[80]](#footnote-80) The Court ruled that the respondent had openly, clearly, and unmistakably demonstrated her discriminatory stance towards the Roma whom she regarded as not taking due regard of personal hygiene and being unfit to work in a restaurant because they were ‘driving away customers’.[[81]](#footnote-81) As the respondent confessed to the allegations in the course of the trial, the Court based its judgment on her confession statement.

In another 2013 case, an action was brought against a bank following situation testing that revealed the respondent, an employee of the bank, had refused to open a bank account for a Roma woman. The Roma woman had attempted to open an account at a branch of the bank so she could receive a one-off payment from a charity. After she told a bank officer why she had come, he responded this would not be a problem, but a different female employee advised her it would be better for her to open an account in another town, where she was registered as living. The complainant overheard the female employee telling her co-worker that she could not open bank accounts for Roma people. The complainant did not insist, but went to a different bank and opened an account there straightforwardly. A Roma advocacy organisation and the Commissioner were notified of this incident, and it was decided to conduct situation testing. In due course, the same Roma woman again went to the same bank branch, this time as a volunteer discrimination tester, to open an account in the name of her husband and with his identity card. She was denied as this was deemed to be illegal. Two hours later, a non-Roma control tester visited the same bank branch asking to open an account for a one-off incoming payment. The same female bank employee suggested she did not have to open an account for this, since payment could be made to any account, but, as the tester insisted, the bank employee opened an account in her name. The first-instance court rejected the Commissioner’s claim alleging that the bank had directly discriminated against the Roma woman on grounds of ethnicity by refusing to open her a bank account.[[82]](#footnote-82) The Court held that the tester’s statement did not make sense and contradicted the results of the testing. The Court’s opinion was influenced by the fact that the branch in question was located across the street from the Property Registry and Civil Registry offices, which meant that the bank often dealt with people seeking to open bank accounts to receive refunds after having made mistaken fee payments. The bank has a policy in place to explain to these prospective customers that commission charges and costs associated with opening and closing an account mean it is more cost-effective to have refunds paid into someone else’s account. The Court ruled that it was unclear what the Roma woman asked of the bank clerk on her first visit, which documents she presented, and what she later related to the Roma organisation and the control tester, and found no discrimination on grounds of ethnicity in this case. The Court of Appeal upheld the first-instance judgment.[[83]](#footnote-83) The Court ruled that the bank clerk did not act in a discriminatory manner as it was consistent with the Bank’s Code of Ethics to notify the Roma woman of the costs she was likely to incur in opening a bank account away from her registered place of residence. The Court also found that the clerk did not refuse to open an account, since, after being notified of the likely cost, the Roma woman no longer insisted on opening one. The Court ruled that no discrimination was involved in the situation testing either, because there the tester had attempted to open an account in her husband’s name, which is not permitted without an appropriate power of attorney. According to the Court, ‘the bank employee acted as any bank employee ought to: she refused to open an account in the name of another person where the applicant provided only that other person’s identity card and not a relevant power of attorney.’[[84]](#footnote-84) The Court found in particular that the bank clerk had acted conscientiously for the control tester, whom she advised against opening an account in her name and incurring additional cost, but suggested making the payment into an existing account. This case is significant because it revealed the importance of securing sound evidence in situation testing, as well as of ensuring that all testers act identically (apart from the tester and controller having different protected characteristics). It was also important to ensure that procedures were put in place before situation testing and that all testers adhered to them, as well as to identify likely challenges and problems that could emerge during the testing, so that all testers were ready to respond to them appropriately.

Yet another action was brought in July 2014 against a farmer for discrimination in hiring ethnic Roma. When hiring workers to harvest raspberries, he sent prospective hires a document entitled ‘Note’ wherein he indicated that ‘Roma workers would not be hired (due to disagreements with workers of other ethnicities and possible consequences when sharing living quarters on the employer’s premises)’. A Roma woman contacted the respondent by e-mail to inquire about a vacancy notice seeking raspberry harvesters published on a jobseekers’ web site; she said herself and her husband were interested and experienced in this type of work. The woman wanted to know more about working conditions and wages. She received a reply on the same day with both information about when the harvesting season would begin and how much she could earn and two documents, titled ‘Contract’ and ‘Note’, respectively, which contained the allegedly discriminatory clause. The Commissioner felt this constituted direct discrimination in employment against ethnic Roma. In its claim, the Commissioner noted that the respondent had openly denied Roma the opportunity to be hired as raspberry harvesters. The respondent contested both the suit and the claim as unmerited, alleging that his parents’ farm had hired ethnic Roma in the past, and that an ethnic Roma man had been hired for that harvesting season under the same conditions as applicable to all other workers in the same job. He added he held no prejudice against the Roma and had friends from this community, and that he had not denied them the right to apply as raspberry harvesters. The respondent sought to explain that the clause was introduced as most other workers were prejudiced against the Roma and as workers housed in the same rooms of the family home had come into conflict with them in the past. The first-instance court first issued an injunction to withdraw the offending document immediately,[[85]](#footnote-85) and then ruled wholly in favour of the Commissioner.[[86]](#footnote-86) The Court found it had been proven on the balance of probabilities the respondent had, in setting out hiring requirements in the ‘Note’, denied Roma the right to work and thereby directly discriminated against the particular woman and other Roma. The Court of Appeal upheld the first-instance judgment.[[87]](#footnote-87) The Court ruled that the Roma woman who consented to have the action brought had been exposed to direct discrimination from the respondent, and that the respondent’s assertion that a Roma man had been hired to harvest raspberries was immaterial, as the existence of discrimination is ascertained with regard to each person individually. The Court rejected the respondent’s allegation that he had been unaware that the woman in question was of Roma ethnicity, since the ‘Note’ was discriminatory in and of itself. The Court agreed to the Commissioner’s application to have the judgment published to ensure it had a preventive effect in letting the public know that discriminatory behaviour was ‘legally unacceptable’.[[88]](#footnote-88)

Commissioner brought a lawsuit against the head of a local community council who had said that his community was ‘living through very hard times’, and that not even ‘earthquake and floods’ had been ‘as degrading as this influx of Roma from Kosovo’. He went on to say: ‘We are not racists, but we simply cannot live alongside them because this endangers our peace. In times of Turkish rule, the residents (…) would flee to the hills, to Trgovište, and it seems we will again have to do the same. We cannot mix with them.’ This statement was carried by many Serbian media outlets. The Commissioner felt that the statement constituted a serious form of direct discrimination against the Roma. The respondent admitted the allegations and the case ended with a final and enforceable judgment based on this admission.[[89]](#footnote-89) The respondent was ordered to take out advertisements in a newspaper with national coverage at his own expense to publish a formal apology within 15 days of the judgment being issued, as well as to publicise the actual judgment.

A lawsuit was brought in mid-2017 against four respondents considered responsible for erecting a wall surrounding a Roma neighbourhood, effectively fencing it in. ‘A non-Roma neighbourhood is situated directly across the same road from the Roma neighbourhood: although this area is subject to the same road hazards (same road category, traffic frequency, and speed limit), no sound barrier or perimeter wall was erected there’.[[90]](#footnote-90) The wall was built in concrete, although sound barriers must be made of transparent materials when erected alongside built-up areas. The above circumstances motivated the Commissioner to consider this case an example of direct discrimination against the Roma and initiate strategic litigation. The case is on-going.

## 5.3 Strategic litigation for discrimination on grounds of sexual orientation

One action for discrimination on grounds of gender and sexual orientation was brought against the author of a newspaper article who voiced views that were disturbing, degrading, and offensive to dignity, and that advocated discrimination and hatred against women and LGBT people. The relevant High Court quickly rendered a judgment finding that the author had perpetrated discrimination on grounds of gender and sexual orientation. The judgment is this case is yet to become enforceable.

In 2018, the Commissioner brought a strategic lawsuit for discrimination against an academic who, in an interview, aired opinions discriminatory to LGBT people. The Court here rendered a judgment in default, and an appeal is currently being heard.

## 5.4. Strategic litigation for discrimination on grounds of other protected characteristics

One lawsuit was brought against a town due to its Ordinance on Financial Support for Married Couples enacted by the town’s legislature.[[91]](#footnote-91) The requirements of the Ordinance deny the right to financial support to some categories of persons, including unmarried couples, people not born in the town, persons who at the time of marrying already had children born out of wedlock, and persons who cohabited out of wedlock before marriage. The Commissioner particularly highlighted the fact that the local legislature did have the right to advance social security arrangements, but that these could not be contrary to anti-discrimination laws. The Commissioner asked for the discriminatory requirements to be removed from the ordinance. The respondent (the town) denied these allegations, adding that the ordinance was not discriminatory but rather merely provided a set of eligibility conditions for assistance, and that unmarried and married couples were not discriminated against since the same distinction was made in the Inheritance Law. The respondent stated that marital status was easy to verify, whilst an unmarried partnership was difficult to ascertain beyond doubt. In 2012, the first-instance court rejected the Commissioner’s complaint as unfounded.[[92]](#footnote-92) Here the Court concluded that the Ordinance had been enacted to aid in increasing the birth rate, and as such envisaged the following eligibility criteria: one of the spouses had to be older than 38, born in the town and a resident there continuously for at least ten years; the couple had to have been married for at least five years and lived at the same address for this period of time; at least one child had to have been born in wedlock; and the spouses were ineligible if they had cohabited prior to marriage and had children born out of wedlock. The Court ruled that incentives to childbearing were socially justified under the Local Government Law and the Social Protection Law. After the Commissioner appealed, the Court of Appeal set aside the judgment and ordered a retrial.[[93]](#footnote-93) In the retrial, the first-instance court found that the local government was certainly within the bounds of its remit when enacting regulations governing social protection and assisting particular categories of persons under specific conditions, but that it was always required to follow national legislation in doing so. Whilst incentives for childbearing were not controversial, distinctions made on grounds of protected characteristics were prohibited (as they favoured persons with a particular birthplace, civil and family status, and age). The Court of Appeal therefore required the first-instance court to re-assess the facts of the case duly and completely and determine whether the Ordinance unjustifiably differentiates between or discriminates against persons on grounds referred to above. As the local legislature subsequently repealed the Ordinance, the Commissioner dropped its action, and the proceedings were thereby formally concluded.

In a second case, a suit was brought against a business that posted a questionnaire for prospective employees on its web site which included questions on a number of protected characteristics, such as marriage, maternity, and health, as well as solicited information about previous convictions. The Court here ruled wholly in favour of the Commissioner[[94]](#footnote-94) by finding that asking these questions constituted discrimination on grounds of protected characteristics,[[95]](#footnote-95) which was not objectively and reasonably justifiable.

Discrimination on grounds of disability was also tested in a strategic case. Here the Commissioner brought a suit after staff of a café refused to serve four young people with hearing loss. The four came to the establishment to celebrate the birthday of one of the group. They found seats at a table inside and used sign language to communicate amongst themselves. One staff member approached to tell them that the table was reserved, but a girl from the group objected by saying there was no ‘Reserved’ sign on the table and suggested they move to one of the other tables that were vacant and not reserved. The staff member responded that all tables were taken and reserved. Another staff member came up to the table, told them that all seats were reserved outside as well, and gestured that they should leave the premises. The Court found that this action by the respondent constituted discrimination against persons with disabilities solely on grounds of their protected characteristics, which amounted to direct discrimination in the provision of public services.[[96]](#footnote-96)

Finally, in late July 2017 the Commissioner brought a strategic suit for termination of a woman due to illness and disability. In this case, the woman, who had leukaemia, came in to work regularly although she was receiving treatment for her condition. She had taken only two short sick leaves for a total of six years. The woman was subsequently diagnosed with a chronic condition that seriously impaired her ability to work; she was deemed unfit for shift, overtime, and night work, including strenuous physical work and work involving handling carcinogenic materials. She was also found to be fit to work morning shifts in her line of work. Regardless of this, the employer dismissed her due to its organisational requirements, her inability to perform her work, and the inability of the employer to find work for redundant staff. The Commissioner felt this was a classic case of discrimination on grounds of health, and so brought the test case which is still on-going.

# **VI. European practice**

## 6.1 Practice in the UK

### 6.1.1 Domestic proceedings in the UK

In the UK, individuals or groups can challenge the exercise of power by public bodies in front of courts and other human rights bodies set up via international conventions, e.g. the Committee on the Rights of the Child.[[97]](#footnote-97) Complaints can be taken to those bodies by organisations acting on behalf of named victims of discrimination. In some cases, organisations can challenge discrimination before courts, either in their own name or on behalf of other litigants, as well as through third-party interventions.

Judicial review is a special type of court procedure in UK where the judge looks at a public body’s decision, policy, practice, act or omission, and decides if it is lawful or not.[[98]](#footnote-98) It is similar to what administrative courts do in many other countries. It can be particularly strategic as a finding of unlawfulness can make a difference to many other people and can give members of the community a focus for lobbying politicians and persuading public bodies to reconsider their policies. An individual or an organisation can act as the complainant in a case, either in their own right or on behalf of some larger class or category of affected persons.

Domestically,any person may apply for permission to file evidence or make representations in judicial review proceedings in the High Court (which is the general court of first instance for civil and administrative matters) and, in some cases (particularly immigration cases) before a chamber of what is known as the Upper Tribunal. [[99]](#footnote-99)

Applicants for judicial review have to have sufficient interest in the matter to which the application relates, which is also known as *locus standi* or standing. Applicants for judicial review are generally of four types: 1) individuals whose personal rights and interests are affected by a decision; 2) individuals concerned that a decision has affected the interests of society as a whole; 3) pressure or interest groups who believe a decision affects the rights or interests of their members or society as a whole; and 4) individuals claiming for judicial review for a breach of human rights under the Human Rights Act 1998.[[100]](#footnote-100)

An organisation can also intervene in judicial review or other proceedings in the form of a third party intervention in the following ways: 1) informally providing legal arguments or factual information to one or more of the existing parties; 2) offering a formal witness statement or expert witness statement to one of the existing parties; 3) securing permission under the Civil Procedural Rules (‘CPR’) to intervene as a third party to provide either written legal submissions, or a witness statement, or both; or 4) intervening as a third party (as above), to put both written and oral representations before the court.[[101]](#footnote-101)

Interventions in judicial review proceedings are explicitly provided for in judicial review proceedings (under CPR 54A) and the Upper Tribunal (under Rule 33 of the Upper Tribunal Rules).

Standing may determine whether interested third parties are allowed to directly intervene or join in a case that has already been filed. An intervener is distinct from a party. A party has a direct stake in the outcome of the case whereas a third-party intervener does not. Generally, a third-party intervener should not be confused with:

1. ***Amicus curiae:*** If third parties are not allowed to directly intervene or join in a case, they may still assist in the litigation by making their opinions known as *amicus curiae*, from the Latin for ‘friend of the court’. In England the amicus curiae (nowadays referred to as an ‘advocate to the court’) remains a largely non-partisan figure, appointed by the Attorney General at the request of the court.
2. **An interested party:** An interested party is someone who is identified by either the complainant or the respondent as being directly affected by the case. An interested party may also be added to the case by the court itself, where it appears to the court that it is desirable to do so to resolve a dispute or an issue.[[102]](#footnote-102)

### 6.1.2 UK Equality and Human Rights Commission

The Equality and Human Rights Commission (EHRC) is the state body responsible for enforcing the Equality Act 2010. They are accredited by the United Nations as an ‘A status’ national human rights institution. The EHRC is an independent organisation. So it is publicly funded but independent from the State.[[103]](#footnote-103) Via the use of their legal expertise, research insight and analysis, the EHRC has the ability to influence public policy and inform debates. Finally, the EHRC aim to use strategic enforcement powers selectively to protect people against serious and systematic abuses of their rights and to comply with equality and human rights standards.

The EHRC have a dedicated staff of caseworkers and solicitors who run test cases on equality and human rights. Unlike some equality bodies, though, the EHRC does not have the power to start litigation in its own name in the domestic courts. It mainly runs test cases by providing financial support for cases and the organisations that take them, and intervening in the forms described above.

The EHRC use their legal powers and embark on strategic litigation to clarify the law, so people and organisations have a clearer understanding of their rights and duties, to highlight priority issues and force these back to the top of the agenda and to challenge policies or practices that cause significant disadvantage, sometimes across a whole industry or sector.

When thinking of best practices and how to conduct strategic litigation, the EHRC outlines the following:

* Whether the EHRC is the most appropriate organisation to take action in the case, including the existence of alternate sources of funding and including the engagement of other regulators.
* Are other solutions other than litigation available and more appropriate to resolve the case.
* The extent to which the resources necessary to take forward the case will be effective and proportionate to the aims and will impact on the ability of the EHRC to take other cases or to respond to emerging new significant issues.
* Whether it would be appropriate for the EHRC to act in partnership with others, including other regulators to achieve the best outcome.[[104]](#footnote-104)

Since 2007, the EHRC have assisted and intervened in significant legal cases, to protect a range of groups.

#### Examples of the EHRC’s work

**R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent)[[105]](#footnote-105)**

**Role**: In these proceedings for judicial review, the EHRC supported the Appellant by intervening and providing expert independent legal arguments by way of written submissions during the case.

**Issue**: **The lawfulness of regulations** (Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013) imposing a structure of fees payable by claimants in Employment Tribunals (ET) and Employment Appeal Tribunals (EAT).

**Outcome**: The decision by the Ministry of Justice to introduce fees was judged unlawful under both domestic and European law because it prevents access to justice. Employment Tribunal cases are also important to wider society as they show how people can take action to uphold their employment rights. The fees were also found to be indirectly discriminatory because the higher fees for more complex claims put women at a particular disadvantage, since more women brought such claims.

***Hurley and Others v. Secretary of State for Work and Pensions* [2015][[106]](#footnote-106)**

**Role:** In this case the EHRC applied for and was granted the right to intervene by submitting written argument and left to the trial judge to decide whether any oral argument should be permitted. The judge allowed the EHRC to also put oral arguments before the High Court.

**Issue:** Under the Benefits Cap the Government set a limit on the amount of payments that can be made to a range of people. Unpaid carers for disabled family members were initially subjected to this Cap. This reduction in income would jeopardise the ability of those affected to continue to care for their relatives, and the loss of a trusted carer would be devastating for a disabled person.

***R (Tracey) v. Cambridge University Hospitals NHS Foundation Trust and the Secretary of State for Health* [2014]**[[107]](#footnote-107)

**Role:** The EHRC made oral submissions as an intervener in this case.

**Issue:** While in hospital, Mrs Tracey had a Do Not Attempt Cardio Pulmonary Resuscitation (DNACPR) notice placed on her notes without her knowledge. The failure to consult Mrs Tracey had breached her human rights.

**Outcome:** The outcome means that health workers should involve patients in any decision about use of DNACPR notices. There should be convincing reasons if this does not happen and causing distress is not a sufficient reason. The rights of patients to be consulted should be set out in a clear and accessible policy. This should be directed at patients and copies automatically made available to them and their families.

### Conclusion

Strategic litigation comes in various forms and can be conducted in front of various forums. If conducted correctly, as evidenced by the case studies above, it can be an effective way to challenge policy or procedure and secure long-lasting change for a large section of society.

The EHRC and organisations who want to bring strategic litigation, either in the form of representing litigants or submitting third party interventions, can do so either in domestic or international courts, depending on their standing and mission. The earliest consideration for any would-be intervener is what their contribution might be and how it might add value to a case. As indicated from the various case studies above, there are no hard and fast rules on what contribution might serve the public interest best, be it in the form of written or oral submissions, witness statements or representation. Strategic litigation often raises important legal issues that may be neglected by the parties but that are still relevant to the public interest. The expertise of strategic litigators renders them capable of representing litigants/intervene offering interpretation of the law, which may be valuable in deciding the issues in the case.

## 6.2 Regional practice

Serbia is one of the few states in the region whose legal framework permits strategic litigation as a means of protecting members of the public from discrimination. Below are examples from two neighbouring countries – Croatia and Montenegro – that allow anti-discrimination watchdogs (the Croatian Gender Equality Ombudswoman and the Montenegrin Ombudsman) to intervene in anti-discrimination cases heard by courts. The Serbian Commissioner actively co-operates with all anti-discrimination and equality institutions in the region.

**The Gender Equality Ombudswoman**[[108]](#footnote-108) has intervened in several cases of employment-related discrimination on grounds of sexual orientation and gender.

In one case, Professor D.K. brought a complaint to assert his dignity in the workplace, followed by a legal action for discrimination at his university as he had been denied career advancement after reporting harassment by two fellow professors and seeking protection from them. The Ombudswoman found that discrimination on grounds of sexual orientation had occurred, and subsequently exercised her legal authority to intervene in the case. During the first-instance case, D.K.’s and the Ombudswoman successfully moved to have the female judge recused for bias. The case ended in an enforceable ruling of the County Court which upheld the first-instance judgment that found D.K. had been exposed to discrimination on grounds of sexual orientation by his peers, and that the university had not accorded him equal treatment in terms of career advancement.

In a second court case, four civil society organisations sued Z.M., a member of the Croatian Football Association (CFA) Executive Committee for homophobic speech. Speaking in public, the CFA officer had said: ‘No gay players would play on my team. I don’t see a gay man as able to storm barricades or tackle aggressively, but I do see him as a ballet dancer, an artist, a screenwriter, journalist – absolutely, yes.’ The four CSOs brought a lawsuit with the relevant County Court, which rejected the complaint with the explanation that this had been ‘a value judgment’ on the part of Z.M. The first-instance court held that the statement had not been an ‘action’ by the respondent, as there had been no activity that resulted in unfavourable treatment of the complainants: rather, this had been a ‘statement’ that conveyed the respondent’s opinion, which he had been perfectly allowed to voice in the exercise of his fundamental freedom of expression. The Ombudswoman felt this misunderstanding of freedom of expression and discrimination was wrong. The CSOs took the case to the Supreme Court, which rejected the appeal with the explanation that no discrimination had taken place and that the respondent had exercised his ‘right to a private opinion’. The Court’s Appeals Panel did not explain at what point a homophobic statement becomes sufficiently offensive to create a hostile environment or engender fear in a same-sex person and why this statement failed to satisfy that standard. The Ombudswoman also intervened in the review procedure, where she asserted that homophobic public appearances by senior and influential football officers were demoralising for some same-sex individuals and encouraged homophobic sentiment amongst other football professionals. This did not result only in restricted access to football for same-sex individuals, but also created a degrading and hostile environment for those same-sex individuals already active in football. The Supreme Court overturned the foregoing judgments and found Z.M. had discriminated against members of the public on grounds of sexual orientation, referring judgments of the European Court of Justice (ECJ) cited by the Ombudswoman.

The Ombudswoman intervened in the review of a third case which involved discrimination on grounds of gender and sexual harassment in the workplace. The Ombudswoman was approached by an officer of the company D.M., which had been sued by a former employee, I.B., for wrongful dismissal. The staff member had been dismissed after sexually harassing and insulting a co-worker, I.M., in the company canteen, where the incident had been witnessed by a number of other staff. I.M. brought a harassment case before the employer, and the firm’s Dignity at Work Officer found the female employee had been seriously sexually harassed, which the employer was legally bound to prevent. As such, the firm dismissed I.B. due to sexual harassment, and the individual subsequently contested this decision. In its first-instance ruling, the court found the dismissal had been legal, but the second-instance court ruled that the man and woman had engaged in ‘the usual sexual banter, except that, on the critical day, the man used excessively insulting language, which is why the woman’s reaction had been more serious’. The second-instance court duly found that the dismissal had been wrong and ordered the employee to be reinstated. The employer sought review of the second-instance judgment and asked the Ombudswoman to intervene in the review procedure on its behalf. The Ombudswoman justified her application for intervention by claiming that sexual harassment constituted a serious breach of discipline in the workplace under Article 108 of the Labour Act and that the dismissal of an employee found to have sexually harassed a co-worker was and effective and appropriate deterrent. The Ombudswoman also noted that three assumptions of sexual harassment had cumulatively been met: 1) the behaviour was unsolicited; 2) the behaviour was sexual in nature; and 3) the behaviour aimed at or constituted a violation of the victim’s dignity. The Supreme Court found in favour of the employer and the Ombudswoman, set aside the second-instance judgment and upheld the first-instance ruling: the dismissal was ruled to be lawful. The fact that the incident had occurred during lunch break in the company’s canteen did not release the complainant of responsibility nor diminished the seriousness of the disciplinary infraction, the Court ruled, as it still took place during working hours and on company premises. Finally, the Court found that the complainant had sexually harassed the respondent’s employee, which constituted direct discrimination, and as such the respondent had rightly characterised the case as a serious disciplinary infraction and legitimately dismissed the complainant under Article 108 of the Labour Act.

**The Ombudsman**[[109]](#footnote-109) has intervened in cases of discrimination arising from disability. In one such case, M.V. brought a lawsuit with a basic court against a bank, seeking an injunction to prevent further discrimination and compensation for damage, alleging he had not been able to enter the bank due to the absence of a wheelchair ramp. The complainant claimed structural obstacles had prevented him from accessing the bank and sought damages for discrimination and mental anguish due to the violation of his dignity and rights. The Ombudsman applied to intervene on behalf of the complainant. In his final complaint, the Ombudsman re-iterated that the respondent had not complied with the Infrastructure Law and United Nations Convention on the Rights of Persons with Disabilities, adding that an accessible environment was key to creating an equal society. the first-instance court ruled direct discrimination had taken place and ordered the respondent to take all appropriate action to prevent further discrimination. The court also made a partial award of damages for mental anguish.

In a second case, M.V. sued a town for discrimination as he, a wheelchair user, had been prevented from attending a public consultation session for a local ordinance designed to make the city’s public spaces more accessible. The complainant also sought an award of compensation for non-material damage due to mental anguish he suffered on that occasion. The Ombudsman applied to intervene on the complainant’s behalf and urged the court to find discrimination, stating that an accessible environment was key to creating an equal society, and did not seek reimbursement of legal fees. The first-instance court ruled that the respondent had discriminated against the complainant but rejected the motion for an injunction that would require the respondent to refrain from further discrimination. The court also made a partial award of damages for mental anguish.

In a third case, M.I. brought an action for discrimination against several government bodies due to being prevented to take part in a public consultation session held on the first floor of a building not equipped with either a wheelchair ramp, lift, or hydraulic lifting platform. The complainant stated that she had been suffering from juvenile arthritis since age three, which damaged her eyesight and greatly restricted her freedom of movement, confining her to a wheelchair. The Ombudsman applied to intervene on the complainant’s behalf, alleging that the complaint and supporting evidence made it clear that a group of individuals sharing identical or similar protected characteristics – namely, disability – had been discriminated against. The Basic Court found direct discrimination had occurred and issued an injunction prohibiting the respondents from engaging in further discriminatory behaviour. In addition, the court made a partial award of damages for mental anguish.

# **VII.** **Key anti-discrimination judgments of the European Court of Human Rights significant for strategic litigation in Serbia**

The European Court of Human Rights (ECtHR) has developed extensive case law in matters of discrimination. Its reasoning is very important for appropriately understanding and interpreting anti-discrimination regulations as it defines the scope of anti-discriminatory provisions and analyses cases of unequal treatment on grounds of protected characteristics in various spheres of life. The ECtHR is also always the final instance that can hear a case when national courts prove reluctant to address a particular issue or problem.

## 7.1 Applications against Serbia

The first case in which the ECtHR found a violation of Article 14 of the ECHR is Milanović v. Serbia. Mr Milanović has been a leading member of the Hare Krishna community since 1984, due to which he has been receiving anonymous threats since 2000. Between 2001 and 2007, he was assaulted on multiple occasions by unknown men, and on four such occasions received injuries that required hospitalisation. Each of the incidents occurred late at night in the vicinity of a flat owned by relatives of Mr Milanović in the town of Jagodina, and each time the assaults were reported to the police. Mr Milanović claimed that the assailants were members of local right-wing organisations. The police took Mr Milanović’s statements on several occasions and canvassed potential witnesses, also launching investigations into the matter, but has to date failed to identify the assailants. Police records included several observations to the effect that Mr Milanović was a member of a ‘religious cult’ and notes on his ‘rather strange appearance’; the police also suspected his injuries could have been self-inflicted. The ECtHR held that there had been a violation of Article 3 of the ECHR in this particular case as the injuries suffered by Mr Milanović were sufficiently serious to amount to ill-treatment.[[110]](#footnote-110) In addition, when ruling on the alleged violation of Article 14 in conjunction with Article 3 of the ECHR, the Court also held that, the same as for racially-motivated assaults, in cases of violence the state has an additional responsibility to take any and all justified steps to uncover a possible religious motive.[[111]](#footnote-111) Failure to do so would mean that the state did not take sufficient regard for the specific nature of actions that violate human rights. The state should, therefore, invest the greatest possible efforts in uncovering religious motivation. However, this obligation was not absolute: the authorities were not required to take on an impossibly or disproportionately large burden. The standard test that applies in these cases is to determine whether the state had taken reasonable steps to protect an individual form harm, or from the risk of violence, it was aware or ought to have been aware of. The ECtHR noted that in this case it was necessary to conduct an effective investigation including all available operational measures it would have been reasonable to take to uncover the perpetrators, but the police failed to take into consideration the religious motivation for the assaults and treated them identically as other violent incidents, for instance bar brawls. This resulted in the failure to take all measures necessary to protect Mr Milanović from religiously-motivated assault, partly caused by the unfounded suspicion of the assaults actually having occurred. These reasons guided the ECtHR to hold a violation had occurred of Article 14 in conjunction with Article 3 of the ECHR.

Another discrimination case against Serbia was brought by army reservists drafted during the attack on the Federal Republic of Yugoslavia from March to June 1999. Although they were entitled to a daily expense allowance (‘per diem’), the Government refused to pay.[[112]](#footnote-112) After a number of demonstrations, some of which ended in open confrontation with the police, on 11 January 2008 the Serbian Government reached agreement with reservists residing in six impoverished municipalities (Kuršumlija, Lebane, Žitorađa, Doljevac, Prokuplje, and Blace) to pay the arrears in six monthly instalments. The said municipalities were chosen because of their ‘underdeveloped’ status, implying the reservists’ indigence. This payment was to be effected through their respective municipalities. For their part, the reservists in question accepted to renounce all of their outstanding claims based on their military service in 1999 which were still pending before the civil courts, as well as any other claims in this connection. At the same time, the Government set up a working group tasked with addressing the requests of all other reservists, but it was concluded that their demands were not acceptable, inter alia, because there had been a lack of State funds which could be used for this purpose and since in most cases, war per diems had already been paid to the reservists. For this reason, reservists not resident in these municipalities brought civil suits. Between 2002 and 2011, Serbian first-instance and appellate courts across Serbia ruled both in favour of the reservists in a situation such as the applicants’ and against them, relying on the three-year/five-year or the ten-year prescription periods respectively. This first period was in line with two legal opinions of the Supreme Court adopted in 2003 and 2004.[[113]](#footnote-113) This case was considered by both the Second Section of the ECtHR[[114]](#footnote-114) and the 17-judge Grand Chamber. The Serbian Government alleged that the reservists had not been discriminated against, because the 2008 agreement did not formally envisage the payment of the per diems but rather a sort of social benefit.[[115]](#footnote-115) It also claimed that the Government’s resources were finite, which was why it was decided to support those reservists in the greatest need of assistance. Also, these reservists had had to renounce any and all of their legal claims concerning their military service whilst other reservists, as well as all other persons in their situation, had retained the possibility to turn to the civil courts for redress. In view of the above, the Government accepted that some reservists were treated unequally, but argued that there was a reasonable and objective justification for this course of action. Having considered the application, the Court first accepted that the complaints concerned rights of a ‘sufficiently pecuniary’ nature to fall within the ambit of Article 1 of Protocol No. 1 to the ECHR.[[116]](#footnote-116) The Court held that the payments referred to were clearly *per diems*, not social benefits awarded to persons in need, as had previously been found by the Serbian Commissioner for Protection of Equality.[[117]](#footnote-117) Even though the municipalities in question were ‘underdeveloped’, the reservists who received the funds were never under an obligation to provide any proof of their indigence, just like all other reservists without a registered residence in these municipalities could not benefit from the disbursement, irrespective of their means.[[118]](#footnote-118) In doing so the Government acted in an arbitrary fashion, and the ECtHR found there had been no ‘objective and reasonable justification’ for the differential treatment of the applicants merely on the basis of their residence and held there had been a violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1.[[119]](#footnote-119) By contrast, the Grand Chamber[[120]](#footnote-120) concluded that the applicants were not dispensed from the requirement to exhaust domestic remedies in accordance with the applicable rules and procedure of domestic law. In other words, the Grand Chamber held that the applicants had not relied on the prohibition of discrimination in Article 21 of the Constitution of Serbia, or on the non-discrimination clauses in Article 14 of the Convention and Article 1 of Protocol No. 12, although these were directly applicable according to Article 18 of the Constitution. Nor did they subsequently invoke the Anti-Discrimination law, which entered into force in March 2009.[[121]](#footnote-121) The case was therefore referred back to Serbia with the request for national courts to address the issue of unpaid expense allowances. Nevertheless, the lack of agreement in the Supreme Court of Cassation on this issue and inconsistent case law regarding prescription periods, finding of discrimination, and award of damages in these cases will in all likelihood result in the case again being heard by the ECtHR.[[122]](#footnote-122)

## 7.2 Other applications to the European Court of Human Rights

It is difficult to pick a limited number cases heard by the ECtHR that are particularly significant for anti-discrimination proceedings before national courts.

In a case against Russia, the question arose of recognising the right to parental leave for fathers as well as mothers.[[123]](#footnote-123) Here, a woman divorced her husband, an army radio intelligence operator, after the birth of their third child, whereupon he sought three-year parental leave available to women after the birth of a third child. He was granted one-year leave as the armed forces took the view that only women were entitled to longer leave. The applicant felt that maternity leave and remuneration during such leave came within the scope of Article 8 of the ECHR as they were necessary to promote his family life and the interests of his children. As the purpose of parental leave is to allow one to take care of one’s child, unlike maternity leave, the applicant argued that he was in a situation analogous to that of servicewomen and civilian men and women. The Chamber noted that it was time to hold that there was no objective or reasonable justification for the difference in treatment between men and women as regards entitlement to parental leave.[[124]](#footnote-124) When the case was ultimately heard by the Grand Chamber, it also took the same view and underlined that invoking general assumptions or prevailing social attitudes in a particular country was insufficient justification for a difference in treatment on grounds of sex.[[125]](#footnote-125) It was particularly significant that the Court ruled that states were prevented from imposing traditions that perpetuate traditional gender roles.[[126]](#footnote-126) The case was especially important in that very few fathers take maternity leave due in large part to traditional gender roles and stereotypes.

In a number of cases the ECtHR also found that inaction on the part of government authorities in providing protection from family violence constituted a form of discrimination. A case in point is *Bălşan v. Romania,*[[127]](#footnote-127) where the applicant had lodged multiple complaints with local authorities seeking protection from her ex-husband for herself and her four children. The ECtHR concluded with concern that at both the investigation level and before the courts the national authorities considered the acts of domestic violence as being provoked and regarded them as not being serious enough to fall within the scope of the criminal law.[[128]](#footnote-128) The Court noted particularly that official statistics showed this type of violence was tolerated and perceived as normal by a majority of people and that a rather small number of reported incidents are followed by criminal investigations.[[129]](#footnote-129) Moreover, the number of victims of such violence had increased every year, the vast majority of them being women. The ECtHR highlighted the fact that the existence of a sound statutory framework to protect women did not mean much unless the rules were appropriately enforced. In this case, the authorities failed to take due consideration of the seriousness and extent of the issue of family violence in Romania,[[130]](#footnote-130) and their actions resulted in discrimination against the applicant on grounds of her female sex. In a particularly important finding, the ECtHR concluded that the violence suffered by the applicant can be regarded as gender-based violence, which is a form of discrimination against women.

There have been several key cases for discrimination against ethnic Roma in the area of education, where it was difficult to determine whether indirect discrimination existed because the Roma were systematically discriminated against and their adverse position was not acknowledged. The ECtHR initially proved reluctant to address systemic violations, such as in the case of *D.H. and Others v. the Czech Republic,* where the applicants were Roma children attending special schools.[[131]](#footnote-131) Between 1996 and 1999, 18 Czech nationals of Roma origin were placed in special schools in the town of Ostrava, either directly or after a spell in ordinary primary schools. The applicants’ parents had consented to and in some instances expressly requested their children’s placement in a special school. The decisions on placement were then taken by the head teachers of the special schools concerned after referring to the recommendations of the educational psychology centres where the applicants had undergone psychological tests. Fourteen applicants asked the Ostrava Education Authority to reconsider their cases, arguing that their intellectual capacity had not been reliably tested and that their representatives had not been adequately informed of the consequences of consenting to their placement in special schools. After their requests were denied, these applicants lodged a constitutional appeal in which they complained that enrolment in special needs schools was a general practice that amounted to racial segregation and discrimination against the Roma due to the existence of two separate education systems, namely special and ‘ordinary’ primary schools, which the Constitutional Court dismissed. The applicants argued this was a violation of Article 14 of the ECHR in conjunction with Article 2 of Protocol No. 1 (right to education), as it clearly constituted discrimination of Roma children, who received a poorer education in the special schools than non-Roma children, and were thus unable to go on to enrol at better secondary schools. The ECtHR held that its role was to examine the facts of one particular case rather than assess the overall social context. The Chamber observed that the rules governing children’s placement in special schools did not refer to the pupils’ ethnic origin, but pursued the legitimate aim of adapting the education system to the needs, aptitudes and disabilities of the children. By contrast, the Grand Chamber[[132]](#footnote-132) noted that, unlike some other countries, the Czech Republic had sought to tackle the problem and acknowledged that, in its attempts to achieve the social and educational integration of the disadvantaged group which the Roma form, it has had to contend with numerous difficulties as a result of, inter alia, the cultural specificities of that minority and a degree of hostility on the part of the parents of non-Roma children. Nevertheless, whenever discretion capable of interfering with the enjoyment of an ECHR right is conferred on national authorities, the procedural safeguards available to the individual will be especially material in determining whether the respondent state had remained within its margin of appreciation. The facts of the case indicated that the schooling arrangements for Roma children were not attended by safeguards that would ensure that, in the exercise of its margin of appreciation in the education sphere, the state took into account their special needs as members of a disadvantaged class. Furthermore, as a result of the arrangements the applicants were placed in schools for children with mental disabilities where a more basic curriculum was followed than in ordinary schools and where they were isolated from pupils from the wider population. As a result, they received an education which compounded their difficulties and compromised their subsequent personal development instead of tackling their real problems or helping them to integrate into the ordinary schools and develop the skills that would facilitate life among the majority population.[[133]](#footnote-133) In these circumstances, the Court was not satisfied that the difference in treatment between Roma children and non-Roma children had been objectively and reasonably justified and that there existed a reasonable relationship of proportionality between the means used and the aim pursued.

*Oršuš and Others v. Croatia*[[134]](#footnote-134) involved a similar problem with the segregation of Roma children, and a similar difference in opinion between the Chamber and the Grand Chamber. In this case, applications were lodged by 15 Croatian nationals of Roma origin who argued that their right to education had been violated, that they had been discriminated against on grounds of ethnicity, and that their right to a fair trial had been infringed upon. The applicants, born between 1988 and 1994, attended one of two elementary schools in the Croatian region of Međimurje (Orehovica, Podturen, and Trnovac), where their knowledge of the Croatian language was assessed at the time of enrolment in elementary school. They were placed in classes composed of only Roma students with the explanation that their command of Croatian was inadequate. Nine applicants initially attended separate classes and were subsequently moved into mixed classes, whilst five applicants attended separate classes only for the duration of their elementary schooling. Nine applicants received additional instruction in the Croatian language. All applicants dropped out of school on turning 15. Roma students were not in the majority in either of the two schools in this case; in one of the schools, most Roma students were placed in separate classes. National courts dismissed the applicants’ action, holding that division into classes had been based on students’ command of the Croatian language rather than ethnicity; further, the students had not subsequently been moved into mixed classes to preserve the integrity of the groups and ensure continuity. The ECtHR found that the children had not been denied their right to education and they had not proved that the quality of instruction in separate classes was inferior to that in mixed groups. The Chamber compared this case with the one described above and found little similarity, as in this case the children were placed in regular schools but in special classes due to their insufficient knowledge of Croatian, the language of instruction.[[135]](#footnote-135) The Chamber reiterated, with regard to states’ margin of appreciation in the sphere of education, that states cannot be prohibited from setting up separate classes or different types of school for children with difficulties, or implementing special educational programmes to respond to ‘special needs’.[[136]](#footnote-136) The case was referred to the Grand Chamber, which took a different view.[[137]](#footnote-137) The Grand Chamber first found a difference in treatment, as discriminatory intent on the part of the relevant state authorities was immaterial, as opposed to the fact that the measure in question was applied exclusively to the members of a singular ethnic group, coupled with the alleged opposition of other children’s parents to the assignment of Roma children to mixed classes. This called for an answer from the state to show that the practice in question was objectively justified by a legitimate aim and that the means of achieving that aim were appropriate, necessary and proportionate.[[138]](#footnote-138) The Grand Chamber considered that temporary placement of children in a separate class on the ground that they lack an adequate command of the language was not, as such, automatically contrary to Article 14 of the ECHR, and that in certain circumstances such placement would pursue the legitimate aim of adapting the education system to the ‘specific needs’ of the children. However, when such a measure disproportionately or even exclusively affects members of a specific ethnic group, then appropriate safeguards have to be put in place.[[139]](#footnote-139)

The issue of legal incapacitation is particularly important; the ECtHR found on numerous occasions that, in the event of institutionalisation and incapacitation requires compliance with procedures and effective remedy to challenge this decision. In *D.D. v. Lithuania*,[[140]](#footnote-140) the applicant, who had had a history of mental disorder, was legally incapacitated at the age of 37 at the application of her adoptive father in a proceeding she did not take part in. The adoptive father was also her first guardian, psychotherapist, and closest friend. At his request, and without her consent, she was placed in a mental institution, whereupon the director of the institution assumed guardianship. Her legal incapacitation made it impossible for her to take part in any proceedings that decided her status. The ECtHR found that the guardianship procedure must include procedural safeguards that entail legal representation, the right of the person being legally incapacitated or already legally incapacitated to voice their own opinion, as well as the right to contest the decision on guardianship or institutionalisation.[[141]](#footnote-141)

Further, in *Sýkora v. Czech Republic*,[[142]](#footnote-142) the ECtHR set somewhat more detailed standards, noting that deprivation of liberty of the applicant had not been lawful as there had not been sufficient guarantees against arbitrary decision-making, and that any deprivation or limitation of legal capacity must be based on sufficiently reliable and conclusive evidence.

Finally, case law of the ECtHR has greatly contributed to the improvement in the position of LGBT people. The Court has dealt with diverse matters, from homophobia to bans on peaceful gatherings to the issue of civil partnerships and change in civil status following gender reassignment surgery. In this context, a 2017 judgment against France is especially significant as the ECtHR found that conditioning corrections to birth certificates to have a person’s gender and name changed by sterilisation or treatment highly likely to cause infertility constituted a violation of Article 8 of the ECHR.[[143]](#footnote-143) This judgment will have an impact on the twenty or so Council of Europe member states that have retained compulsory sterilisation as a prerequisite for recognising changes to gender identity.[[144]](#footnote-144)

# **VIII. Final considerations**

In addition to being able to make use of all other means at its disposal, the Commissioner for Protection of Equality can also engage in strategic litigation. This is pursued in the public interest when a particular legislative provision needs to be clarified or a legal void filled, in the event of widespread discrimination of marginalised groups, and when it must be clearly demonstrated that such behaviour is unacceptable and prohibited by law. Experiences to date have shown that test cases have mainly been brought in situations involving the commonest forms of discrimination on grounds of protected characteristics. Apart from discrimination in employment and hiring, strategic cases have been brought for unequal treatment in service provision and public information. These cases have played a major role in the development of case law regarding hate speech, harassment, and degrading treatment to draw a clear distinction between freedom of expression – a fundamental value of society – and situations in which this freedom may be circumscribed.

One challenge the Commissioner faces in this regard is selecting a robust complaint that meets all requirements for strategic litigation: a case of this sort must be substantiated by a wealth of evidence that will be accepted by the court. It is particularly important to collect evidence for the initial hearing where this evidence will be presented in court.

Finally, it can be concluded that some contentious issues have now been resolved. These include jurisdiction for ruling in discrimination cases; standing; requirement for consent when discrimination concerns a group of individuals; use of statistics in evidence; etc. In addressing these questions, the Commissioner has shown that strategic litigation primarily aims to clarify controversial legal issues and so make it easier for individuals and human rights charities to bring legal action for discrimination – and win these cases.

1. Li Weiwei, *Equality and Non-Discrimination Under International Human Rights Law*, Norwegian Centre for Human Rights, Oslo, 2004, p. 5. [↑](#footnote-ref-1)
2. Law on the Charter of the United Nations (*Official Gazette of Democratic Federal Yugoslavia*, No. 69/45). [↑](#footnote-ref-2)
3. Article 2(1) of the Charter of the United Nations. [↑](#footnote-ref-3)
4. Law Ratifying the International Covenant on Civil and Political Rights (*Official Gazette of the Socialist Federal Republic of Yugoslavia*, No. 7/71). [↑](#footnote-ref-4)
5. Law Ratifying the International Convention on the Elimination of All Forms of Racial Discrimination(*Official Gazette of the Socialist Federal Republic of Yugoslavia*, No. 31/67). [↑](#footnote-ref-5)
6. Law Ratifying the International Covenant on Economic, Social and Cultural Rights (*Official Gazette of the Socialist Federal Republic of Yugoslavia*, No. 7/71). [↑](#footnote-ref-6)
7. Law Ratifying the Convention on the Elimination of All Forms of Discrimination against Women (*Official Gazette of the Socialist Federal Republic of Yugoslavia – International Treaties*, No. 11/81). [↑](#footnote-ref-7)
8. Law Ratifying the Convention on the Rights of Persons with Disabilities (*Official Gazette of the Republic of Serbia – International Treaties*, No. 42/09). [↑](#footnote-ref-8)
9. Law Ratifying the Convention on the Rights of the Child (*Official Gazette of the Socialist Federal Republic of Yugoslavia – International Treaties*, No. 15/90, and *Official Gazette of the Federal Republic of Yugoslavia – International Treaties*, Nos. 4/96 and 2/97). [↑](#footnote-ref-9)
10. Priručnik za prepoznavanje slučajeva diskriminacije pred organima javne vlasti [‘Handbook for identifying cases of discrimination involving public authorities’]; Brankica Janković, Jelena Kotević i prof. dr Marijana Pajvančić. Poverenik za zaštitu ravnopravnosti i *Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH* Program za pravne i pravosudne reforme u saradnji sa ORF Pravna reforma; Beograd, 2016. [↑](#footnote-ref-10)
11. Law Ratifying the European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended in accordance with Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No. 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty, Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, and Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances (*Official Gazette of Serbia and Montenegro – International Treaties*, Nos. 9/03, 5/05, and 7/05 – Correction, and *Official Gazette of Serbia and Montenegro – International Treaties*, Nos. 12/10 and 10/15). [↑](#footnote-ref-11)
12. Law Ratifying the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (*Official Gazette of the Republic of Serbia – International Treaties*, No. 1/10). [↑](#footnote-ref-12)
13. Law Ratifying the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (*Official Gazette of the Republic of Serbia – International Treaties*, No. 12/13). [↑](#footnote-ref-13)
14. *Ibid.* [↑](#footnote-ref-14)
15. Priručnik za prepoznavanje slučajeva diskriminacije pred organima javne vlasti [‘Handbook for identifying cases of discrimination involving public authorities’]; Brankica Janković, Jelena Kotević i prof. dr Marijana Pajvančić; Poverenik za zaštitu ravnopravnosti i *Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH* Program za pravne i pravosudne reforme u saradnji sa ORF Pravna reforma; Beograd, 2016. [↑](#footnote-ref-15)
16. *Official Gazette of the Republic of Serbia* No. 98/06. [↑](#footnote-ref-16)
17. *Official Gazette of the Republic of Serbia*, Nos. 107/05, 72/09 – Other Law, 88/10, 99/10, 57/11, 119/12, 45/13 – Other Law, 93/14, 96/15, 106/15, 113/17 – Other Law, and 105/17 – Other Law. [↑](#footnote-ref-17)
18. *Official Gazette of the Republic of Serbia*, No. 45/13. [↑](#footnote-ref-18)
19. *Official Gazette of the Republic of Serbia*, No. 24/11. [↑](#footnote-ref-19)
20. *Official Gazette of the Republic of Serbia*, Nos. 88/17 and 27/18 – Other Law. [↑](#footnote-ref-20)
21. *Official Gazette of the Republic of Serbia*, Nos. 88/17 and 27/18 – Other Law. [↑](#footnote-ref-21)
22. *Official Gazette of the Republic of Serbia*, Nos. 24/05, 61/05, 54/09, 32/13, 75/14, 13/17 – Constitutional Court Ruling, and 113/17. [↑](#footnote-ref-22)
23. *Official Gazette of the Republic of Serbia*, Nos. 36/09, 88/10, 38/15, 113/17, and 113/17 – Other Law. [↑](#footnote-ref-23)
24. *Official Gazette of the Republic of Serbia*, No. 36/10. [↑](#footnote-ref-24)
25. *Official Gazette of the Republic of Serbia*, Nos. 83/14, 58/15, and 12/16 – Authentic Interpretation. [↑](#footnote-ref-25)
26. *Official Gazette of the Republic of Serbia*, Nos. 120/04, 54/07, 104/09, and 36/10. [↑](#footnote-ref-26)
27. *Official Gazette of the Republic of Serbia*, No. 10/16. [↑](#footnote-ref-27)
28. *Official Gazette of the Republic of Serbia*, No. 50/11. [↑](#footnote-ref-28)
29. *Official Gazette of the Federal Republic of Yugoslavia*, No. 11/02, *Official Gazette of Serbia and Montenegro*, No. 1/03 – Constitutional Charter, and *Official Gazette of the Republic of Serbia*, Nos. 72/09 – Other Law, 97/13 – Constitutional Court Ruling, and 47/18. [↑](#footnote-ref-29)
30. *Official Gazette of the Republic of Serbia*, No. 36/06 [↑](#footnote-ref-30)
31. *Official Gazette of the Republic of Serbia*, No. 55/14 [↑](#footnote-ref-31)
32. *Official Gazette of the Republic of Serbia*, No. 18/05, 72/11 – Other Law, and 6/15. [↑](#footnote-ref-32)
33. *Official Gazette of the Republic of Serbia*, No. 85/05. [↑](#footnote-ref-33)
34. *Official Gazette of the Republic of Serbia*, Nos. 33/06 and 13/16. [↑](#footnote-ref-34)
35. *Ibid.* [↑](#footnote-ref-35)
36. Anti-Discrimination Law, Art. 41.2. [↑](#footnote-ref-36)
37. Anti-Discrimination Law, Art. 41.3. [↑](#footnote-ref-37)
38. Anti-Discrimination Law, Art. 45. [↑](#footnote-ref-38)
39. The Commissioner is given this authority in Art. 33 of the Anti-Discrimination Law. [↑](#footnote-ref-39)
40. Anti-Discrimination Law, Art. 46. Strategic litigation is litigation that aims to provide effective relief from discrimination, enhance case law in priority and under-developed areas, and increase public awareness of particular issues (Rules of Procedure, Art. 34.1). [↑](#footnote-ref-40)
41. See judgment Rev. 98/2016. [↑](#footnote-ref-41)
42. Basic Court of Vršac, No. II 6. P. 1. 749/10, 1 March .2012. [↑](#footnote-ref-42)
43. High Court of Pančevo, 3 P1 No. 5/2014, 26 May 2014. See also 2 P1. No. 6/14, 14. May 2014; 3 P 1 No. 7/14, 11 April 2014. [↑](#footnote-ref-43)
44. See e.g. Supreme Court of Cassation, Rev 2197/16, 22 June 2017; Supreme Court of Cassation, Rev 422/17, 6 April 2017; Supreme Court of Cassation, Rev 357/17, 15 March 2017. [↑](#footnote-ref-44)
45. See Supreme Court of Cassation, Rev. 3602/10, 16. December 2010; Supreme Court of Cassation, Rev. 66/12, February 2012. [↑](#footnote-ref-45)
46. Basic Court of Kraljevo, P No. 2580/10, 19 May 2010. No discrimination was found in this case by the High Court of Kraljevo either; see High Court of Kraljevo, File No. Gž No. 953/10, 1 September 2010. [↑](#footnote-ref-46)
47. First Basic Court of Belgrade, 10 December 2013. This judgment was made available pursuant to a freedom of information request but the number was redacted. [↑](#footnote-ref-47)
48. Supreme Court of Cassation, Rev 99/11, 10 February 2011. [↑](#footnote-ref-48)
49. First Basic Court, judgment P. No. 6272/2008. [↑](#footnote-ref-49)
50. Beogradski centar za ljudska prava, *Ljudska prava u Srbiji u 2011* [Human Rights in Serbia in 2011], Beograd, 2012, pp. 265-266. [↑](#footnote-ref-50)
51. First Basic Court of Belgrade, 73. P. No. 15378/12, 17 September 2013. [↑](#footnote-ref-51)
52. Belgrade Court of Appeal, Gž. 2426/14, 11 June 2014. [↑](#footnote-ref-52)
53. First Basic Court of Belgrade, judgment of 7 March 2013. This judgment was made available pursuant to a freedom of information request but the number was redacted. [↑](#footnote-ref-53)
54. *Fudbal*, Official Journal of the Serbian Football Association, No. 3 of 20 June 2011. [↑](#footnote-ref-54)
55. Art. 71 of the Rules. [↑](#footnote-ref-55)
56. Commissioner for Protection of Equality, Complaint against the Serbian Football Association, No. 404/2011, opinion of 5 April 2011. [↑](#footnote-ref-56)
57. First Basic Court of Belgrade, 56 No. P. 24416/11, judgment of 5 December 2011. [↑](#footnote-ref-57)
58. Court of Appeal of Belgrade, Gž. 7097/12, judgment of 6 November 2012. [↑](#footnote-ref-58)
59. Supreme Court of Cassation, Rev. 647/2013, ruling of 25 July 2013. [↑](#footnote-ref-59)
60. First Basic Court of Belgrade, 73 P. No. 18254/2012, judgment of 17 September 2013. [↑](#footnote-ref-60)
61. *Ibid,* p. 6. [↑](#footnote-ref-61)
62. *Ibid.* [↑](#footnote-ref-62)
63. Court of Appeal of Belgrade, Gž- 2746/14, judgment of 10 September 2014. [↑](#footnote-ref-63)
64. *Ibid.* [↑](#footnote-ref-64)
65. Supreme Court of Cassation, Rev. 262/2015, judgment of 26 March 2015. [↑](#footnote-ref-65)
66. *Ibid,* p. 3. Here the Court relied on Article 171 of the Labour Law. [↑](#footnote-ref-66)
67. *Ibid.* [↑](#footnote-ref-67)
68. First Basic Court of Belgrade, 63. P. 16956-12, judgment of 7 March 2013. [↑](#footnote-ref-68)
69. *Ibid,* p. 2. [↑](#footnote-ref-69)
70. *Ibid,* p. 5. [↑](#footnote-ref-70)
71. Court of Appeal of Belgrade, Gž. No. 5012/13, judgment of 19 July 2013. [↑](#footnote-ref-71)
72. *Ibid,* p. 7. [↑](#footnote-ref-72)
73. Supreme Court of Cassation, Rev. 872/2014, judgment of 11 February 2015. [↑](#footnote-ref-73)
74. Basic Court of Niš, Svrljig Court Unit, Š-25 P. No. 3259/11, judgment of 11 July 2011. [↑](#footnote-ref-74)
75. *Ibid,* p. 4. [↑](#footnote-ref-75)
76. First Basic Court of Belgrade, 23 No. 16041/2012, ruling of 30 October 2012. [↑](#footnote-ref-76)
77. High Court of Smederevo, Gž. 840/13, ruling of 2 October 2013. [↑](#footnote-ref-77)
78. Supreme Court of Cassation, Rev. 853/2014, ruling of 3 September 2014. [↑](#footnote-ref-78)
79. High Court of Belgrade, 2-P. No. 1245/15, judgment of 5 July 2017. [↑](#footnote-ref-79)
80. First Basic Court of Belgrade, 11 P. No. 8484/13, judgment of 27 May 2013. [↑](#footnote-ref-80)
81. *Ibid,* p. 3. [↑](#footnote-ref-81)
82. High Court of Belgrade, 4 P. No. 346/2014, judgment of 7 September 2015. [↑](#footnote-ref-82)
83. Court of Appeal of Belgrade, Gž. No. 6975/15, judgment of 21 January 2016. [↑](#footnote-ref-83)
84. *Ibid,* p. 4. [↑](#footnote-ref-84)
85. High Court of Belgrade, P. No. 519/14, judgment of 1 September 2014. [↑](#footnote-ref-85)
86. High Court of Belgrade, 1 P. No. 519/14, judgment of 22 October 2015. [↑](#footnote-ref-86)
87. Court of Appeal of Belgrade, Gž. 262/16, judgment of 24 February 2016. [↑](#footnote-ref-87)
88. *Ibid.* [↑](#footnote-ref-88)
89. High Court of Belgrade, 8 P. No. 577/14, judgment of 8 June 2015. [↑](#footnote-ref-89)
90. 2017 Annual Report of the Commissioner for Protection of Equality, 15 March 2018, p. 170. [↑](#footnote-ref-90)
91. City of Jagodina, Ordinance on Financial Support for Married Couples, No. 011-92/10-10-1, 23 December 2010. [↑](#footnote-ref-91)
92. Basic Court of Jagodina, ZP. No. 1704/11, judgment of 17 January 2012. [↑](#footnote-ref-92)
93. Court of Appeal of Kragujevac, Gž. No. 2904/12, ruling of 6 November 2012. [↑](#footnote-ref-93)
94. First Basic Court of Belgrade, 21 P. No. 14946/12, judgment of 8 March 2013. [↑](#footnote-ref-94)
95. *Ibid,* p. 3. [↑](#footnote-ref-95)
96. First Basic Court of Belgrade, 29 P. No. 19199/12, judgment of 22 January 2013. [↑](#footnote-ref-96)
97. ‘Guide to Strategic Litigation - Public Law Project’ (*Public Law Project*, 2018) [publiclawproject.org.uk/resources/guide-to-strategic-litigation/](https://publiclawproject.org.uk/resources/guide-to-strategic-litigation/) [↑](#footnote-ref-97)
98. Home Office, ‘Judicial Review Guidance (Part 1)’ [assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\_data/file/454770/JR\_Guidance\_England\_and\_Wales\_3\_0.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/454770/JR_Guidance_England_and_Wales_3_0.pdf). [↑](#footnote-ref-98)
99. ‘Guide to Strategic Litigation - Public Law Project’ (*Public Law Project*, 2018) [publiclawproject.org.uk/resources/guide-to-strategic-litigation/](https://publiclawproject.org.uk/resources/guide-to-strategic-litigation/) [↑](#footnote-ref-99)
100. ‘Standing’ (Publicinterest.info, 2018) [publicinterest.info/?q=judicial-review/standing](http://publicinterest.info/?q=judicial-review/standing), accessed 14 August 2018. [↑](#footnote-ref-100)
101. ‘To Assist The Court: Third Party Interventions In The Public Interest’, Freshfield Bruckhaus Deringer and JUSTICE, [2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2016/06/To-Assist-the-Court-Web.pdf](https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2016/06/To-Assist-the-Court-Web.pdf), p. 26. [↑](#footnote-ref-101)
102. Ibid, p. 6. [↑](#footnote-ref-102)
103. ‘Governance Framework’, Equality and Human Rights Commission (EHRC) [equalityhumanrights.com/sites/default/files/2015\_governance\_framework\_update\_sept\_2015.pdf](https://www.equalityhumanrights.com/sites/default/files/2015_governance_framework_update_sept_2015.pdf). [↑](#footnote-ref-103)
104. The Equality and Human Rights Commission’s Strategic Litigation Policy, [equalityhumanrights.com/sites/default/files/strategic\_litigation\_policy\_100315.pdf](https://www.equalityhumanrights.com/sites/default/files/strategic_litigation_policy_100315.pdf), accessed 14 August 2018. [↑](#footnote-ref-104)
105. [2017] UKSC 51 [↑](#footnote-ref-105)
106. [2015] EWHC 3382 (Admin) [↑](#footnote-ref-106)
107. [[2014] EWCA Civ 822](http://www.bailii.org/ew/cases/EWCA/Civ/2014/822.html) [↑](#footnote-ref-107)
108. The Office of the Gender Equality Ombudswoman is an independent institution established in 2003 by the Croatian Parliament that is tasked with overseeing appropriate and efficient enforcement of anti-discrimination provisions of the Gender Equality Law and the Anti-Discrimination Law insofar as it governs gender equality. The Ombudswoman’s responsibilities include receiving gender equality complaints from individuals and businesses, assisting complainants in bringing legal action, investigating each complaint before the court case begins, and engaging in mediation, with the consent of the parties, including the option of entering into out-of-court settlements. The Ombudswoman’s legal interest in anti-discrimination cases is regulated by the Anti-Discrimination Law and is based upon the Office’s remit and right to intervene in court cases. [↑](#footnote-ref-108)
109. The Montenegrin Ombudsman is an independent and autonomous institution whose responsibilities include acting to safeguard human rights and freedoms when threatened by an enactment, action, or failure to act by a government body, national or local authority, public service, or other holder of public authority. The Ombudsman’s powers are regulated by the Constitution and statute and he is bound by the principles of justice and equity. [↑](#footnote-ref-109)
110. *Milanović v. Serbia*, ECtHR, Application no. 44614/07, judgment of 14 December 2010. [↑](#footnote-ref-110)
111. *Ibid,* para. 96. [↑](#footnote-ref-111)
112. The statutory basis for this allowance is contained in the Yugoslav Army Rules on the Reimbursement of Expenses, *Official Gazette of the Armed Forces*, No. 38/93, 23/93, 3/97, 11/97, 12/98, 6/99, and 7/99. [↑](#footnote-ref-112)
113. See legal opinion of the Civil Division of the Supreme Court of Serbia of 26 May 2003, *Supreme Court Bulletin* No. 1/04; and legal opinion of the Civil Division of the Supreme Court of Serbia of 6 April 2004, *Supreme Court Bulletin* No. 1/04. [↑](#footnote-ref-113)
114. *Vučković and others v. Serbia,* ECtHR, Application no. 17153*/*11, and 29 other applications, judgment of 28 August 2012. [↑](#footnote-ref-114)
115. *Ibid,* para. 77. [↑](#footnote-ref-115)
116. *Ibid,* para. 82. [↑](#footnote-ref-116)
117. *Ibid,* para. 84. [↑](#footnote-ref-117)
118. *Ibid,* para. 85. [↑](#footnote-ref-118)
119. *Ibid,* para. 87. [↑](#footnote-ref-119)
120. *Vučković and others v. Serbia*, ECtHR (GC), Application no. 17153/11 and 29 other applications, judgment of 25 March 2014. [↑](#footnote-ref-120)
121. *Vučković and others v. Serbia*, ECtHR (GC), Application no. 17153/11 and 29 other applications, judgment of 25. March 2014*,* para. 79. [↑](#footnote-ref-121)
122. See A.I, ‘Ratne dnevnice zatrpale sud’ [*Court swamped by veterans’ claims*], *Politika*, 7 March 2018, available online at [politika.rs/sr/clanak/399662/Ratne-dnevnice-zatrpale-](http://www.politika.rs/sr/clanak/399662/Ratne-dnevnice-zatrpale-)sud (accessed on 1 July 2018). The article notes that the High Court of Subotica alone had to date received 1,216 anti-discrimination lawsuits for failure to pay expense allowances. Many actions have also been brought before other Serbian High Courts as well. The complainants are asking for findings of discrimination, after which they will be able to seek compensation for damage in civil cases. [↑](#footnote-ref-122)
123. *Konstantin Markin v. Russia*, ECtHR, Application no. [30078/06](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{"appno":["30078/06"]}), judgment of 7 October 2010. [↑](#footnote-ref-123)
124. *Ibid,* para. 99. [↑](#footnote-ref-124)
125. #  *Konstantin Markin v. Russia*, ECtHR, Application no. [30078/06](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{"appno":["30078/06"]}), judgment of 7 October 2010, para. 127.

 [↑](#footnote-ref-125)
126. *Ibid*, para. 142. [↑](#footnote-ref-126)
127. *Bălşan v. Romania*, ECtHR, Application no. 49645/09, judgment of 23 May 2017. [↑](#footnote-ref-127)
128. *Bălşan v. Romania*, ECtHR, Application no. 49645/09, judgment of 23 May 2017, para. 81. [↑](#footnote-ref-128)
129. *Ibid,* para. 83. [↑](#footnote-ref-129)
130. For the same issue, see e.g. *Eremia and Others v. Moldova*, ECtHR, Application no. 3564/11, judgment of 28 May 2013. [↑](#footnote-ref-130)
131. *D.H. and Others v. the Czech Republic,* ECtHR, Application no. 57325/00, decision of 1 March 2005. [↑](#footnote-ref-131)
132. *D.H. and Others v the Czech Republic*, ECtHR (GC), Application no. 57325/00, judgment of 13 November 2007. [↑](#footnote-ref-132)
133. *D.H. and Others v the Czech Republic*, ECtHR (GC), Application no. 57325/00, judgment of 13 November 2007*,* para. 207. [↑](#footnote-ref-133)
134. *Oršuš and Others v. Croatia*, ECtHR, Application no. 15766/03, judgment of 17 July 2008. [↑](#footnote-ref-134)
135. *Oršuš and Others v. Croatia*, ECtHR, Application no. 15766/03, judgment of 17 July 2008*,* para. 65. [↑](#footnote-ref-135)
136. *Ibid,* para. 68. [↑](#footnote-ref-136)
137. *Oršuš and Others v. Croatia*, ECtHR (GC), Application no. 15766/03, judgment of 16 March 2010. [↑](#footnote-ref-137)
138. *Ibid,* para. 155. [↑](#footnote-ref-138)
139. *Ibid,* para. 157. [↑](#footnote-ref-139)
140. *D.D. v. Lithuania*, ECtHR, Application no. 13469/06, judgment of 14 February 2012. [↑](#footnote-ref-140)
141. See also *A.N. v. Lithuania*, ECtHR, Application no. 17280/08, judgment of 31 May 2016. [↑](#footnote-ref-141)
142. *Sýkora v. Czech Republic,* ECtHR,Application no. 23419/07, judgment of 22 November 2012. [↑](#footnote-ref-142)
143. See *A.P, Garçon and Nicot v. France*, ECtHR, Application no. 79885/12, judgment of 6 April 2017. [↑](#footnote-ref-143)
144. A list of these countries can be found on the *Trans Rights Europe Map* *2016*, available online at [tgeu.org/wp-content/uploads/2016/05/Trans-mapA\_Map2016july.pdf](https://tgeu.org/wp-content/uploads/2016/05/Trans-mapA_Map2016july.pdf%20%281) (accessed on 1 July 2018). [↑](#footnote-ref-144)