



Republic of Serbia



# Collection of Selected Opinions and Recommendations of the Commissioner for Protection of Equality

collection II | September 2013.





**Collection of Selected Opinions and  
Recommendations of the  
Commissioner for Protection of Equality**

**Collection of Selected Opinions and Recommendations of the**  
Commissioner for Protection of Equality

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## TABLE OF CONTENTS

Foreword .....	7
1. Discrimination Complaints on the Basis of National Identity .....	9
1.1. The complaint of M. o. lj. p. against the Ministry of Interior against discrimination committed on the basis of national affiliation in the field of provision of services (File no. 1572 dated 19 December 2011) .....	9
1.2. The complaint of D. z. r. d. m. against primary school A. S. L. D. against discrimination committed on the basis of national identity in the field of education (File no. 84 dated 20 January 2012) .....	14
1.3. The complaint of the organization P. against the City Administration of the City of Belgrade against discrimination committed on the basis of national identity in the field of housing (File no. 1673 dated 16 October 2012) .....	20
2. Discrimination Complaints on the Basis of Sex/Gender .....	36
2.1. The complaint of G. Dj. against P. u. Č. B. against discrimination based on gender in the field of education and upbringing (File no. 631 dated 17 May 2012) .....	36
3. Discrimination Complaints on the Basis of Sexual Orientation .....	46
3.1. The complaint of S. R. from K. against E. Š. in K. against discrimination committed on the basis of sexual orientation in the field of education and upbringing (File no. 160 dated 8 February 2013) .....	46
4. Discrimination Complaints on the Basis of Disability .....	56
4.1. The complaint of M. G. against NES against discrimination on the basis of disability in the field of work and employment (File no. 906 dated 15 June 2012) .....	56
4.2. The complaint of N. o. o. s. i. against the First Basic Court in Belgrade against discrimination on the basis of disability in the proceeding before public administration organs (File. no. 1007 dated 20 June 2012) .....	65
4.3. The complaint of O. z. lj. p. against City of Niš against discrimination on the basis of disability in the field of the use of public spaces (File no. 1181 dated 29 August 2012) .....	73

5. Discrimination Complaints on the Basis of Political Opinion and Religious Belief.....	83
5.1. The complaint of the Association A. S. against the Faculty of Orthodox Theology against discrimination on the basis of religious belief in the field of education (File no. 1065 dated 15 October 2012) .....	83
6. Discrimination Complaints on Any Other Basis.....	94
6.1. The complaint of J. M. against the Mayor of Belgrade concerning the violation of the principle of equal treatment in the proceeding conducted before public administration organs (File no. 72 dated 16 January 2012).....	94
6.2. The complaint of T. Š. Against the company M. against discrimination on the basis of family status in the field of work and employment (File no. 1839 dated 15 November 2012) .....	100
6.3. The complaint of Z. F. against the company G. T. against discrimination on the basis of membership in the trade union organization in the field of labor relations (File no. 188 dated 18 January 2013) .....	109



## FOREWORD

You are looking at the second Collection of Opinions and Recommendations of the Commissioner for Protection of Equality in English. This Collection assembles the selected acts issued by the Commissioner from 1<sup>st</sup> December 2011 to 30 May 2013, with the idea to make a choice of characteristic cases upon which we conducted the procedure.

During the previous period the Commissioner for Protection of Equality continued to work systematically and continuously on preventing and combating discrimination in Serbia and improving the realization and protection of equality in social relations. This Collection of Opinions and Recommendations presents these results and reflects the pursuit of the objective to make them transparent and accessible to the wider public.

Regardless of the fact that our capacities still remain modest and the difficulties the Commissioner for Protection of Equality encountered during its three-year long proactive work, we succeeded in positioning ourselves in the wider public as a central national body for combating discrimination and became one of the key promoters of human rights and equality, while also nurturing a fruitful cooperation with state agencies, civil society organizations and the media.

We hope that this Collection will encourage all social actors to work and act even more intensively and efficiently in the field of combating discrimination and building an open, tolerant and inclusive society in Serbia that guarantees equal rights and equal opportunities for all.

Belgrade, 30 May 2013

Nevena Petrušić, PhD  
Commissioner for Protection of Equality



## **1. DISCRIMINATION COMPLAINTS ON THE BASIS OF NATIONAL IDENTITY**

### **1.1. The complaint of M. o. lj. p. against the Ministry of Interior against discrimination committed on the basis of national affiliation in the field of provision of services (File no. 1572 dated 19 December 2011)**

Acting within the jurisdiction stipulated by law to receive and consider complaints filed pertaining to violations of provisions of the Law on the Prohibition of Discrimination, to issue opinions and recommendations, and pass measures stipulated by law, (Article 33, paragraph 1, point 1 of the Law on the Prohibition of Discrimination, Official Gazette of the Republic of Serbia, no. 22/2009) concerning the complaint of M. o. lj. p. from N., the Commissioner for Protection of Equality issues the following

#### **OPINION**

In the procedure conducted upon the complaint of M. o. lj. p. from N., against the Ministry of Interior – Police Directorate N. it has not been established that discrimination had been committed against P. Dž. from N. on the grounds of personal characteristic – affiliation to the Roma national minority during the procedure of issuing an identity card.

#### *Rationale*

The Commissioner for Protection of Equality received the complaint on 21 October 2011 filed by M. o. lj. p. on behalf and with consent of P. Dž. from N. against the Police Directorate N. In the complaint the following is alleged:

- That the Ministry of Interior, Police Directorate N. prevented the realization of P. Dž.'s right to be issued an identity document (identity card) because he belongs to the Roma national minority, thus committing discrimination on the basis of national identity;
- That P. Dž. had lived in the settlement ... number ... until his mother passed away, after which he was accommodated in the Home for Children without Parental Care in N. due to the fact that his father was serving a prison sentence at the time;

- That he reached legal age in the Home but the application for issuing the identity document was not timely submitted due to the omission of the competent service providers from the Home;
- That he returned to the house where he had lived before his mother passed away and started living with his uncle at the address ..... number.....;
- That on 29 September 2011 (he could not claim that this was the exact date because he was never given an acknowledgement of receipt) he submitted an application for the issuance of an identity card, as per official procedure requirements, but a few days later he received information that there was no possibility for him to be issued an identity card on the basis of permanent residence;
- That he tried to obtain an identity card on the basis of established residence (Article 5, paragraph 3 of the Identity Card Law<sup>1</sup>) but was told that this provision of the Law applied only to persons from Kosovo and Metohija;
- That Police Outpost C. K. sent an official notice to P. Dž. stating the address of his residence on the envelope, but the female officer in charge for receiving documents did not take this fact into account, explaining that each police outpost works independently.

In addition to the complaint M. o. Ij. p. also submitted the written consent of P. Dž. stating that M. o. Ij. p. could lodge a complaint to the Commissioner for Protection of Equality on his behalf; the notice sent by the Police Outpost C. K., no: ZK-959/11 dated 6 October 2011; and the contract regulating the conditions of the use of apartment no. 4490/270 dated 31 December 1996, concluded between the Housing Company (Stambeno preduzeće) and V. C.

The Commissioner for Protection of Equality conducted the procedure in order to determine the legally relevant facts and circumstances in accordance with Article 35, paragraph 4 and Article 37, paragraph 2 of the Law on the Prohibition of Discrimination. During the course of the procedure a statement was requested from the Ministry of Interior, Police Department N.

The Ministry of Interior, PD N. - Section for administrative affairs delivered the statement 17/2 no. 205-8239/2011 dated 28 November 2011 wherein it is stated:

- That following the inspection of the files it has been established that P. Dž. from N. submitted the application for residence registration on 28 September 2011;
- That he enclosed the contract regulating the use of the apartment at the address in N., ... number ... in the name of the late V. U. (MKU N. number ... page ... for the year 2004) as holder of the occupancy right;
- That the identity of P. Dž. was confirmed by the witnesses – E. U. and R. S. both from N, ... number ...;

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<sup>1</sup> Official Gazette of RS, no. 62/2006 and 36/2011.

- That the competent authority acted in accordance with the provisions of Article 5 of the Law on Permanent and Temporary Residence of Citizens<sup>2</sup>, which prescribes that when applying for permanent and temporary residence and communicating their address citizens can be required to show their identity card or other identification document on the basis of which their identity can be established or prove other facts relevant for registration. It also states that “other identification document” particularly implies agreements on the use of an apartment, title deeds, tenancy agreements, etc;
- That citizens are obliged, *inter alia*, to submit for inspection evidence of the legal basis for the use of the housing unit where they wish to register their permanent residence;
- That in situations when the person who requests registration of the permanent residence is not at the same time the owner of the apartment at the address where he/she wishes to register his/her permanent residence, it is necessary to obtain the consent of the real-estate owner to register a person at his/her address;
- That the allegations of the complaint are groundless taking into consideration that in the occasion of submitting the request for permanent residence registration P. Dž. stated that he intended to live in the apartment ... number ... for which he did not possess evidence of ownership and enclosed the agreement on the use of the apartment at the address ... number ...;
- That the persons who confirmed his identity are registered at the address ... number ..., which is the same address as the one indicated in P. Dž. request but the witnesses did not have the evidence of ownership or receipts of bill payments for that address;
- That, with the intention to establish the facts, they had sent the correspondence no. 205-5/11 dated 7 November 2011 to the Police Department but did not receive the report on the field check up to the moment of sending their statement regarding the complaint to the Commissioner for Protection of Equality.

Article 4 of the Law on the Prohibition of Discrimination prescribes the general prohibition of discrimination by stipulating that all persons shall be equal and shall enjoy equal status and equal legal protection regardless of personal characteristics, and that everyone shall be obliged to respect the principle of equality. By the provision contained in Article 8 it is stipulated that a violation of the principle of prohibition of discrimination occurs if an individual or a group of persons, on account of his/her or their personal characteristics, is unwarrantedly denied rights and freedoms or has obligations imposed that, in the same or a similar situation, are not denied to or imposed upon another person or group of persons, if the objective or the consequence of the measures undertaken is unjustified, and if the measures undertaken are not commensurate with the objective achieved through them.

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2 Official Gazette of FRS, no. 42/77 – revised text, 24/85, 6/89 and 25/89 and Official Gazette of RS, nos. 53/93, 67/93, 48/94 and 101/2005 – other Law.

Provisions of the Identity Card Law prescribe that each citizen of the Republic of Serbia over the age of 16 is eligible for an identity card<sup>3</sup> and that a citizen over the age of 16 residing in the territory of the Republic of Serbia is obliged to have an identity card<sup>4</sup>. The Law on Permanent and Temporary Residence of Citizens<sup>5</sup>, which was in force at the time when P. Dž. submitted the application for registration of residence, stipulated that the citizens were obliged to register their residence<sup>6</sup> and that in doing so the citizens may be asked to show their identity card or other document on the basis of which his/her identity or other important facts can be established<sup>7</sup>. The term “other important facts” entails in particular agreements on the use of apartment, title deeds, tenancy agreements, statement of the applicant regarding the intention to permanently live at the address that he/she registered as a new permanent residence<sup>8</sup>. Also, the provision of the Article 5, paragraph 3 of the Identity Card Law prescribes that a citizen with a right to the identity card without permanent residence on the territory of the Republic of Serbia shall be issued the identity card on the basis of established residence for a two-year period.

Not entering into evaluation whether the Ministry of Interior – Police Directorate N. correctly applied regulations in accordance with the principles of good government, the Commissioner for Protection of Equality shall state that the evidence submitted with the complaint and those presented during the procedure were not sufficient to confirm or deny the allegation that the acting of the Police Directorate N. has been motivated by the personal characteristics of P. Dž. Therefore, the Commissioner issued the Opinion that in the present case it has not been established that the Ministry of Interior – Police Directorate N. discriminated against P. Dž. on the grounds of his national identity.

The Commissioner for Protection of Equality shall take this opportunity to remind that by adopting the Strategy for Improvement of the Status of Roma in the Republic of Serbia<sup>9</sup> (2009), the Government of the Republic of Serbia set its strategic goal to improve the status of Roma in the Republic of Serbia. The goal is defined as reduction in the gap between the status of Roma and the remaining part of the population. In addition to other issues, this document deals with the accessibility of identity documents to members of the Roma community. The right to legal personality, that is, the right to recognition as a person before the law, represents a basic human right and a precondition for enjoyment of all other rights guaranteed in domestic and international legislation. Many members of the Roma community face serious obstacles in enjoying the right to be recognized before the law and to possess documents. Without personal documents they are legally invisible, which prevents the realization of their basic human rights: the right to health and social protection, right to education, right to work etc. The data included in the Strategy indicate that a

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3 Article 2, paragraph 1.

4 Article 3.

5 Official Gazette FRS, no. 42/77 – revised text, 24/85, 6/89 and 25/89 and Official Gazette of RS, no. 53/93, 67/93, 48/94 and 101/2005 – other law.

6 Article 2, paragraph 1.

7 Article 5, paragraph 2.

8 Article 5, paragraph 3.

9 Official Gazette of RS, no. 27/2009.

large percentage of Roma do not have valid documents and that 39.5 percent of Roma do not have a valid identity card. The Strategy states that some of the causes of such a situation include **inadequate sensitivity of employees in competent bodies when it comes to the needs of the Roma population as well as inadequate flexibility of authorities to adapt to the situation of Roma**. This quotation finds its confirmation in practice when the situation of P. Dž. is taken into consideration, as he does not live in an illegal settlement but in his uncle's house in which he had lived until the death of his mother, and fulfills legal requirements for the issuance of an identity card, but is nevertheless facing difficulties to exercise his right in the proceedings before the PD N.

The Commissioner for Protection of Equality points out that the obligation of all relevant social actors in Serbia, especially state bodies, is to show a higher degree of sensitivity in procedures that involve parties from sensitive social groups as well as to take all actions within their competences to provide the necessary support in order to facilitate exercising the guaranteed rights to these persons.

The Commissioner shall note that she is not competent to evaluate whether the Ministry of Interior, Police Department N. correctly applied regulations in the contested case, or to make statements regarding the duration of the procedure following the request submitted by P. Dž. or the respect of the principle of good governance. Establishing this kind of omission falls within the competence of the Ombudsman and the complainant may address this institution.

## **1.2. The complaint of D. z. r. d. m. against primary school A. S. L. D. against discrimination committed on the basis of national identity in the field of education (File no. 84 dated 20 January 2012)**

Acting within the jurisdiction stipulated by law to receive and consider complaints filed pertaining to violations of provisions of the Law on the Prohibition of Discrimination to issue opinions and recommendations and pass measures stipulated by law (Article 33, paragraph 1, point 1 of the Law on the Prohibition of Discrimination, Official Gazette of the Republic of Serbia, no. 22/2009) concerning the complaint of D. z. r. d. m. – O. k. from N., the Commissioner for Protection of Equality issues the following

### **OPINION**

By forming segregated classes attended exclusively by Roma children from displaced families the primary school A. S. L. D., village V. – B. near N. P. discriminated against children from displaced Roma families on the basis of national identity.

The Commissioner for Protection of Equality, pursuant to Article 33, paragraph 1, point 1 and Article 39, paragraph 2 of the Law on the Prohibition of Discrimination issues to the primary school A. S. L. D. village V. – B. near N. P. the following

### **RECOMMENDATION**

1. D. M., Director of the primary school A. S. L. D. village V. – B. near N. P. shall without delay undertake all necessary actions and measures to desegregate the classes composed exclusively of Roma children who come from displaced families.
2. The Director shall without delay undertake all necessary actions and measures to provide that all school employees pass a training/professional development course on the topic of the prohibition of discrimination in order to ensure a larger degree of discrimination sensitivity of all employees.
3. The Director shall undertake all necessary measures within his competences in order to provide appropriate programs, trainings and education with the aim of developing a spirit of tolerance, acceptance of diversities and non-discriminatory behavior among pupils.
4. The Director shall take care, in the future, to not violate the provisions of the Law on the Prohibition of Discrimination in relation to organizing instruction and with his decisions, that is, he shall abstain from unjustified discrimination or unequal treatment and omission (exclusion, restriction or prioritizing), which is based on any personal characteristic in relation to an individual or group of persons.



5. The Director of the school shall inform the Commissioner for Protection of Equality about the measures he will have undertaken in order to act in line with the Recommendation within 30 days from the day of receiving this Opinion with Recommendation.

### *Rationale*

D. z. r. d. m. – O. k. from N. contacted the Commissioner for Protection of Equality on 13 October 2011 with the complaint in which they alleged that in the satellite classroom of the primary school A. S. L. D., village V. – B. segregated classes for Roma children, especially those from displaced families, are being formed for five consecutive years, by which the discrimination against Roma children is being committed on the basis of their affiliation to the Roma national minority. In the complaint it is also alleged:

- That a segregated first grade class was also formed in the Academic Year 2007/2008 and was composed only of Roma children due to significant pressures and threats coming from the local inhabitants of the village V. – B of Serbian and Bosniak nationality;
- That the Municipality of N. P. issued a decision to accommodate the displaced Roma families on a piece of land in the village V. Up to that moment the families had lived near the wholesale market in N. P. but were forced to move out following a notification issued by the Sanitary and Communal Police;
- That the Municipality adopted such a decision most probably because there was another settlement of the local Roma community nearby;
- That the displaced Roma children are being enrolled in school surrounded by an atmosphere of offence, threats and boycott by Serbian and Bosniak parents who do not wish for their children to be in the same class with the displaced Roma children and who make comments about their hygiene;
- That the settlement of displaced Roma families is not legalized and that the water supply is provided twice a week in a cistern that is filled by the local town waterworks while an electrical outlet is provided by the neighbors;
- That a segregated class was formed once again in the Academic Year 2009/2010;
- That a meeting held with the representatives of the Municipality, the School and the School Inspection resulted in the creation of a framework plan of desegregation but was never formalized;
- That due to the older age of the pupils who were enrolled in A. Y. 2007/2008, one of the possibilities proposed was their referral to the adult education program; that the School employees attended the training for the implementation of the program “Functional Primary Education of Adult Roma”, but the Program was never implemented in the school;
- That at the beginning of the Academic Year 2010/2011 O. k. received an invitation from the Director to take part at the parents/teachers meeting for the first grade,

which was initiated by the non-Roma children's parents who requested to form a segregated class for Roma children;

- That the representatives of the City of N. P. (an alderman and a Roma coordinator) took part at the meeting together with Roma and non-Roma parents, the Director and a teacher and that on this occasion representatives of O. k. called parents for solidarity with people who live in extreme poverty and reminded them of equal rights to a quality education and the statutory prohibition of segregation;
- That after the meeting the Director did not cease under the pressures to change his mind and he kept the mixed first grade class, which was possible due to the smaller number of children enrolled;
- That the number of children enrolled in the first grade increased in the A. Y. 2011/2012 and non-Roma parents exerted strong pressure when they decided that their children would boycott the lessons;
- That a segregated first grade class was formed for displaced Roma children and the other first grade class is mostly composed of non-Roma children and a few local Roma children evaluated by non-Roma parents as "acceptable", who will be "offered" as proof that there is no segregation in the school;
- That the segregation is specific also from the point of view of the school's space and resources since the renovated school building has four classrooms, teachers' office, staff room and toilets so that the school covers all grades from I to VIII and both morning and afternoon shifts. The old school building is situated in the immediate vicinity of this renovated building. Its two classrooms are used by the pre-school preparation groups, the segregated first grade class and the segregated third grade class, and until last year also by the segregated fourth grade class;
- That the old building has an old decking pavement, old school desks and chairs and no didactic material except for the pre-school program;
- That the number of children in the segregated fourth grade class decreased and the children who continued with fifth grade were moved to the mixed class where they have problems adapting, they lack self-confidence during oral examinations, and when they are not supervised by teachers some pupils from the new class forbid them to take part in sport activities.

In addition to the complaint D. z. r. d. m. – O. k. submitted the correspondence sent to the Ministry of Education dated 31 January and 9 September 2008 as well as the minutes from the meeting "Protection of Roma National Minority from Discrimination" dated 7 April 2008.

In order to determine legally relevant facts and circumstances in accordance with Article 35, paragraph 4 and Article 37, paragraph 2 of the Law on the Prohibition of Discrimination, a statement was requested from the D. M. Director of the primary school A. S. L. D., village V. – B. near N. P. regarding the grounds of the complaint.

Primary school A. S. L. D. delivered the statement wherein the following is stated:

- That the allegations of the complaint on segregated classes are absolutely untrue and they therefore submit evidence on the number of class separations made

during the previous five years – number of pupils and classes of the School for the current academic year:

1. First grade 29 pupils – 2 classes
  2. Second grade 25 pupils – 1 class
  3. Third grade 37 pupils – 2 classes
  4. Fourth grade 25 pupils – 1 class
  5. Fifth grade 24 pupils – 1 class
  6. Sixth grade 15 pupils – 1 class
  7. Seventh grade 12 pupils – 1 class
  8. Eighth grade 19 pupils – 1 class;
- That it is true that the existing fifth grade class was divided into 2 classes from the first until the fourth grade because the children from displaced areas belonging to the Roma population were brought to school with delay and everyone agreed that they should be placed in a separate class, which proved to be justified even though the school was accused before the Ministry of Education but not incriminated because it acted following the advice of the School Administrations and the Minister;
  - That for the current academic year the school had two groups of children who attended pre-school and the Director registered one first grade class composed of 25 pupils, which led to one teacher being dismissed as redundant;
  - That the parents explicitly asked to keep the classes according to the pre-school division, threatening not to send their children to school otherwise; that during the first few days only Roma pupils attended the instruction and the Director and the parents informed the School Administration in N. P. and K. about what was going on, as well as that Municipality Inspection, Chief of the School Administration N. P. and Republican inspector from K visited the school;
  - That the first grade was divided in 2 classes because there must not be more than 2-3 pupils per class in which the instruction is implemented following a specific program of inclusive education and that there are currently 15 pupils in one class - 8 pupils of Serbian nationality, 1 Bosniak and 6 Roma, while in the other class there are also 15 pupils all from the Roma community and 3 of them follow a specific program of education;
  - That both first grade classes attend the same shift, follow the same timetable, that they cooperate and that during physical education and religious education classes the pupils spend time together, as well as that no parent from the Roma population was against such a division;
  - That it is hard to determine the number of Roma children in various classes because their number decreases from one year to the next, that is, from one grade to the next; that their number is highest in September and that as the year goes by their attendance gradually decreases;

- That out of 30 pupils in the first grade there are 21 Roma children and they are placed in 2 classes (6 pupils in I-1 and 15 in I-2). In grade II there are 8 Roma pupils, in grade III there are 23 Roma pupils (6 pupils in III-1 and 17 in III-2), in grade IV there are 12 Roma pupils, in grade V there are 10 Roma pupils, in grade VI there is 1 Roma pupil, in grade VII there are no Roma pupils and in grade VIII there is 1 Roma pupil;
- That Roma children are singled out in separate classes only in two cases– a) because most of them did not attend pre-school; b) because they do not speak the Serbian language; and c) because of the total neglect of personal hygiene and age difference (there were married children in the first grade);
- That it was entirely untrue that someone deliberately segregated the pupils on the basis of their national identity and that the school, by acting as they did, believed they were helping children to engage in schoolwork as quickly as possible.

The minutes of the inspection supervision no. 423-614-00380/2011-12 dated 19 September 2011 were delivered together with the statement.

Article 21 of the Constitution of the Republic of Serbia<sup>10</sup> prohibits any form of discrimination, direct or indirect, on any grounds, particularly on race, sex, national origin, social origin, birth, religion, political or other opinion, property status, culture, language, age and mental or physical disability.

Article 19 of the Law on the Prohibition of Discrimination prescribes that everyone shall have the right to pre-school, primary school, secondary school and higher education and professional training under equal circumstances in accordance with the law. Paragraph 2 of the same article prohibits obstructing or preventing entry into an educational institution to an individual or a group of persons on the grounds of his/her personal characteristics, or to exclude them from these institutions, to obstruct or prevent their attendance of classes and participation in other educational activities, to categorize pupils on the basis of personal characteristics, to maltreat them and unwarrantedly differentiate among them in other ways and to treat them in an unequal manner. Provisions of Article 22 of the Law on the Prohibition of Discrimination stipulates that every child, that is, every minor, shall have equal rights and protection in the family, society and the state, regardless of his/her personal characteristics or those of his/her parents, guardians or family members.

The Law on Fundamentals of Educational System<sup>11</sup> prescribes that activities aimed at threatening, belittling, discriminating or singling out groups or individuals on the basis of *inter alia*, their national, ethnic, linguistic background or financial status shall be prohibited in an institution as well as encouraging or not preventing such activities. Discrimination of a group or an individual shall imply each and every direct or indirect, covert or overt exclusion or limitation of rights and freedoms, unequal treatment or failure to act or unjustified differentiation through lax discipline or giving precedence.

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<sup>10</sup> Official Gazette of RS, no. 98/2006.

<sup>11</sup> Official Gazette of RS, no. 72/2009 and 52/2011, Article 44.

Following the analysis of the complaint filed by O. K. and the statement of the primary school A. S. L. D., village V. – B. near N. P., the Commissioner for Protection of Equality establishes that the Roma children, especially children from displaced families, were placed in a less favorable position compared to the non-Roma children. The segregation of children is reflected in the formation of a separate first grade class in the primary school, which is composed only of children belonging to displaced Roma families. The pupils from the segregated first and third grade classes attend lessons together with children attending the pre-school program in a separate building (of the old school) while pupils in other classes at the primary school attend lessons in the new, renovated school building.

The statement by D. M., Director of the primary school A. S. L. D. shows that two first grade classes were formed with a total of 30 pupils. Class I-1 is attended by 15 children out of whom 6 are Roma, while in class I-2 there are 15 Roma pupils. In the two third grade classes with a total 37 pupils, 6 Roma children attend class III-1, while exclusively 17 Roma pupils attend III-2. The segregated classes are composed of Roma children from displaced families, while in the other classes there are a few local Roma children. In this way children are singled out and classified on the grounds of personal characteristics, while the presence of a small number of Roma children from the local families is only a way to hide the obvious segregation of Roma children. Considering the presented arguments it is evident that there were no justifiable and reasonable reasons and there cannot be any justifiable and reasonable reasons for segregating one group of children from the rest of the children on the grounds of national identity and the fact that they come from displaced families.

The Commissioner for Protection of Equality shall remind that the Republic of Serbia adopted the Strategy for Improvement of the Status of Roma in the Republic of Serbia<sup>12</sup>, which sets the grounds for the improvement of the status of Roma in the Republic of Serbia and for the reduction in the gap between the Roma population and the remaining population. The Strategy dedicates special attention to, *inter alia*, the field of education and discrimination, stating that Roma are often exposed to different forms of hidden or overt discrimination in the field of education by school authorities, teachers, school staff, other children and non-Roma parents, as well as the fact that segregated classes are occasionally formed. The Strategy also states that the formation of such segregated classes is often justified by the need to make the classes uniform in order for the instruction to take place more efficiently and successfully, which indicates a didactic approach in which emphasis is placed on the teacher and instruction, while individualization and cooperative approach remain on the back burner.

Evaluating the established facts and legal regulations, the Commissioner for Protection of Equality, pursuant to the Article 33, points 7 and 9 of the Law on the Prohibition of Discrimination issued this Opinion and Recommendation to the Director of the primary school A. S. L. D., village V. – B. near N. P. to undertake appropriate measures with the objective of eliminating the consequences of discriminatory treatment.

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12 Official Gazette of RS, no. 27/2009.

### **1.3. The complaint of the organization P. against the City Administration of the City of Belgrade against discrimination committed on the basis of national identity in the field of housing (File no. 1673 dated 16 October 2012)**

#### **OPINION No. 214/2012**

This Opinion is issued in the procedure conducted upon the complaint submitted by the organization “P.” from B. against the City Administration of the City of Belgrade, Secretariat for Social and Children’s Welfare regarding certain provisions of the contract regulating the use of mobile housing units concluded with displaced members of the Roma national minority, the application of house rules in the newly formed settlement of mobile housing units and the written notice regarding the prohibition of visits and overnight stay in the mobile housing units for individuals who do not live in the container settlement.

#### **1. COURSE OF THE PROCEDURE**

- 1.1. Organization „P.“ from B. submitted a complaint against the City Administration of the City of Belgrade, Secretariat for Social and Children’s Welfare, and Secretariat for Education on 7 June 2012 on behalf of the beneficiaries of mobile housing units who are members of the Roma national minority.
- 1.2. In the complaint it is alleged that the provisions of the contract regulating the use of mobile housing units, which prescribe the obligation of the socialization of mobile housing units’ beneficiaries and the information notice called „house rules“, which listed the forms of prohibited behavior of the inhabitants of the newly formed settlement constitute discrimination against the displaced members of the Roma national minority who now live in the mobile housing units settlement.
- 1.3. In the complaint it is also alleged:
  - That there is a large number of informal settlements in Serbia where only Roma live and that the inhabitants of those settlements certainly represent the most vulnerable category of the population;
  - That since 2009 a large number of forced evictions has been carried out in the territory of the City of Belgrade and that special container settlements were created after the displacement of larger settlements and are inhabited exclusively by Roma;
  - That the clauses of the contract regulating the use of mobile housing units, the house rules in container settlements and the correspondence of the Secretariat for Education of the Belgrade City Administration regarding the

obligation of socialization of the inhabitants of these settlements represent unjustified differentiation in regard to the inhabitants of the container settlements who exclusively belong to the Roma community, which according to the Article 13 of the Law on the Prohibition of Discrimination represents a severe form of discrimination;

- That according to Article 11 of the contract regulating the use of mobile housing units the Secretariat for Social and Children's Welfare has the unilateral right to terminate the contract without any specific justification if "the beneficiary (adult family member) does not show an active engagement in the activities of the City Administration pertaining to socialization of the individuals and their families, which entail – attendance of instruction in pre-school and educational institutions for children, education and employment of the working-age adults, respect of adopted rules of polite behavior towards representatives of the Secretariat and other competent institutions, etc." Also, point 7 of this Article prescribes the same sanction "if the beneficiary refuses three times a proposed job for which he/she fulfills the requirements (documented by a competent institution)";
- That the provision of paragraph 8 (a) of the General Comment No. 4 of the United Nations Committee for Economic, Social and Cultural Rights states that the displaced individuals must be conferred, *inter alia*, legal security of tenure;
- That the rules of polite behavior are not regulated by laws and that they represent a reflection of upbringing, which is different for all individuals, and that taking into consideration that such an obligation is not prescribed for the other party – employees of the Belgrade City Administration – imposition of such an incommensurable obligation constitutes a violation of the principle of equal rights and obligations. Also, taking into account that the rules of polite behavior do not represent a legal standard and that such rules can imply a large number of different behaviors, this clause particularly threatens Roma from the container settlements;
- That during the signing of the contract with the Belgrade City Administration members of the Roma community who live in container settlements did not have the possibility to start a negotiation process or to propose any changes to the contract clauses. In addition, they were not provided with any explanation regarding the provisions of the contract or legal aid for the interpretation of the contract;
- That the contract provision regarding the house rules in the container settlements, which strictly prohibits "relieving oneself next to the mobile housing unit and letting children do the same" is discriminatory because it presupposes that members of the Roma community relieve themselves next to their housing units. Also, such a clause cannot be found neither in residential buildings house rules ordinations nor in tenancy contracts for social apartments that the City of Belgrade signs with vulnerable categories of the inhabitants of Belgrade;



- That the Belgrade City Administration, Secretariat for Education sends correspondence to all Roma citizens who live in container settlements in which they state that “the Secretariat for Social and Children’s Welfare reserves the right to terminate the contract in case the beneficiary does not show an active attitude regarding the efforts of the City to socialize individuals and their families”. The active attitude regarding socialization entails children regularly attending educational institutions, employment of the working-age population but also adoption of the rules of polite behavior towards the representatives of the institutions of the City of Belgrade;
  - That the sanctions for the aforementioned behavior are already foreseen in other laws and that it is not necessary to impose an additional sanction for members of the Roma community – termination of the contract regulating the use of mobile housing units.
- 1.4. In addition to the complaint the following enclosures were submitted: 1) the copy of the contract regulating the use of the mobile housing unit; 2) the copy of the tenancy contract for social apartments; 3) the copy of the house rules in container settlements; 4) the copy of the correspondence sent by the Secretariat for Education to the inhabitants of the container settlements; and 5) the list of forced evictions of members of the Roma community identified in the period 2009-2012.
- 1.5. The Commissioner for Protection of Equality conducted the procedure to establish the legally relevant facts and circumstances in accordance with Article 35, paragraph 4 and Article 37, paragraph 2 of the Law on the Prohibition of Discrimination. During the course of the procedure the statement of the Belgrade City Administration, Secretariat for Social and Children’s Welfare was obtained.
- 1.6. The statement noted the following:
- That the City displaced a few informal settlements in the territory of the city of B.;
  - That the displaced families were provided with accommodation in mobile housing units for which the electricity and water bills are paid by the City, as well as with employment, health care and social protection, schooling for the youngest, transportation to school as well as many other forms of assistance in order to empower the families both socially and economically, to educate them and make them become equal members of society;
  - That the City provided material assistance in many forms – furniture, stoves, heaters, clothes for children and adults, food, toiletries, books, computers as well as assistance for employment, professional training, etc;
  - That the Secretariat organizes continuous trainings, workshops, lessons and counseling for the inhabitants of mobile housing units with the aim of obtaining knowledge and necessary life skills in four areas: employment, health, education and housing;



- That the inhabitants were surveyed on the topic of employment, that they were offered around 200 vacant job positions, and that only 11 percent of inhabitants - pregnant women, older persons and individuals who did not wish to work - were not provided with job offers;
- That the inhabitants of the newly formed settlements were trained regarding the procedure for obtaining the work history booklet;
- That a literacy course for adult members of the Roma community was organized in order to help them to be more competitive in the labor market;
- That different trainings were organized, such as those related to child care, health, alcoholism, hygiene, drugs, family planning, conflict resolution in family, sexually transmitted diseases, etc;
- That several hundred children's books were provided to community centers in the newly formed settlements;
- That computers were provided to community centers in the newly formed settlements;
- That the students from the Faculty of Philology and Faculty of Fine Arts worked with children in the newly formed settlements;
- That numerous visits, excursions and shows were organized for the children from the newly formed settlements;
- That the rules of polite behavior represent a part of the socialization and integration process and their goal is not to be repressive but to enable the families to obtain knowledge and habits necessary for a life in the community of social housing, which provides a dignified life for all human beings living in the 21<sup>st</sup> century. The essence and objective of the house rules is to improve the living conditions of the inhabitants of the newly formed settlements;
- That it has been observed that a number of inhabitants in the newly formed settlements were still relieving themselves next to their housing units and the Secretariat was therefore forced to introduce a specific rule that forbids relieving oneself in inappropriate spaces in the settlement;
- That on one occasion the Institute for Health Care found bacteria from feces on the drinking fountains, which represents a considerable danger for the health of all inhabitants of the settlement;
- That the stand taken by the NGO "P." claiming that the prohibition of relieving oneself in the settlement represents a violation of the Law on the Prohibition of Discrimination is worrying and scandalous;
- That the contract clause regulating the use of mobile housing units, which prescribes compulsory primary schooling for children represents the precondition for the use of mobile housing units and that its objective is the best possible socialization of families, bearing in mind that the City,

as the owner of the mobile housing units, will not tolerate parents who instead of sending their children to school send them to beg, especially in a situation where the City provided all the preconditions for children to regularly attend classes.

- 1.7. Organization “P” submitted the supplement to the complaint in which it stated that on 28 August 2012 the Secretariat for Social and Children’s Welfare of the Belgrade City Administration issued a written notice to the inhabitants of the container settlements stating that individuals who do not live in the container settlement are forbidden to visit the mobile housing units and that any overnight stay of such individuals in the mobile housing units will be sanctioned with a warning, whereas three warnings will lead to the seizure of the mobile housing unit.
- 1.8. The supplement to the complaint also states:
  - That there is no doubt that the City Administration wishes to regulate relations of the inhabitants of the container settlements and to prevent abuse of utilization of the mobile housing units;
  - That there are no other cases of providing housing for individuals where they are prevented to abuse it by severe violation of their rights and by treatment that undermines their dignity, as it is the case with Roma inhabitants of the container settlements;
  - That the students who live in student residence halls have the right to receive daily visits or to receive members of their families and other persons for an overnight stay. Although the students are allowed to receive visits it is clear that there is an interest to prevent abuses – residing of other persons in student halls of residence who do not fulfill conditions for student accommodation. Despite this fact, nobody infringed on the dignity of the students in such a harsh manner by prohibiting anyone to visit or to stay overnight in the student dorms;
  - That Article 3 of the House Rules and Other Rights and Duties of the Students – Beneficiaries of Services – living in the residence halls of the “Student’s Centre Belgrade” dated September 2011, prescribes that the beneficiary of the Student’s Centre hall of residence is entitled to: “[...] receive daily visits from 8:00 AM to 11:30 PM; receive for an overnight stay without financial compensation members of the immediate family (father, mother, sister, brother) and up to one resident living in another student residence hall, one to seven nights per month; receive other persons who are not listed in the previous line for an overnight stay from one to ten nights per month with financial compensation determined by the competent authority of the Institution;
  - That the prohibition of visiting mobile housing units for persons who do not live in container settlements particularly affects those Roma inhabitants of container settlements who have relatives and friends from outside B. and who therefore will not be able to receive visits of friends and relatives

because they are not able to financially sustain accommodation costs for them;

- That this prohibition represents discrimination in the area of the right to private and family life, which is guaranteed by the Constitution of the Republic of Serbia and by Article 8 of the European Convention for Protection of Human Rights and Fundamental Freedoms;
- That there are no regulations which could prohibit any citizen of the Republic of Serbia to receive a daily or overnight visit of the other person who does not live in his/her accommodation if there is a need for such a visit and if the user or owner of the accommodation allows such a visit;
- That, although placement in a less favorable position has been already made by prescribing that the individuals who do not live in container settlements are not allowed to visit or to spend a night in mobile housing units, such behavior by the Belgrade City Administration is worrying because it affects the most vulnerable category of inhabitants in the Republic of Serbia who are threatened to be displaced from the only accommodation they have;
- That contrary to such behavior of the City Administration, the European Court for Human Rights in the case *Connors vs. United Kingdom* (Application no. 66746/01) paragraph 84 states that: „The vulnerable position of gypsies as a minority means that some special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases”;
- That the Belgrade City Administration did not enable Roma inhabitants of the container settlements and beneficiaries of mobile housing units to influence the decision to prohibit third persons visits to the settlements in which they live. Instead, by a subsequent modification of the rules for inhabitants of container settlements the City Administration placed Roma who live there in an unequal position without a reasonable and adequate justification;
- That this “quasi-norm”, which the Belgrade City Administration adopted outside of due procedure and regulations, is not sufficiently clear and precise even though it contains a very serious sanction and therefore does not fulfill even elementary conditions of legal security;
- That, because of this vagueness, the Belgrade City Administration can sanction all behaviors mentioned in the written notice (visits and overnight stay in the mobile housing units of the persons who are not inhabitants of the settlements) with a warning that ultimately leads to eviction from the mobile housing unit;
- That the members of the Roma community are further discriminated against by the vagueness of this „norm“, since they cannot presume which forms of behavior the City Administration will sanction. Linguistic interpretation,

which should be a starting point in an attempt to comprehend the reach of the written notice, could lead to a conclusion that the users of the mobile housing units are forbidden to receive even visits from social workers, health mediators, representatives of non-governmental organizations, journalists or even employees of the Belgrade City Administration.

- 1.9. The copy of the written notice issued by the Belgrade City Administration, Secretariat for Social and Children's Welfare to the inhabitants of the container settlements was enclosed with the complaint.
- 1.10. The Commissioner for Protection of Equality requested an additional statement from the City Administration of the City of Belgrade, Secretariat for Social and Children's Welfare in relation to the allegations of the supplement to the complaint. The following was stated in the statement:
  - That the supplement to the complaint submitted by the organization „P“ in which it is alleged that the City of Belgrade, Secretariat for Social and Children's Protection places into an unequal position and discriminates against the Roma population from the container settlements is groundless;
  - That the inhabitants of these settlements actually enjoy a privileged position because the Roma children have organized transportation from home to school and back, free workshops and trainings; their parents are offered jobs in city companies; inhabitants of the settlements are provided with paid public transportation, etc.;
  - That the house rules, with which the inhabitants are familiar, has the objective to improve living conditions in the newly formed settlements, to keep public order, to prevent conflict situations and threats to the life and security of the inhabitants of the settlements;
  - That the provision regarding the prohibition of daily and overnight visits in the mobile housing units for persons who are not the inhabitants of the settlements does not refer to the prohibition of daily visits for the inhabitants' guests but only to overnight stays in mobile housing units;
  - That it has been observed that the fights in the settlements usually occur when the so-called guests who visit the settlement provoke quarrels with the inhabitants of the settlements, mostly under the influence of alcohol as a result of loud music, property damage, etc.;
  - That this is best confirmed by an event that recently took place in the newly formed settlement Lipovica, when three so-called guests physically assaulted one inhabitant of the settlement and his wife in front of their minor children. Due to this incident, the inhabitant of the settlement, who had lived there for the past three years, was forced to leave the mobile housing unit for some time together with his family out of fear;
  - That in the settlement Kijevo a so-called guest under the influence of alcohol was throwing garbage throughout the settlement and threatened the inhabitants;

- That in the settlement Jabučiji Rit one of the inhabitants regularly invited guests to spend the night in his mobile housing unit, and they disturbed the other inhabitants by organizing revels with loud music, threatening the inhabitants of the settlements and even extorting money from them;
- That the City allows overnight stay of family and friends in cases of sickness, mothers in need of help with babies as well as in the case when old and disabled persons need the help and support of their family members;
- That the City pays for all costs of electricity, maintenance and repairs in the settlement, and that the increased number of people in the settlement means an increase of all costs, especially considering the fact that some of the so-called guests resided in the settlements for weeks and even months, which created additional pressure to the infrastructure – e.g. increased number of people per sanitary unit, larger number of damages, increased consumption of electricity and water;
- That it has been observed that a large number of the so-called guests from the other parts of Serbia come to the newly formed settlements and stay with their relatives for a long time, which is unacceptable for the City because it cannot provide for persons who have permanent residence in Leskovac, Vranje, Niš and in other towns;
- That in its report from last year the European Commission positively evaluated the efforts made by the city of B. regarding the improvement of the status of the Roma population, as did the European Investment Bank and European Bank for Reconstruction and Development, Ombudsman and Directorate for Human and Minority Rights;
- That the City developed very good cooperation with a large number of non-governmental organizations that genuinely wish to help in the work with the Roma population, and contrary to that some non-governmental organizations have only one goal – to constantly criticize all efforts the City makes to create better living conditions for Roma, especially for the youngest ones.

## **2. FACTS**

- 2.1 Having inspected the contract regulating the use of the mobile housing units, the Commissioner for Protection of Equality established that the contract was concluded between the Belgrade City Administration, Secretariat for Social and Children's Protection and the beneficiaries who are defined in Article 2 as individuals in a state of social need who do not have access to affordable housing and who have a regularly registered permanent residence in the territory of the City of Belgrade for at least three years.

- 2.2. The provision of Article 11 of the contract regulating the use of mobile housing units prescribes conditions for the unilateral termination of the contract. Among other things, the stated reasons for the termination of the contract are: „failure to demonstrate an active engagement in activities of the City Administration aimed at socializing the individual and his/her family, which implies attendance in pre-school and educational institutions for children, education and employment of working-age adults, adopted rules of polite behavior towards the representatives of the Secretariat and other competent institutions“. The provision of the same article prescribes that the contract with the beneficiary will be terminated in case that he/she refuses a job offer three times for which he/she fulfills the requirements.
- 2.3. Having inspected the information notice issued by the Secretariat for Social and Children's Protection, which is called „house rules“, it has been established that the document contains a line written in capital letters: „It is most severely forbidden: to relieve oneself next to the mobile housing unit“ and „letting children relieve themselves next to the mobile housing unit“.
- 2.4. Having inspected the correspondence of the Belgrade City Administration, Secretariat for Social and Children's Protection, which is called a „written notice“, it has been established that the document prohibits visits in mobile housing units to persons who do not live in the container settlement and that any overnight visit of such persons will be sanctioned by a warning, whereas three warnings will lead to the seizure of the mobile housing unit.

### **3. MOTIVES AND REASONS FOR ISSUING THE OPINION**

- 3.1. While reaching a decision in this case, the Commissioner for Protection of Equality analyzed allegations stated in the complaint, supplement to the complaint and the statements, as well as relevant laws and regulations in the area of the protection against discrimination.

#### Legal Framework

- 3.2. The Commissioner for Protection of Equality is an independent, autonomous and specialized state authority established on the basis of the Law on Prohibition of Discrimination, with the task to prevent all forms and types of discrimination and to work on the realization of equality in social relations. The competence of the Commissioner for Protection of Equality is broadly defined in accordance with international standards in order to enable the efficient realization of the institution's role. One of the basic competences of the Commissioner for Protection of Equality is to receive and consider complaints of discrimination, to issue opinions and recommendations in concrete discrimination cases and to stipulate measures defined by the Law. In addition, the Commissioner is authorized to initiate the reconciliation procedure as

well as court procedures for protection against discrimination and to submit misdemeanor notices against discrimination as defined by antidiscrimination legislation. The Commissioner is also authorized to warn the public about the most common, typical and severe cases of discrimination and to recommend measures for achieving equality to public authorities.<sup>13</sup>

- 3.3. The Commissioner shall first state that the Framework Convention for Protection of National Minorities<sup>14</sup> in Section II Article 4 guarantees members of the national minorities equality before the law and prohibits any discrimination. By ratification of the International Convention on Elimination of All Forms of Racial Discrimination<sup>15</sup> State Parties, including Serbia, undertake to prohibit and eliminate all forms of racial discrimination and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law.
- 3.4. Article 76 of the Constitution of the Republic of Serbia<sup>16</sup> guarantees equality before the law to persons belonging to national minorities and prohibits any discrimination on the grounds of affiliation to a national minority, while Article 81 prescribes that the Republic of Serbia shall give impetus to the spirit of tolerance and intercultural dialogue and undertake efficient measures for enhancement of mutual respect, understanding and cooperation among all people living on its territory. Article 21 prescribes that all citizens are equal before the Constitution and law, and that 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.
- 3.5. Constitutional prohibition of discrimination is further elaborated in the Law on the Protection of Discrimination<sup>17</sup>, which prescribes in Article 4 that all persons shall be equal and shall enjoy equal status and equal legal protection regardless of personal characteristics and that everyone shall be obligated to respect the principle of equality, that is to say, the prohibition of discrimination. The provision of Article 2, paragraph 1, point 1 prescribes that the terms “discrimination” and “discriminatory treatment” shall be used to designate any unwarranted discrimination or unequal treatment, that is to say, omission (exclusion, limitation or preferential treatment) in relation to individuals or groups, as well as members of their families or persons close to them, be it overt or covert, on the grounds of race, skin color, ancestors, citizenship, national affiliation or ethnic origin, language, religious or political beliefs, gender, gender identity, sexual orientation, financial position, birth, genetic characteristics, health, disability, marital and family status, previous

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<sup>13</sup> Article 33 of the Law on the Prohibition of Discrimination.

<sup>14</sup> Law on Ratification of the Framework Convention for the Protection of National Minorities (Official Gazette of SFRY, no. 6/98).

<sup>15</sup> Law on Ratification of International Convention on the Elimination of All Forms of Racial Discrimination (Official Gazette of SFRY, no. 31/67).

<sup>16</sup> Official Gazette of RS, no. 98/2006.

<sup>17</sup> Official Gazette of RS, no. 22/09.

convictions, age, appearance, membership in political, trade union and other organizations and other real or presumed personal characteristics. Provisions of Article 24 of the Law on the Prohibition of Discrimination prohibit discrimination against national minorities and their members on the grounds of religious affiliation, ethnic origin, religious beliefs and language.

- 3.6. The Law on Protection of Rights and Freedoms of National Minorities<sup>18</sup> stipulates that all forms of discrimination against persons belonging to national minorities based on national, ethnic, linguistic or racial grounds are prohibited.

Analysis of the supplement to the complaint from the aspect of the antidiscrimination regulations

- 3.7. Bearing in mind that the Commissioner for Protection of Equality is competent to conduct procedures based on complaints in cases of discrimination, the subject of the analysis in this case is limited to the parts of the complaint that refer to the breach of regulations prohibiting discrimination, while possible violations of other regulations do not fall within the competence of the Commissioner for Protection of Equality.
- 3.8. Bearing in mind the circumstances of the concrete case it is necessary to examine whether the stipulation of specific rules regulating the use of the mobile housing units and behavior of the persons living in the container settlement, who were previously evicted from the informal Roma settlements, represents discrimination. In this sense, it was necessary to examine whether these persons were placed in a less favorable position in comparison to other persons who are in a similar situation. Accordingly, with the aim to correctly consider the case, the Commissioner for Protection of Equality analyzed the modality of treatment that the Belgrade City Administration, Secretariat for Social and Children's Protection adopted towards other citizens who find themselves in a state of social need and who do not have access to affordable housing and are not displaced from informal Roma settlements. For this reason, provisions of the tenancy contract where the lessor is the Secretariat for Social and Children's Protection were analyzed, bearing in mind that the system of social housing is similar to the system of housing that applies to the beneficiaries of the mobile housing units.
- 3.9. According to Article 10, paragraph 1 of the Law on Social Housing<sup>19</sup> the right to have their housing needs addressed belongs to people without housing, that is, to individuals without housing with adequate standards and those who cannot secure housing from their income based on the market conditions. Social housing terms and conditions are therefore similar to those that the City of Belgrade prescribed for the use of the mobile housing units.

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18 Law on Protection of Rights and Freedoms of National Minorities (Official Gazette of FRY, no. 11/02; Official Gazette of Serbia and Montenegro, no. 1/03; Official Gazette of RS, no. 72/09 – other law).

19 Law on Social Housing (Official Gazette of RS, no. 72/09).



- 3.10. Having analyzed the tenancy agreement it has been established that it does not contain the provision by which socialization represents a precondition for use of the social housing. Also, Article 13 of that contract stipulates the obligation to respect the house rules prescribing, “the tenant and members of his family household are obliged to respect the house rules and specific rules of its implementation”. This agreement also prescribes other obligations of the tenant, which refer to the prohibition of damaging the apartment and common spaces as well as the obligation of the tenant to meet the costs of regular repairs and maintenance. The agreement, however, does not elaborate the provision on the respect of the house rules or specify the forbidden actions, as it is the case with the information notice regarding the “house rules”.
- 3.11. While taking a stand in the present case it was necessary to consider whether there was an objective and reasonable justification to establish specific rules in the contract regulating the use of mobile housing units, “house rules” and written notice that apply in the newly formed settlement, considering the fact that they do not exist in the housing agreements with the beneficiaries of social housing. Therefore, it was necessary to consider whether the Belgrade City Administration, Secretariat for Social and Children’s Protection had an objective and reasonable justification to condition the use of the mobile housing units by the obligation of “socialization of beneficiaries” or to underline prohibited behavior in “house rules” such as the prohibition of relieving oneself next to the housing unit, or to forbid visits of persons who do not live in the settlement by the “written notice”.
- 3.12. It was therefore necessary to establish:
- Whether the objective or effect of the measures undertaken were justified.
  - Whether the measure undertaken and the objective to be achieved by that measure were commensurate.
- 3.13. In order to examine whether the provision of Article 11 of the contract regulating the use of mobile housing units, “house rules” information notice and the written document named “written notice” violate the principle of equal rights and obligations it is first necessary to consider what was the objective of the adoption of these documents.
- 3.14. Bearing in mind the quotes of the statement, it can be concluded that the objective of the Belgrade City Administration was to provide housing for the members of the Roma national minority from Blok 72 in N. B. as well as to integrate them into the system, and therefore it can be stated that the objective was allowed and justified.
- 3.15. The Secretariat for Social and Children’s Protection of the Belgrade City Administration attempted to realize this important objective by affirmative measures such as educational workshops, job offers and similar actions but also by introducing repressive measures, that is, by imposing the contractual obligation which is defined as “to demonstrate an active attitude towards the activities of the City Administration, with the aim of socialization, which

implies attendance of pre-school and educational institutions for children, education and employment of working-age adults, respecting adopted rules of polite behavior towards the representatives of the Secretariat and other competent institutions”. However, the Commissioner for Protection of Equality takes the stand that this measure is not commensurate to the objective that the City Administration wished to achieve, that is, the objective can be also achieved by applying less restrictive measures. Namely, the quoted contractual provision places the displaced members of the Roma national minority who live in mobile housing units in a less favorable position in comparison to all other citizens who find themselves in a similar situation, first of all tenants of social apartments, for whom the same or similar obligations and rules of behavior are not prescribed.

- 3.16. In addition, bearing in mind that the Constitution of the Republic of Serbia and the Law on Fundamentals of Educational System stipulate that primary education is compulsory, failure to enroll the children in school is already sanctioned as a misdemeanor and applies to all citizens, including the inhabitants of the mobile housing units. Prescribing this as a condition is therefore unjustified and not commensurate, especially taking into consideration the fact that the state prescribed the modalities of response and sanctions in cases when parents and guardians fail to enroll their children in school. The Belgrade City Administration had a possibility to achieve the objective without using such repressive measures (unilateral termination of contract), by using affirmative action that would successfully stimulate Roma parents to enroll their children in school. Therefore, the seizure of the mobile housing unit from the beneficiaries in case they do not enroll their children in school represents a measure that is not commensurate to the objective achieved through it.
- 3.17. Also, the condition that is defined as “adopted rules of polite behavior towards the representatives of the Secretariat and other competent institutions” is not clear and can lead to arbitrary interpretation. Bearing in mind that the consequence of noncompliance is in accordance with the provisions of the contract – unilateral termination of the contract, the Commissioner for Protection of Equality shall point out that this condition is not commensurate with the objective that is to be achieved through it, especially when one considers the fact that there is a large social distance towards the Roma population and that it is very easy to characterize certain behaviors as negative (such as those which decline from the “rules of polite behavior”) without deeper understanding of the cultural diversities among people and ways of adopting social constructs such as “polite behavior”, which varies in different communities and is conditioned by a range of subjective and objective circumstances.
- 3.18. There is no doubt that the Belgrade City Administration, Secretariat for Social and Children’s Protection had the objective to secure the maintenance of satisfactory hygiene conditions in the newly formed settlements by posting the “house rules” information notice. However, the Commissioner for the Protection of Equality analyzed whether the measure of the prohibition

of relieving oneself next to the housing unit was additionally motivated by stereotypes related to non-hygiene, which is often linked to the Roma community, and whether the same or similar prohibition exists in regard to other citizens who find themselves in a situation comparable to this one. It has been established that the tenancy contracts regulating social apartments for the citizens who are not displaced from informal Roma settlements contain the provision that underlines the general obligation to respect the house rules, but this obligation does not specify concrete forbidden behaviors, such as, *inter alia*, relieving oneself in front of the housing unit. The Commissioner for Protection of Equality evaluated the statement of the Secretariat for Social and Children's Protection that stated that some of the inhabitants do relieve themselves in inappropriate spaces of the newly formed settlement, which disturbs other inhabitants, and that the Secretariat was forced to issue a notice prohibiting such behavior. The Commissioner for Protection of Equality shall point out, however, that such behavior (relieving oneself in public spaces) is prohibited – it represents a misdemeanor that applies equally to all citizens.

- 3.19. Furthermore, there is no doubt that the Belgrade City Administration, Secretariat for Social and Children's Protection has an interest to prevent abuses regarding the use of the mobile housing units. It has been established, however, that in the tenancy contracts regulating the use of social apartments for citizens who are not displaced from informal Roma settlements there is no such provision that forbids the persons who do not live in social apartments to visit, that is, there is no regulation by which the overnight stay of persons who do not live in social apartments could lead to termination of contract, that is, to seizure of the social apartment. This is understandable, bearing in mind that such a rule would represent an unacceptable limitation of the right to private life. The Commissioner for Protection of Equality evaluated the statement of the City Administration, which stated that there were situations in which the guests of the mobile housing units' beneficiaries caused disorder in the settlements and committed other misconducts but at the same time shall point out that such behaviors are forbidden in the Republic of Serbia and that the prohibition applies to all citizens. When and if such a situation occurs prescribed rules that are valid for all citizens need to be applied. In this way it is possible to secure order in the mobile housing units' settlement in the same way as in any other settlement. Thus, prescribing and issuing notices on such prohibitions exclusively in the settlement where the inhabitants are mostly members of the Roma national minority represents a violation of the principle of equality and is contrary to antidiscrimination legislation.
- 3.20. During the process of reaching a decision in this case the Commissioner for Protection of Equality took into consideration the fact that despite the efforts of different state institutions and civil society organizations that undertake measures directed at the improvement of the status of Roma, this minority is still one of the most vulnerable social groups in Serbia. In addition, the implemented measures have not yet led to considerable improvements regarding living conditions and the status of the Roma population in society.

- 3.21. Although the parts of the statement of the Secretariat for Social and Children's Protection, which refer to different affirmative action measures that the City Administration implements in order to improve living conditions and socialization of the mobile housing units' beneficiaries are not legally relevant for taking a stand in this concrete case, the Commissioner for Protection of Equality wishes to emphasize that these efforts of the City Administration are commendable and expresses the hope that the Belgrade City Administration will continue to work on the improvement of the status of the Roma national minority.

#### **4. OPINION**

The provision of the contract regulating the use of mobile housing units, which the Secretariat for Social and Children's Protection of the Belgrade City Administration concluded with the displaced members of the Roma national minority, which prescribes that the Secretariat for Social and Children's Protection can unilaterally terminate the contract in case the beneficiary does not show an active attitude towards the activities of the City Administration aiming to socialize individuals and members of their families, the "house rules" notice in the newly formed mobile housing units settlement as well as the written notice forbidding visits in mobile housing units to the persons who do not live in the container settlement are not in accordance with the provisions of the Law on the Prohibition of Discrimination.

#### **5. RECOMMENDATION**

The Commissioner for Protection of Equality recommends to the Secretariat for Social and Children's Protection of the Belgrade City Administration the following:

- 5.1. Removal from the contract regulating the use of mobile housing units of the provision prescribing that the Secretariat for Social and Children's Protection can unilaterally terminate the contract in case that the beneficiary does not demonstrate an active attitude towards activities of the City Administration aiming to socialize individuals and members of their families;
- 5.2. Amending the "house rules" information notice placed in mobile housing units, that is, placing the new information with the content that will not differ from the house rules that apply to the rest of the citizens from the social housing system;
- 5.3. Removal of the written notice issued to the beneficiaries of the mobile housing units that the persons who do not live in their settlement are forbidden visit or to stay overnight in their housing units.

The Belgrade City Administration, Secretariat for Social and Children's protection shall inform the Commissioner for Protection of Equality about the measures planned in order to implement this Recommendation within 30 days from the day of receiving this Opinion with Recommendation.

If the Belgrade City Administration, Secretariat for Social and Children's Protection fails to act upon the Recommendation within 30 days, the Commissioner shall issue the measure of caution by passing a decision against which it is not allowed to lodge a complaint; if the Belgrade City Administration, Secretariat for Social and Children's Protection fails to implement the measure of caution, the Commissioner for Protection of Equality shall inform the public about it through the media and in other appropriate ways.

## **2. DISCRIMINATION COMPLAINTS ON THE BASIS OF SEX/GENDER**

### **2.1. The complaint of G. Dj. against P. u. Č. B. against discrimination based on gender in the field of education and upbringing (File no. 631 dated 17 May 2012)**

Acting within the jurisdiction stipulated by law to receive and consider complaints filed pertaining to violations of provisions of the Law on the Prohibition of Discrimination, to issue opinions and recommendations and pass measures stipulated by law (Article 33, paragraph 1, point 1 of the Law on the Prohibition of Discrimination, Official Gazette of the Republic of Serbia, no. 22/2009) concerning the complaint of G. Dj., from N. B. against P. u. Č. B. from N. B. whose plenipotentiary is S. F., Director, the Commissioner for Protection of Equality issues the following

#### **OPINION**

By presenting the New Year's performance in which children acted and in which a part of the acting performance supported prejudice and social patterns based on stereotypic roles of genders, P.u. "Č. B." from N. B. on 22 December 2011 committed an act of discrimination based on gender, prohibited by Article 20 of the Law on the Prohibition of Discrimination and by other regulations.

The Commissioner for Protection of Equality, pursuant to Article 33, paragraph 1, point 1 and Article 39, paragraph 2 of the Law on the Prohibition of Discrimination issues to P.u. "Č. B." from N. B. the following

#### **RECOMMENDATION**

1. S. F., Director of P. u. "Č. B." shall organize workshops, i.e. education programs for children on the topic of eliminating prejudice based on gender role stereotypes with the aim of promoting gender equality.
2. S. F., Director of P. u. "Č. B." shall organize, with the support of experts in the field of child psychology and non-discrimination, a training and professional development program for employees and external collaborators who work with children on the topic of prohibition of discrimination with the aim of achieving a larger degree of sensitivity for recognizing discrimination.

3. In the future, S. F., Director of P. u. "Č. B." shall pay attention not to spread the ideas and attitudes that support prejudices and social patterns based on gender role stereotypes by organizing shows and other activities in the framework of pre-school and the upbringing of children.
4. S. F., Director of P. u. "Č. B." shall inform the Commissioner for Protection of Equality about the measures she plans to undertake in order to act in line with the Recommendation within 30 days from the day of receiving this Opinion with Recommendation.

### *Rationale*

The Commissioner for Protection of Equality received the complaint of G. Dj., mother of the girl enrolled in P. u. "Č. B." in which it is alleged that during the New Year's performance the children were "led" to accept the stand that the corruption of doctors is tolerable, and that by staging the performance an act of discrimination based on gender and sexual orientation was committed.

The complaint stated, *inter alia*:

- That on 22 December 2011 in P. u. "Č. B." a New Year's show was performed by the children from the middle and older groups and that the show abounded with potentiating discriminatory stereotypes;
- That the complainant is a mother of one of the participants of the performance, as well as that she had shared her remarks regarding the contents of the performance, especially those related to potentiating "discriminatory stereotypes" in the performance, with S. F., Director of P. u. and the drama teacher U.
- That her remarks provoked a negative reaction of the Director and drama teacher U. and that during the conversation both of them expressed discriminatory views on the basis of gender and sexual orientation;
- That on the occasion the Director and drama teacher, among other things, stated the following: "those are only children, they love stereotypes...", "...the things you are protesting about are traditional patriarchal values...", "...indeed, your place is in the kitchen...", "...you think you can control me...", "...I hope you will not try to introduce the gay parade in this kindergarten...", "...I could have expected this from anyone but not from you", etc.;
- That during the performance, in the group scenes the boys always stood in front of the girls, they played and sang and the girls stood behind them and were almost a part of the scenery. During the performance the boys were playing fathers who read newspapers, watched TV and told mothers to keep the children quiet. In the play, the boys fought in school or made scenes when they wanted someone to buy them something. The girls played mothers who cooked in the kitchen or girls who "only" dressed up and put on their make-up.
- That, when during the performance two boys were preparing for their part they were told: "play the part and we will see who is better in it", while the girls

were removed on the first wrong word (e.g. when instead of “...mom, can I buy an ice cream..”, they say “...mom, can I buy chocolate..”) with the words “get out” and were roughly moved by the hand;

- That in one part of the show “the doctor said to a grateful patient who brought him chocolate to eat it himself and to build a big house for the doctor”;
- That everyone has the right to an opinion but not to “the postulate of imposing it”, especially if the population in question are children between the ages of 4 and 7 who are in the phase of intensive psycho-sexual development;
- That the complainant also sent a written plea to the Director asking her to act in accordance with the Law on the Prohibition of Discrimination and the Law on Pre-school Education with the aim of preventing similar occurrences in the future, which also entails that the daughter of the complainant should not suffer consequences of the anti-discriminatory views of her mother.

The Commissioner for Protection of Equality conducted the procedure in order to determine the legally relevant facts and circumstances in accordance with Article 35, paragraph 4 and Article 37, paragraph 2 of the Law on the Prohibition of Discrimination, and sent a request to S. F., Director of P. u. “Č. B.” to give a statement on the allegations and the grounds of the complaint.

P. u. “Č. B.” sent a written statement wherein, among other things, it is stated:

- That immediately after being informed that G. Dj. had an objection to the performance concept she was asked to go to a separate room where U. drama teacher and instruction collaborator were also asked to come. It is also stated that the dynamics of that conversation did not go in a good direction because emotions began to unleash. In order to not jeopardize further communication and potentially spoil interpersonal relations, it was decided that they would continue the conversation on another occasion;
- That only two days later a meeting was held with the drama teacher in order to identify possible gender discrimination and sexism. During that meeting the video recording of the performance was reviewed as well;
- That after the conversation and reviewing the video the Director of the P. u. “Č. B.” ascertained that in the performance there was no discrimination on the basis of gender or sexual orientation, as well as that G. Dj.’s daughter was not removed with the words “get out” and that she was not roughly moved by the hand;
- That on the basis of the drama teacher’s statement, the aim of the performance was to encourage children’s creative performance, creativity, humor and their affirmation through preparation and performance of the shows, while the topic of the current quarter period was satiric/sarcastic scenic collage on the topic of every-day life. That the aim of a great heuristic potential that characterized the show was not to set any ideal prototype of the doctor, mother, father, etc., but to develop creativity and humor through children’s imaginative play;



- That the position of P. u. "Č. B." is that the progressive development of children should be enabled and encouraged through joint activities and with finely tuned support. The program of the P. u. "Č. B." was adopted without any objections by the Ministry of Education, Science and Technological Development and it is being implemented in accordance with legal provisions, while the activities related to education and upbringing are adapted to group processes as well as to individual needs of the children;
- That the misunderstanding that occurred on 22 December 2011 was resolved on 31 December with G. Dj., i.e. a peaceful and friendly conversation was conducted, while her daughter did not suffer, and will not suffer any consequences because of G. Dj.'s anti-discriminatory views. The theme of the next show, which is currently in the process of creation, fulfills the aforementioned views and beliefs.

Following the request of the Commissioner for Protection of Equality the video of the New Year's show that took place on 22 December 2011 was subsequently delivered in addition to the statement on the allegations of the complaint.

The Commissioner for Protection of Equality analyzed all the allegations contained in the complaint and the statement to the complaint, the delivered evidence as well as the relevant legal regulations in the field of protection from discrimination.

Having analyzed the allegations of the complaint and the statement it cannot be determined with certainty that the Director of the P. u. and drama teacher expressed discriminatory views during the conversation with G. Dj. in relation to her remarks on the content of the performance. In the complaint it is stated that S. F. and the drama teacher stated, *inter alia*, the following: "those are only children, they love stereotypes...", "...the things you are protesting about are traditional patriarchal values...", "...indeed, your place is in the kitchen...", "...you think you can control me...", "...I hope you will not try to introduce the gay parade in this kindergarten...", "...I could have expected this from anyone but not from you", etc. In the part of the S. F.'s statement which referred to this conversation she stated that: "...the dynamics of that conversation did not go in a good direction because emotions began to unleash..." but she did not deny the allegations of the complaint.

Furthermore, the Commissioner for Protection of Equality shall state that the Director of P. u. noted in her statement that after the conversation with the drama teacher U. and after having reviewed the performance video, she ascertained that its content was not discriminatory on the basis of gender and sexual orientation.

Having reviewed the performance video it has been established that the New Year's show was composed of different parts that the children recited, sang and played in short sketches. In this concrete case, the disputable parts are those relating to acting (short sketches). Following the inspection of the video it was established that at the very beginning of the part of the acting performance the drama teacher only announced "little actors" although the girls had their parts as well – there was no announcement for the girls. In certain segments of the acting part of the performance the girls were standing in the back while the boys exclusively filled the first lines.

Following the analysis of the same evidence it has been established that the part of the performance in which a boy and a girl played sister and brother also promoted stereotypes and inequality of sexes. Namely, the girl was unequivocally placed in a subordinate position – she is asking to go to a birthday party, thereby kneeling in front of her brother, who eventually allows her to go. The stereotypical idea of the male child's dominant role in the family is clearly promoted by such an attitude, as well as subordination of woman in every-day life starting from childhood.

It has also been ascertained that during the performance the drama teacher was supportive with the boys when they made mistakes but not with the girls, as in the example of a girl who was replaced with another girl in a non-supportive manner because she made a mistake while pronouncing the text.

Also, obvious stereotypes and the promotion of the inequality of sexes were noted in the part of the performance when the girls are getting ready to go to the theatre. The girls' part was to put their make-up on, to comb their hair, put on perfume, stand in front of the mirror, etc. Again, the stereotypical idea of the male child's dominant role in the family was promoted, since the girls were trying to leave several times to go to the theatre but they were always coming back because of their younger brother who was crying and demanding that they buy him different things. In the end the girls stayed home since they were late due to having to return home several times because of their brother.

The Commissioner for Protection of Equality shall first state that Article 21 of the Constitution of the Republic of Serbia<sup>20</sup> prescribes that everyone is equal before the Constitution and law and that any discrimination based on any grounds is prohibited, while Article 15 prescribes that the State shall guarantee equality of women and men and develop an equal opportunities policy. The constitutional prohibition of discrimination is further elaborated in the Law on the Prohibition of Discrimination in Article 2, paragraph 1, point 1 where discrimination is defined as any unwarranted discrimination or unequal treatment, that is to say, omission (exclusion, limitation or preferential treatment) in relation to individuals or groups, as well as members of their families or persons close to them, be it overt or covert, on the grounds of race, skin color, ancestors, citizenship, national affiliation or ethnic origin, language, religious or political beliefs, *gender*, gender identity, sexual orientation, financial position, birth, genetic characteristics, health, disability, marital and family status, previous convictions, age, appearance, membership in political, trade union and other organizations and other real or presumed personal characteristics. Article 19 of the Law on the Prohibition of Discrimination prohibits discrimination in the field of education by prescribing that everyone shall have the right to pre-school, primary school, secondary school and higher education and professional training under equal circumstances. By the same article it is forbidden to obstruct or prevent entry into an educational institution to an individual or a group of persons on the grounds of his/her or their personal characteristics, or to exclude them from these institutions, to obstruct or prevent their attendance of classes and participation in other educational

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<sup>20</sup> Constitution of the Republic of Serbia (Official Gazette of RS, no. 98/2006).

activities, *to categorize pupils on the basis of personal characteristics*, to maltreat them and unwarrantedly differentiate among them in other ways and to treat them in an unequal manner.

The provision of Article 20, paragraph 1 of the Law on the Prohibition of Discrimination prescribes that discrimination on the grounds of gender shall be considered to occur in the case of conduct contrary to the principle of the equality of the genders, that is to say, the principle of observing the equal rights and freedoms of women and men in the political, economic, cultural and other aspects of public, professional, private and family life. Paragraph 2 of the same Article prescribes that it is forbidden to *publicly advocate, support and practice conduct in keeping with prejudices, customs and other social models of behavior based on the idea of gender inferiority or superiority, that is, the stereotyped roles of the genders*.

Article 31 of the Gender Equality Law<sup>21</sup> prescribes, *inter alia*, that education about gender equality is an integral part of pre-school education, while paragraph 2 of the same article prescribes that within the framework of teaching curricula, i.e. within syllabuses, *education about gender equality is provided in order to overcome restricted gender-based roles, liberation from gender-based stereotypes and gender-based prejudices*.

It is necessary to point out that the Republic of Serbia ratified international documents and pledged to respect rights and international standards in certain fields that those documents address. By the ratification of the United Nations Convention on the Rights of the Child<sup>22</sup>, which by this act became a part of domestic law, the Republic of Serbia committed itself to respecting the rights of the child and securing the rights contained in the Convention to every child under its jurisdiction, without discrimination and irrespective of the child's or his or her parent's or legal guardian's race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. In the present case Article 29 of the Convention on the Rights of the Child is relevant, which prescribes that *the education of the child shall be, inter alia, directed to preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, etc.* In this regard it is necessary to point out the Committee on the Rights of the Child's General Comment No. 7<sup>23</sup>, where the third part elaborates on principles and rights in early childhood. The Committee on the Rights of the Child points out that the groups of young children must not be discriminated against, and specifically notes that discrimination against female children is a serious violation of rights affecting their survival and all areas of their young lives. As an example of what is considered to constitute discrimination of female children it is pointed out that they may not be expected to undertake excessive family responsibilities and deprived of opportunities to participate in early childhood.

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21 Gender Equality Law (Official Gazette of RS, no. 104/2009).

22 Law on the Ratification of the United Nations Convention on the Rights of the Child (Official Gazette of the SFRY – International Treaties, no. 15/90, and Official Gazette of the FRY – International Treaties nos. 4/96 and 2/97).

23 UN Committee on the Rights of the Child, General Comment No. 7: Implementing child rights in early childhood.

Furthermore, the Convention on the Elimination of All Forms of Discrimination against Women<sup>24</sup> where Article 5 prescribes that States Parties shall *take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women* is also significant for the present case.

In the concrete case, bearing in mind that it concerns a pre-school institution, regulations in the field of education and upbringing are also important. As one of the education objectives the Law on the Fundamentals of Education system<sup>25</sup> prescribes to develop and respect racial, national, cultural, linguistic, religious, *gender* and age equality, tolerance, and respect for differences. Article 44 prescribes the prohibition of discrimination and quotes that activities aimed at threatening, belittling, discriminating or singling out groups or individuals on the basis of their racial, national, ethnic, linguistic, religious background or *gender*, physical and psychological characteristics, developmental impairments and disabilities, health condition, age, social and cultural origin, financial status or political views as well as encouraging or not preventing such activities, and other types of activities stipulated by the law prescribing the prohibition of discrimination, shall be prohibited in an institution. Article 1, paragraph 2 of the Law on Preschool Education<sup>26</sup> prescribes that preschool education is implemented in compliance with the Constitution, the law governing the educational system, ratified international conventions, with regard to children's rights, developmental, educational, cultural, health and social requirements of preschool-aged children and families with children under school age.

Two key questions that arise in this case are:

- Did the Director of P. u. and the drama teacher express views which represent discrimination on the basis of gender and sexual orientation during the conversation they had with the complainant after the performance, as stated in the complaint?, and
- Did one part of the children's New Year's performance on 22 December 2011 support prejudices and social patterns based on stereotypical gender roles, that is, were the regulations on prohibition of discrimination violated, as pointed out in the complaint?

The Commissioner for Protection of Equality shall state that the content of the conversation between the complainant, Director of P. u. and drama teacher that took part after the children's performance cannot be established with certainty because neither of the parties offered any evidence to confirm or to deny the allegations. However, taking into consideration all circumstances of the case, the Commissioner for Protection of Equality shall emphasize that discrimination as well as expressing discriminatory views and ideas cannot be justified by e.g. *turbulent or unleashed*

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24 Law on the Ratification of the United Nations Convention on the Elimination of All Forms of Discrimination of Women (Official Gazette of the SFRY – International Treaties, no. 11/81).

25 Law on the Fundamentals of Education system, Official Gazette of the Republic of Serbia No 72/2009 and 52/2011.

26 Law on Preschool Education (Official Gazette of the Republic of Serbia, no. 18/2010).

*emotions*, that is, the subject of the evaluation in this and in similar cases is the manifested behavior. In addition, it should be noted that from the perspective of anti-discrimination regulations it is not relevant whether a person was aware or had intention to discriminate against by expressing views or by other behavior. The Commissioner for Protection of Equality shall point out that all citizens, especially those working with children should pay due attention to not violate provisions of the Law on the Prohibition of Discrimination by expressing their views, that is, to not spread ideas based on stereotypes, prejudices and other discriminatory attitudes. This is particularly important in the present case, bearing in mind the fact that the Director of P. u., as she herself stated, did not recognize discrimination in the children's performance, which was the reason for submitting this complaint. Also, it is obvious that the Director of P. u. is not sufficiently familiar with anti-discrimination regulations, considering the fact that in her statement she said that she "established" that there was no discrimination in the New Year's performance, which indicates that she is not familiar with the provisions of the Law on the Prohibition of Discrimination, which established the Commissioner for Protection of Equality as a central national body for the prevention of discrimination, that is, for protection of equality, with the mandate to conduct procedures upon discrimination complaints and to establish whether the discrimination was committed or not.

Regarding the allegations of the complaint which refer to the children's show, the Commissioner for Protection of Equality is of the opinion that the part of the children's performance where children were acting, which took place on 22 December 2011, supported prejudices and social patterns based on stereotypical gender roles, that is, in the concrete case the provisions of the Law on the Prohibition of Discrimination were violated, along with other domestic and international regulations prohibiting all types of discrimination based on gender/sex.

From the aspect of anti-discrimination regulations it is unacceptable to use non-differentiated (non-sensitive) language with regards to gender, i.e. in this concrete case it is unacceptable to exclusively use masculine grammatical gender – "little actors", while not announcing the participation of girls in the show and to leave the feminine gender implied. Bearing in mind the age of the children and the fact that the event took place in a pre-school educational institution, such an announcement cannot be justified by the fact that the expression "actors" implies the girls, i.e. "actresses".

Furthermore, discrimination against girls in the performance was evident, along with the promotion of stereotypical ideas and views about gender relations. It is unacceptable that only the boys stand in the first row in the performance, while the girls remain in the last row, behind the boys, as well as placing the girls in a subordinate position (*kneeling* while asking her brother to *allow* her to go to a birthday party), by which the stereotypical idea of the male child's dominant role in the family and subordination of women (girls) in everyday life is unequivocally promoted. The situation with the part of the show where the girls are getting ready to go to theatre is similar for two reasons: a) the way they prepare for going out (putting on their make-up, preening, standing in front of the mirror etc.) is problematic because the idea of a female as an object is represented as acceptable from the earliest age, and b) being late for theatre which results in the girls staying home due to constantly coming back

because of having to care for a younger brother. In addition, the behavior of the drama teacher is also unacceptable, since during the show he was supportive towards the boys as he cheers for them, praises them and allows them to repeat the text when they make a mistake, while he does not behave in the same way with the girls who played the parts in the show, thus observably differentiating between boys and girls.

The Commissioner for Protection of Equality takes the stand that the responsibility of educational institutions is particularly emphasized when the general prohibition of discrimination is concerned, bearing in mind basic principles of education, such as education and upbringing without discrimination and singling out on the basis of gender, social, cultural, ethnic, religious or other affiliation as well as on any other grounds. It is prescribed that educational institutions are responsible to, *inter alia*, promote a spirit of tolerance, respect for human rights and gender equality etc., which additionally indicates that organizing children's shows of such content is intolerable because they reflect the existing stereotypes and construct new ones. This has particularly negative consequences because of the fact that the children are very young and that their critical awareness is not sufficiently developed in order to know the difference between a sarcastic and affirmative tone.

Bearing all this in mind, the Commissioner for Protection of Equality is of the opinion that P. u. "Č. B." from N. B. committed an act of discrimination based on gender/sex, by staging the children's New Year's performance on 22 December 2011 in which one part of the acting performance supported prejudice and social patterns based on stereotypical gender roles. The Commissioner also issued appropriate recommendations for redressing discriminatory behavior.

The content of the recommendations is motivated by the need to eliminate the consequences of the discriminatory act in the best possible way and to prevent further discriminatory behavior, taking into consideration the general goal of the recommendations defined by the law. It is necessary that P. u. "Č. B." organize educational programs for children on the topic of eliminating prejudice based on stereotypical gender roles, with the objective of promoting gender equality. Also, it is particularly important to organize professional trainings on the topic of the prohibition of discrimination for all employees and external collaborators who work with children in order to achieve a larger degree of sensitivity for recognizing discrimination, especially when a worrying fact is considered that even after viewing the video of the performance discriminatory views and stereotypical ideas were not recognized. This is why it has been recommended to organize trainings with the assistance and support of child psychology and non-discrimination experts. Finally, it is necessary that the management and all employees of P. u. pay attention to not spread ideas and views that support prejudice and social patterns based on stereotyped gender roles in the future when organizing performances and other activities in the framework of their activities in pre-school education and upbringing.

Evaluating the established facts and regulations, the Commissioner for Protection of Equality, pursuant to Article 33, paragraph 1, point 1 and Article 39, paragraph 2 of the Law on the Prohibition of Discrimination issued the Opinion with Recommendation to S. F., Director of the P. u. "Č. B." with the aim of eliminating the consequences of discrimination.

In accordance with Article 40 of the Law on the Prohibition of Discrimination, if the Director of P. u. "Č. B." from N. B. fails to act upon the Recommendation within 30 days of the day of receiving it, the Commissioner shall issue the measure of caution by passing a decision against which it is not allowed to lodge a complaint; should the Director of P. u. "Č. B." from N. B. fail to implement the measure of caution, the Commissioner for Protection of Equality shall inform the public about it through the media and in other appropriate ways.

### **3. DISCRIMINATION COMPLAINTS ON THE BASIS OF SEXUAL ORIENTATION**

#### **3.1. The complaint of S. R. from K. against E. Š. in K. against discrimination committed on the basis of sexual orientation in the field of education and upbringing (File no. 160 dated 8 February 2013)**

#### **OPINION NO. 499/2012**

This Opinion is issued in the procedure upon the complaint submitted by S. R. from K. against “E. Š” in K. against discrimination that occurred on the school premises on the basis of personal characteristic – sexual orientation.

#### **1. COURSE OF THE PROCEDURE**

- 1.1. S. R. from K. contacted the Commissioner for Protection of Equality with a complaint against discrimination on the basis of personal characteristic – sexual orientation.
- 1.2. The complaint stated:
  - That S. R. is a part-time student at the high school “E. Š.”;
  - That on 29 October 2012 he came to school in order to take an exam and on that occasion at the premises of the school around ten students attending the school started following him shouting “Kill, kill the faggot” and “Kill, slaughter, the faggot should not live”;
  - That after the verbal assaults he headed towards the staff room when he was hit in the left shoulder;
  - That after the physical assault in the school he sought medical assistance and reported the attack to the police;
  - That about a year ago he publicly declared himself as a homosexual and that because of the maltreatment by fellow students in the school he was forced to leave full-time and continue part-time schooling;



- That in September 2012, before the examination period started, he had sent a letter to the Director of the school in which he asked to be provided with the protection of the school policeman in the hall during the examination, but this did not happen;
  - That he believes that he was discriminated against on the basis of personal characteristic – sexual orientation.
- 1.3. In addition to the complaint and the supplement to the complaint he also delivered the following documents: extracts of the media articles regarding the event he complained about and the medical records by the medical doctor M. I. V. dated 29 October 2012 with the prescription for injections, medical records by the medical doctor N. D. from the Health Centre K. dated 31 October 2012 with the general findings on S. R.'s health condition and the medical record by medical doctor V. M. S., psychiatrist dated 31 October and 6 November 2012 with the therapy prescriptions.
- 1.4. The Commissioner for Protection of Equality conducted the procedure in order to establish the legally relevant facts and circumstances in accordance with Article 35, paragraph 4 and Article 37, paragraph 2 of the Law on the Prohibition of Discrimination<sup>27</sup>. Therefore, the statement of "E. Š" in K. was obtained during the course of the procedure.
- 1.5. In the statement the Director M. O. stated:
- That S. R. is a part-time student of Culinary Studies and that he is currently enrolled in third grade;
  - That he publically declared his sexual orientation and because of this he asked to have a school policeman present in the school during his examinations;
  - That this request was met and therefore the allegations of the complaint regarding the absence of the school policeman on the day of the event that S. R. is complaining about are groundless;
  - That the Director found out about the incident which occurred on 29 October only the day after, when she was informed that the charges were filed at the police station, and from the media, because S. R. did not report the violence to the Director and to the school policeman;
  - That, based on a suspicion of violence, she collected statements from teachers, staff and students regarding the allegations made by S. R. On the basis of the written and oral statements it was not possible to determine that a physical assault took place but it was established that there were certain comments regarding S.R.'s sexual orientation;
  - That in accordance with the Law on Fundamentals of Education System and the Rulebook on procedures in the institutions in response to violence, abuse and neglect the Director undertook the following activities:

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27 Official Gazette of RS, no. 22/09.

- 1) The meeting of the Team for Protection from Violence, Abuse and Neglect was held on 1 November 2012, when the conclusion was reached that it is necessary to intensify educational work with students and that the students needed to be reminded about all forms of violence;
  - 2) The Teaching Council session took place on 2 November 2012, when the employees were again informed about the obligation of responding to violence or suspected violence;
  - 3) The class teachers held parents/teachers meetings on 5 November 2012, where they reminded the parents about the content of the Rulebook on procedures in the institutions in response to violence, abuse and neglect;
- That S. R. was present in the school on five occasions after 29 November 2012 and that nothing similar happened again.

In addition to the statement an official note n. 565 dated 14 November 2012 was submitted. The document was prepared with regard to the suspicion of possible violence committed against S. R.

1.6. Following the request of the Commissioner for Protection of Equality, in order to fully establish the facts "E. Š." in K. also submitted the supplement to the statement in which M. O., Director stated:

- That after the conversation with the school policeman it was established that he was present in the school on that day but that nobody reported any problem;
- That the school policeman cannot send a written statement without the consent of his superior, but that he certainly does not have a problem to do that once consent is obtained;
- That the school employees are not entitled to take statements from the school policeman and that they addressed the Chief of the Police Station in K. and asked for a statement but that the statement did not arrive within the deadline prescribed for sending the reply to the Commissioner for Protection of Equality.

The supplement to the statement also contained the correspondence no. 12 dated 21 January 2013, which had been sent to the Police Directorate in Prokuplje, as well as the statement of B. S., a teacher from the school.

1.7. In the statement of the teacher B. S. it was stated:

- That on 29 October 2012 during the break between the classes she went to the cooking classroom with the student S. R. for consultations with the teacher of that subject;
- That while they were passing through the hall on the way to the cooking classroom many students were standing in the hall and she heard the teasing, and she turned to the students and told them to lower their voices.

## **2. FACTS**

- 2.1. During the course of the procedure, allegations of the complaint, statements, submitted evidence and excerpts of the newspapers articles were considered and it has been established that S. R. gave a statement to the media claiming that he was physically assaulted in school and that he reported the assault to the police. In his statement for the media he said that on his way to the staff room around ten boys he came across followed him shouting, “Kill, kill the faggot” and “Kill, slaughter, the faggot should not live”. In his statement he said that on that occasion he was hit in the left shoulder. He also stated that during the incident his class teacher B. S. came across and that the reactions of the students calmed down at that moment but did not stop.
- 2.2. Having examined the medical records submitted in the supplement to the complaint it has been established that on 31 October and 6 November 2012 B. M. S., psychiatrist prescribed to S. R. medication therapy for treatment of anxiety and that she referred him to a neurologist. Having examined the medical record issued by M. I. V., medical doctor, it has been established that on 29 October 2012 she prescribed the injections of Diclofen to S. R. The medical record by N. D., medical doctor from the Health Center K. dated 31 October 2012 stated that S. R. came to the medical examination by himself and that he reported that around ten of his peers physically assaulted him because of his sexual orientation as well as that the event took place on 29 October 2012.
- 2.3. Having inspected the official note no. 565 dated 14 November 2012 signed by M. O., Director of “E. Š.” in K. it has been established that S. R. did not report the violence to the Director or to the school policeman. By further inspection of the official note it has been established that due to this incident the school initiated an investigation in the course of which the professors B. S. and K. B. as well as school janitor R. E. and the student M. T. gave their statements. Also, in the official note it is written that it had been established that the comments directed to S. R. regarded sexual orientation and that the incident took place during the break between the classes. Having further inspected the official note it has been established that on 1 November 2012 a meeting was held with the Team for Protection from Violence, Abuse and Neglect, where the conclusion was reached that it is necessary to intensify educational work with students and to remind them of the forms of violence, while the class teacher B. M. took the commitment to intensify educational work with her class III/2 in collaboration with the pedagogue and parents, since it was concluded that the case represented the first level of violence – social violence, mockery. Also, it has been established that at the meeting of the Teachers’ Council held on 2 November 2012 a conclusion was reached that the parents should be reminded and informed about the content of the Rulebook on procedures in the institutions in response to violence, abuse and neglect, and that they should undertake preventive activities in collaboration with the school.

- 2.4. Having inspected the correspondence no. 12 dated 21 January 2013 addressed to the Chief of the Police Station Kuršumlija, Police Directorate Prokuplje, it has been established that the Director of “E. Š.” in K. asked for information regarding the presence of the school policeman on 29 October 2012 since S. R. stated in his complaint to the Commissioner for Protection of Equality that the school policeman was not present at the school on that day.

### **3. MOTIVES AND REASONS FOR ISSUING THE OPINION**

- 3.1. While taking the decision in the present case the Commissioner for Protection of Equality considered the allegations of the complaint and the statements as well as relevant legislation in the field of protection from discrimination.

#### Legal framework

- 3.2. The Commissioner for Protection of Equality is an independent, autonomous and specialized state authority established on the basis of the Law on the Prohibition of Discrimination, with the task to prevent all forms, types and cases of discrimination and to work on the realization of equality in social relations. The competence of the Commissioner for Protection of Equality is broadly defined in accordance with international standards in order to enable the efficient realization of the institution's role. One of the basic competences of the Commissioner for Protection of Equality is to receive and consider complaints of discrimination, to issue opinions and recommendations in concrete discrimination cases and to stipulate measures defined by the Law. In addition, the Commissioner is authorized to initiate the reconciliation procedure as well as court procedures for protection against discrimination and to submit misdemeanor notices against discrimination as defined by anti-discrimination legislation. Also, the Commissioner is authorized to warn the public about the most common, typical and severe cases of discrimination and to recommend measures for achieving equality to public authorities.<sup>28</sup>
- 3.3. Constitution of the Republic of Serbia<sup>29</sup> prohibits any 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.<sup>30</sup>
- 3.4. The constitutional prohibition of discrimination is further elaborated in the Law on the Prohibition of Discrimination<sup>31</sup>, where discrimination is defined as any unwarranted discrimination or unequal treatment, that is to say, omission

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28 Law on the Prohibition of Discrimination, Article 33.

29 Official Gazette of RS, no. 98/06.

30 Constitution of the Republic of Serbia, Article 21.

31 Law on the Prohibition of Discrimination, Article 2.

(exclusion, limitation or preferential treatment) in relation to individuals or groups, as well as members of their families or persons close to them, be it overt or covert, on the grounds of race, skin color, ancestors, citizenship, national affiliation or ethnic origin, language, religious or political beliefs, *gender*, gender identity, sexual orientation, financial position, birth, genetic characteristics, health, disability, marital and family status, previous convictions, age, appearance, membership in political, trade union and other organizations and other real or presumed personal characteristics. Article 6 of the Law on the Prohibition of Discrimination prescribes that direct discrimination shall occur if an individual or a group of persons, on the grounds of his/her or their personal characteristics, in the same or in a similar situation, are placed or have been placed or might be placed in a less favorable position through any act, action or omission. Another relevant provision is Article 12, which forbids to expose an individual or a group of persons, on the basis of his/her or their personal characteristics, to harassment and humiliating treatment aiming at or constituting violation of his/her or their dignity, especially if it induces fear or creates a hostile, humiliating or offensive environment. Articles 15-27 of the Law on the Prohibition of Discrimination define special cases of discrimination. In addition to other cases, Article 21 prescribes that everyone shall have the right to declare his/her sexual orientation, and discriminatory treatment on account of such a declaration shall be forbidden. Taking into account the circumstances of this concrete case, Article 19, which prescribes prohibition of discrimination in the field of education and professional training is also relevant as it prescribes that it is forbidden to obstruct or prevent entry into an educational institution to an individual or a group of persons on the grounds of his/her or their personal characteristics, or to exclude them from these institutions, to obstruct or prevent their attendance of classes and participation in other educational activities, to categorize pupils on the basis of personal characteristics, to maltreat them and unwarrantedly differentiate among them in other ways, and to treat them in an unequal manner.

- 3.5. The provision of Article 44 of the Law on Fundamentals of Education System<sup>32</sup> prescribes that activities aimed at threatening, belittling, discriminating or singling out groups or individuals on the basis of their racial, national, ethnic, linguistic, religious background or gender, physical and psychological characteristics, developmental impairments and disabilities, health condition, age, social and cultural origin, financial status or political views as well as encouraging or not preventing such activities, and other types of activities stipulated by the law prescribing the prohibition of discrimination, shall be prohibited in an institution. The law uses the term discrimination of individuals or groups to designate any direct or indirect, overt or covert, exclusion or limitation of rights and freedoms, unequal treatment or omission, that is, unwarranted discrimination by favoritism or preferential treatment.

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32 Official Gazette of RS, nos. 72/2009 и 52/2011.

- 3.6. The Law on Youth<sup>33</sup> also prescribes the prohibition of discrimination and Article 5 states that it is prohibited to differentiate or unequally treat young people, whether directly or indirectly, on the grounds of race, gender, nationality, religion, language, social origin, property, membership in political parties and other organizations, mental or physical disability, health status, physical appearance, sexual orientation, gender identity and other real or assumed personal characteristics.

### Analysis of the evidence submitted with the complaint

- 3.7. Based on the evidence submitted during the course of the procedure, it can be stated that S. R., part-time student of “E. Š.” in K. was present in the school on 29 October 2012 and that at the premises of the school during the break between classes around ten students directed comments to him regarding his sexual orientation. On the basis of the claim of the complainant and taking into consideration that the Director of the school in her statement did not deny the content of the comments directed to S. R. but did confirm that the comments regarded his sexual orientation, it can be concluded that the words “Kill, kill the faggot” and “Kill, slaughter, the faggot should not live” were directed to S. R. Therefore, the verbal insults referred exclusively to his sexual orientation, and it is thus certain that S. R.’s sexual orientation was the cause of the verbal comments.
- 3.8. In the course of the procedure it was not possible to establish if on the occasion of the incident that S. R. is complaining about a physical assault occurred in addition to the verbal one, taking into consideration that S. R. gave a statement to the media that a physical assault took place, as well as that he told this to the medical doctor during the medical examination but in the statements that the Director of the school collected no one who was present when the incident took place confirmed that physical violence happened – all claimed that the conflict was a verbal one.
- 3.9. The Commissioner shall state that the words the students directed to the complainant S. R. represent an act of discrimination since the words and expressions used insult S. R.’s dignity and because the degrading comments concerning his sexual orientation were brought out. This behavior carries a specific weight because the insulting statements and degrading comments at the account of the complainant were expressed in school, that is, in an educational institution.
- 3.10. The Commissioner for Protection of Equality has established that S. R. asked the school policeman several times to be present in the school, taking into consideration that after having publicly declared his sexual orientation he was verbally assaulted and disturbed in school.
- 3.11. The Commissioner for Protection of Equality also took into consideration that after the incident the Director of the school called up a meeting with the

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<sup>33</sup> Official Gazette of RS, no. 50/2011.

Team for Protection from Violence, Abuse and Neglect, where the conclusion was reached that educational work with students would be intensified, while the class teacher B. M. committed on that occasion that she would intensify educational work with her class III/2 in cooperation with the pedagogue and parents. Therefore, the Commissioner takes the opportunity to commend the school that in this situation reacted in accordance with the Rulebook on procedures in institutions in response to violence, abuse and neglect. Taking into consideration the fact that a bylaw which would regulate the modalities of institutions' response in case of discrimination has not yet been adopted, the only available act that the school had on its disposal in this situation was the Rulebook on procedures in the institutions in response to violence, abuse and neglect, along with the anti-discrimination regulations in force. Also, the Commissioner uses this opportunity to once again<sup>34</sup> emphasize the importance and necessity of adopting a bylaw, which would regulate the criteria for recognizing discrimination in schools, and identify modalities of preventing discrimination, recalling at the same time the provisions of the Law on Fundamentals of Educational System.<sup>35</sup>

- 3.12. The Commissioner for Protection of Equality emphasizes in particular that even though in the present case the discrimination act was committed by the students the responsibility of the school is indisputable, recalling the content of the Rulebook on procedures in the institutions in response to violence, abuse and neglect<sup>36</sup>, which establishes the duty of the school to provide conditions for a safe and encouraging environment to grow up in and for the development of the child and pupil, protection from all forms of violence, abuse and neglect and social reintegration of the child and pupil who committed or was exposed to violence, abuse or neglect. Bearing in mind the fact that S. R. publically declared his sexual orientation as well as that, as he claims, he left full-time schooling because of the maltreatment by his peers, the school should have begun with an intensive and continuous work with students regarding raising the degree of tolerance and acceptance of diversities since it could have supposed that the risk of violence and abuse was imminent bearing in mind first of all the negative attitude of the majority of society towards the LGBT population. The school, however, did not undertake preventive activities prescribed by the Rulebook on procedures in the institutions in response to violence, abuse and neglect, such as raising awareness and sensitivity of the pupils for recognizing the violence, abuse and neglect, nourishing the atmosphere of cooperation and tolerance in which there is no tolerance for violence, abuse and neglect. On the basis of everything aforementioned it can be concluded that the school did not take action in due time in order to prevent discrimination, which contributed to the persistence of a discriminatory attitude of the pupils towards the LGBT population and paved the way for the incident about which S. R. is complaining.

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34 Regular Annual Report of the Commissioner for Protection of Equality for 2011, Section 9, Recommendations for suppressing discrimination and improving equality, point 9.

35 Article 171, paragraph 1.

36 Official Gazette of RS, no. 30/10.

- 3.13. During the process of taking the decision in the present case, the Commissioner for Protection of Equality bore in mind that persons of different sexual orientation in Serbia currently represent one of the most vulnerable social groups and that they face numerous threats, harassment and problems in society on a daily basis. Bearing this in mind, the Commissioner for Protection of Equality believes that special attention must be dedicated to the prevention of humiliation, harassment and degrading treatment and that all competent state authorities must act decisively by undertaking measures against anybody who by their statements and actions provoke hatred and intolerance towards the LGBT population.

#### **4. OPINION**

“E. Š.” from K did not undertake adequate measures in a timely manner in order to overcome their pupils’ discriminatory attitudes directed towards the LGBT population and to prevent discrimination against S. R. based on his sexual orientation, which contributed to around ten students discriminating against S. R. on 29 October 2012 by directing insulting and disturbing comments related to his sexual orientation, contrary to Article 12 of the Law on the Prohibition of Discrimination that prohibits the exposure of an individual or a group of persons, on the basis of his/her or their personal characteristics, to harassment and humiliating treatment aiming at or constituting violation of his/her or their dignity, especially if it induces fear or creates a hostile, humiliating or offensive environment. By the omission to timely undertake appropriate measures aimed at preventing discrimination “E. Š.” from K. violated Article 44 of the Law on Fundamentals of Educational System.

#### **5. RECOMMENDATION**

The Commissioner for Protection of Equality recommends to “E. Š.” from K. the following:

- 5.1. To undertake without delay all necessary actions and measures to secure that all employees in the educational institution attend training/professional development on the topic of prohibition of discrimination based on sexual orientation and other personal characteristics in order to ensure a larger degree of sensitivity of all employees.
- 5.2. To undertake without delay all necessary measures from its competence to introduce appropriate programs and trainings in order to develop a spirit of tolerance, acceptance of diversities and non-discriminatory behavior among students.



“E. Š.” in K. shall inform the Commissioner for Protection of Equality about the measures planned with the aim of acting in line with this recommendation within 30 days of receiving this Opinion with Recommendation.

In accordance with Article 40 of the Law on the Prohibition of Discrimination, if “E. Š.” in K. fails to act upon the Recommendation within 30 days of the day of receiving it, the Commissioner shall issue the measure of caution by passing a decision against which it is not allowed to lodge a complaint; if “E. Š.” in K. fails to implement the measure of caution, the Commissioner for Protection of Equality shall inform the public about it through the media and in other appropriate ways.

## **4. DISCRIMINATION COMPLAINTS ON THE BASIS OF DISABILITY**

### **4.1. The complaint of M. G. against NES against discrimination on the basis of disability in the field of work and employment (File no. 906 dated 15 June 2012)**

Acting within the jurisdiction stipulated by law to receive and consider complaints filed pertaining to violations of provisions of the Law on the Prohibition of Discrimination and to issue opinions and recommendations in concrete cases (Article 33, paragraph 1, point 1 of the Law on the Prohibition of Discrimination, Official Gazette of the Republic of Serbia, no. 22/2009) concerning the complaint of M. G. from B., the Commissioner for Protection of Equality issues the following

#### **OPINION**

In the procedure conducted upon the complaint of M. G. from B. against National Employment Service (NES) it has been established that the officials employed in the National Employment Service branch in Belgrade treated M. G. in a degrading manner on 29 February 2012 while he was applying to be registered in the records of the NES as well as that this kind of treatment is provoked by the fact that M. G. is a person with a disability who needs services of sign language interpretation, which constitutes an act of discrimination – harassment and degrading treatment – prohibited by Article 12 in connection to Article 26 of the Law on the Prohibition of Discrimination.

In accordance with Article 33, paragraph 1, point 1, of the Law on the Prohibition of Discrimination the Commissioner for Protection of Equality issues to the National Employment Service the following

#### **RECOMMENDATION**

1. The National Employment Service shall address a written apology to M. G. because of the harassment and degrading treatment of their officials towards M. G. on 29 February 2012 while he was applying for registration at the NES.
2. The National Employment Service shall undertake all necessary measures in order to provide that all persons with disability have a procedure that respects

individual specificities and prevents any form of direct and indirect discrimination when using the services of the NES.

3. The National Employment Service shall undertake without delay all necessary measures to provide that its employees pass training/professional development on the topic of discrimination in general, and discrimination of persons with disabilities in particular in order to achieve a larger degree of sensitivity of all employees in regard to this social phenomenon.
4. The National Employment Service shall inform the Commissioner for Protection of Equality about actions it undertook in order to act in line with this Recommendation within 30 days of the day of receiving this Opinion with Recommendation.

### *Rationale*

The Commissioner for Protection of Equality received the complaint of M. G. against the National Employment Service on 5 March 2012 since he believes he was discriminated against on the basis of his disability. The complaint stated the following:

- That on 29 February 2012 he went to register with the National Employment Service accompanied by his interpreter for sign language but that the employees in the NES branch in Belgrade did not allow her to be present with the explanation that according to the “house policy” the interpreters are not allowed to assist;
- That on that occasion he had a verbal conflict with I. T., the only officer on the territory of Belgrade in charge for persons with disabilities; that she insulted him three times; and that he could not engage in proper communication with her without his interpreter because the officer’s knowledge of sign language was at a very low level;
- That M. B., Chief of Department, whom he addressed because of this problem, informed him that he could not change the officer and confirmed that the “rules of the house” did not allow the interpreter’s assistance since the officer with whom he had a verbal conflict was trained to use sign language and is a certified court interpreter;
- That he hired the interpreter through the Sign Language Interpreting Service in Belgrade, which works with the City of Belgrade Organization of the Deaf.

The complainant believes that the National Employment Service and the employees of this institution are discriminating against him since they prevented him to use the services of his interpreter for sign language. In addition, he suggested a hearing with I. B., the interpreter for sign language, who was present in the National Employment Service on 29 February 2012 during the event about which he is complaining.

The Commissioner for Protection of Equality conducted the procedure in order to establish the legally relevant facts and circumstances in accordance with Article 35, paragraph 4 and Article 37, paragraph 2 of the Law on the Prohibition of Discrimination.

The National Employment Service submitted their written statement on 9 April 2012, wherein it is stated:

- That I. T., the advisor for work with persons with disabilities, stated that there was no discrimination against or unfriendly treatment of M. G. during their individual conversation;
- That the advisor invited M. G. to enter the office, without physical contact or aggression, in order to avoid talking in the hall, since the procedure of the National Employment Service prescribes that individual conversations with persons who are not NES employees shall be carried out in offices at the scheduled time;
- That M. G. refused to communicate without his interpreter and that the advisor accepted this at once;
- That the interpreter was present during the individual conversation, which is why the allegations from the complaint that M. G. was not allowed to use services of his interpreter for sign language in communication with the employees of the National Employment Service are not objective;
- That according to the statement of the advisors for employment of persons with disabilities, who work in the office n. 9 (I. T. and S. B.) the misunderstanding occurred when the interpreter I. B. was asked to slightly move aside because the other advisor had a scheduled interview with another unemployed person at the same time. M. G. and his interpreter were revolted by this request and asked to speak with the Chief of Department, which was immediately provided;
- That according to the statement of M. B., Chief of Department, the client was not told that according to the “rules of the house” he could not use his interpreter, and that such rules do not exist;
- That the Chief of Department stated that there were NES employees – advisors – such as I. T. who had attended the seminar “School of Sign Language”, organized by the Association of the Deaf and Hard of Hearing, where they gained basic knowledge and the level of interpreter for sign language in order to improve their services and communication with deaf persons;
- That the Chief of Department suggested that M. G. could have changed the advisor if he wanted to and that the allegations of the complainant that he was not allowed to change the advisor are groundless;
- That the Chief of Department, without any intention to insult M. G., used by mistake the expression “gesture speech” instead of “sign language”, and that she used terms “deaf” and “hard of hearing” because they are used in usual communication by the employees of the National Employment Service and by the Association of the Deaf and Hard of Hearing of Serbia and the City of Belgrade Association of the Deaf and Hard of Hearing;
- That the National Employment Service does not have a document regulating the modalities of communication with persons with a hearing disability and that unemployed persons with hearing impairment may use the services of

interpreters for sign language in all local branches of the National Employment Service;

- That there is no document of the National Employment Service that prohibits the use of sign language interpreters' services during conversations with the employees and that M. G., as any other person, was allowed to use the services of an interpreter for "gesture speech" in communication with the employees of the NES;
- That the local branches of the National Employment Service employ 37 advisors for the employment of persons with disabilities, and that in each local branch there is at least one employment advisor for persons with disabilities;
- That so far around 30 employment advisors for persons with disabilities attended the seminar "School of Sign Language" organized by the Association of the Deaf and Hard of Hearing of Serbia, where they gained knowledge required for interpreters of sign language;
- That due to all the aforementioned M. G.'s complaint is groundless.

Pursuant to Article 37, paragraph 1 of the Law on the Prohibition of Discrimination the Commissioner for Protection of Equality requested a statement from I. B. during the course of the procedure. The statement of I. B., interpreter for sign language, dated 31 May 2012 states:

- That she has been engaged in Sign Language Interpreting Service in Belgrade since December 2009, working with City of Belgrade Association of the Deaf as well as that she was assigned to M. G. according to the working schedule since he needed this service while applying for registration at the National Employment Service;
- That on 29 February 2012 around 10 AM she and M. G. went together to the NES branch in Belgrade; that M. G. knocked on the office door where he was supposed to go and that two officers from that office told him to wait until one of them finishes the interview. After that the officer came out to the hall, stood between her and M. G. and without introducing herself, with a hand gesture said to M. G: "you come in alone, she cannot";
- That an argument developed in the hall because M. insisted to go to the office with the interpreter but the officer told him she knew sign language, that she was an interpreter and that she was the authorized officer in the National Employment Service for persons with disabilities, as well as that bringing the interpreter was not allowed;
- That M. became very upset because of the impossibility to use the interpreter's services, that he stressed that he needed complete and accurate information, that he had the right to be provided with such information and that he could choose his interpreter;
- That during this argument in the hall the officer whose name, she believed, was I. told M.: "How do you think you will get a job anywhere if you are taking your

interpreter with you all the time; an employer would hardly select you; this way you are showing right away that you are not self-sufficient”;

- That M. decided to enter the office alone, while I. B. stayed in the hall and waited for him but soon after the officer went out and asked her to come inside because they could not understand each other, as she said;
- That she came in the office only after M. called her and then the officer said that she would not address M. directly but through her, considering that he had his interpreter now;
- That because of such an attitude she insisted to respect the rules, saying to the officer that the interpreter was just an intermediary in their communication and that the officer should not pay attention to her but directly address M.;
- That on that occasion M. was supposed to fill a form, which he had brought with him, but since he did not fill it out at home the officer told him that he had two minutes to complete it;
- That the form was quite extensive, with many data, and that in her opinion a deaf person should fill it out with an interpreter, which they did;
- That M. gave the form to the officer, who then entered the data from the form to the computer database;
- That in that moment the officer's colleague who was in the office talked to someone on the phone and that she started interpreting her conversation to M., considering that the rules of the Interpretive Service require the interpreter to translate everything he/she hears in the room. However, the officer became very angry when she saw that the interpreter translated her conversation to M. and said that her conversation did not concern him and that the interpreter was unprofessional, for which she could be made accountable;
- That because of such behavior M. stood up and asked for a manager, which was allowed and they were referred to office n. 6;
- That M. asked the Chief of Department to change the officer in order to complete his application and the procedure because of which he came to the NES but she said that he “could not change the officer because I. was the only one who was paid to do that job and the only one who knows *that gesture speech*”;
- That the Chief of Department used insulting terms during the conversation such as “invalids, gesture speech” etc., which insulted M. very much;
- That the Chief of Department emphasized that the policy of the National Employment Service was that external interpreters are not allowed but that since that was the first time for M. they had “turned a blind eye” and that nevertheless he should know this for the future;
- That upon M.'s request for explanation of such treatment and practice the Chief of Department stated that the National Employment Service had paid the seminar organized by the Association of the Deaf and Hard of Hearing of Serbia and that the officer obtained the certificate for court interpreter;

- That M. claimed that he was sure the officer did not have that diploma, noting that it was true that she had knowledge of sign language but that it was absolutely not enough for complete and accurate communication with a deaf person, which is why the Chief of Department called the officer on the phone to check which diploma she had and was told that the officer had the diploma for interpreter for the second level out of the existing four;
- That the Chief of Department repeated several times that it was “not allowed to use the services of other interpreters in the National Employment Service since this was the policy of the house”;
- That in the end they came back to the same officer but that there was no further mentioning of this situation and the verbal conflict, and that they finished the procedure for which they came to the NES.

In her statement I. B. highlighted that the seminars for obtaining certificates for translators and interpreters of sign language, organized by the Association of the Deaf and Hard of Hearing of Serbia, last five days and that many institutions pay for their employees to pass the training and obtain the certificate for translators and interpreters but that the knowledge obtained in five days is not even sufficient for basic communication and surely not for more professional services as the one that should be provided by the National Employment Service.

While taking a stand in the present case, the Commissioner for Protection of Equality analyzed the allegations from the complaint and the statements, the written statement of the witness who was present during the event as well as the relevant legislation in the field of protection from discrimination.

Based on the allegations from the complaint and the statement of I. B. it has been established that there was a problem with behavior and attitude of I. T., advisor for persons with disabilities, towards M. G. Such an attitude was also confirmed by the fact that the advisor did not succeed in establishing a good relationship with M. but on the contrary, the conflict situation led to M. G. addressing M. B., Chief of Department. It has been also established on the basis of the consistent statements of the complainant and I. B. that the conflict occurred precisely because in his communication with the employees M. G. was not allowed to use the services of I. B., interpreter for sign language.

While considering the circumstances of the present case the Commissioner for Protection of Equality first of all bore in mind that the Republic of Serbia ratified the Convention on the Rights of Persons with Disabilities (Official Gazette of RS – International Treaties, no. 42/2009), where Article 2 prescribes that discrimination on the basis of disability means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. Provision of Article 21 of the Constitution of the Republic of Serbia (Official Gazette of RS, no. 98/2006) prescribes that 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 constitutional prohibition of discrimination is further elaborated in the Law on the Prohibition of Discrimination, which in Article 2, paragraph 1, point 1 prescribes that the terms “discrimination” and “discriminatory treatment” shall be used to designate any unwarranted discrimination or unequal treatment, that is to say, omission (exclusion, limitation or preferential treatment) in relation to individuals or groups, as well as members of their families or persons close to them, be it overt or covert, on the grounds of race, skin color, ancestors, citizenship, national affiliation or ethnic origin, language, religious or political beliefs, gender, gender identity, sexual orientation, financial position, birth, genetic characteristics, health, disability, marital and family status, previous convictions, age, appearance, membership in political, trade union and other organizations and other real or presumed personal characteristics. Taking into account the circumstances of the present case the provision of Article 12 of the Law on the Prohibition of Discrimination is also relevant – it prescribes that it is forbidden to expose an individual or a group of persons, on the basis of his/her or their personal characteristics, to harassment and humiliating treatment aiming at or constituting violation of his/her or their dignity, especially if it induces fear or creates a hostile, humiliating or offensive environment. Article 26, paragraph 1, which prescribes that discrimination shall be considered to occur in the case of conduct contrary to the principle of observing equal rights and freedoms of disabled persons in political, economic, cultural and other aspects of public, professional, private and family life is also relevant.

Furthermore, the Law on Prevention of Discrimination against Persons with Disabilities (Official Gazette of RS, no. 33/2006) is based on principles of prohibition of discrimination against persons with disabilities, respect for human rights and dignity of the persons with disabilities, inclusion of persons with disabilities in all areas of social life, on equal footing, inclusion of persons with disabilities in all decision-making processes regarding their rights and duties and equality of rights and duties. Article 4 of this Law stipulates that public administration organs shall have the duty to secure enjoyment of rights and freedoms to persons with disabilities without discrimination. In accordance with Article 11, point 1, public administration organs must not discriminate against persons with disabilities through any action or omission, while according to Article 13, paragraph 1 any discrimination on the basis of disability regarding access to services and to the objects in public use as well as public spaces, whereas the term “service” in the context of this Law is used to designate all services provided by a legal or physical entity in the framework of its/her/his activities or profession, with or without financial compensation (paragraph 2).

Taking into consideration the circumstances of the present case, the subject of the analysis is the treatment by the employees of the National Employment Service, i.e. the question whether the NES committed an act of discrimination against the complainant on the basis of his personal characteristic – disability – on the occasion of provision of services in the framework of their activities.



Bearing in mind the consistent statements of the complainant M. G. and I. B. the Commissioner for Protection of Equality is of the opinion that the employees of the Belgrade branch of the National Employment Service treated M. G. in a degrading manner during his application for registration in the NES, as well as that this kind of treatment was caused by the fact that M. G. is a person with a disability who needs sign language interpreting services. The overall attitude and behavior of the employees of the NES, especially forbidding the presence of I. B., who was hired to provide support to M. G., as well as the attitude of I. T., advisor for persons with disabilities, which she expressed by saying that considering his disability M. G. will have troubles finding a job ("How do you think you will get a job anywhere if you are taking your interpreter with you all the time; an employer would hardly select you; in this way you are showing straight away that you are not self-sufficient") indisputably violate the dignity of the complainant and create a humiliating and offensive environment.

The provision of Article 12 of the Law on the Prohibition of Discrimination explicitly prohibits harassment and the humiliating treatment of an individual or a group of persons aiming at or constituting violation of his/her or their dignity, on the basis of his/her or their personal characteristics. The analysis of this provision shows that the legislator prohibits harassment and humiliating treatment not only in cases where the aim of such behavior is violation of dignity of an individual or group on the basis of their personal characteristics but also when such behavior objectively constitutes violation of the dignity of an individual or a group of persons.

The Commissioner for Protection of Equality shall point out that such behavior of the NES employees is unacceptable, bearing in mind the mandate, role and principles of the National Employment Service, stipulated in the Law on Employment and Insurance in Case of Unemployment (Official Gazette of RS, no. 88/2010). Bearing in mind the prescribed role of the NES, the degree of responsibility of all employees in NES is higher, while the obligation of non-discriminatory treatment and behavior is accentuated even more.

The Commissioner for Protection of Equality shall point to the fact that persons with disabilities still cannot realize some of the basic human rights on equal footing with other citizens, despite efforts of certain state institutions and civil society organizations, which undertake measures directed to the improvement of their status, as well as that the special measures which are being undertaken have not yet brought noticeable improvements of living conditions and social status of persons with disabilities. Bearing all this in mind, the Commissioner for Protection of Equality believes that special attention must be dedicated to the prevention of belittlement, harassment and degrading treatment as well as any other form of discrimination of persons with disabilities.

Having evaluated the established facts and legal regulations, the Commissioner for Protection of Equality, pursuant to Article 33, paragraph 1, point 1 of the Law on the Prohibition of Discrimination, issued the Opinion and recommended that the National Employment Service undertake appropriate actions in order to redress its discriminatory treatment.

In accordance with Article 40 of the Law on the Prohibition of Discrimination, if the National Employment Service fails to act upon the Recommendation within 30 days of the day of receiving it, the Commissioner shall issue the measure of caution by passing a decision against which it is not allowed to lodge a complaint; if the NES fails to implement the measure of caution, the Commissioner for Protection of Equality shall inform the public about it through the media and in other appropriate ways.

## **4.2. The complaint of N. o. o. s. i. against the First Basic Court in Belgrade against discrimination on the basis of disability in the proceeding before public administration organs (File. no. 1007 dated 20 June 2012)**

Acting within the jurisdiction stipulated by law to receive and consider complaints filed pertaining to violations of provisions of the Law on the Prohibition of Discrimination, to issue opinions and recommendations and pass measures stipulated by law (Article 33, paragraph 1, point 1 of the Law on the Prohibition of Discrimination, Official Gazette of the Republic of Serbia, no. 22/2009) concerning the complaint of N. o. o. s. i. from B. against First Basic Court in Belgrade the Commissioner for Protection of Equality issues the following

### **OPINION**

The First Basic Court in Belgrade refused to certify to M. S., who due to his visual impairment is not able to write, the stamp containing his name and surname written in technical letters in place of his handwritten signature, by which the Court committed an act of discrimination – a violation of the principle of equal rights and duties on the bases of M. S.'s personal characteristic – disability, prohibited by Article 8 in connection to Articles 13, 15 and 26 of the Law on the Prohibition of Discrimination.

The Commissioner for Protection of Equality, pursuant to Article 33, paragraph 1, point 1 and Article 39, paragraph 2 of the Law on the Prohibition of Discrimination issues to the First Basic Court in Belgrade the following

### **RECOMMENDATION**

1. The First Basic Court in Belgrade shall undertake all necessary measures in accordance with its jurisdiction in order to enable the unhindered certification of facsimile stamps in the place of handwritten signatures to M. S. and to all other persons with disabilities, who because of the disability to write use the stamp with their name and surname written in technical letters ("facsimile stamp").

2. The First Basic Court in Belgrade shall inform the Commissioner for Protection of Equality about the measures undertaken in order to act in line with the Recommendation within 30 days from the day of receiving this Opinion with Recommendation.

### *Rationale*

The Commissioner for Protection of Equality received on 20 March 2012 the complaint from N. o. o. s. i., submitted on behalf and with consent of M. S. against the First Basic Court in Belgrade. In the complaint it is alleged that during the proceeding for the certification of documents on 31 January 2012 the employees

of the Certification Department of the First Basic Court in Belgrade (court's building in 14, Ustanička Street) did not allow M. S., who is a person with impaired vision (a blind person), to use his facsimile stamp instead of his signature, which he always uses for legal actions in Serbia. The complaint alleges that the employees of the Court requested M. S. to sign by placing his fingerprint on the document, thus equating him with illiterate persons, although M. S. is an educated person who owns a certified facsimile signature stamp. The complainant believes that by such treatment of the First Basic Court in Belgrade M.S.'s dignity was violated as well as his right to equal access to courts, and that bearing in mind that the discrimination occurred in the course of the proceeding conducted before a public administration organ the present case represents a severe form of discrimination. The written consent of M. S. was delivered as a supplement to the complaint.

The Commissioner for Protection of Equality conducted the procedure aimed at establishing the legally relevant facts and circumstances in accordance with Article 35, paragraph 4 and Article 37, paragraph 2 of the Law on the Prohibition of Discrimination, so during the procedure, a request was sent to the First Basic Court in Belgrade to give a statement on the allegations and grounds of the complaint and on reasons why M. S. was not allowed to use his facsimile stamp in the place of his signature during the proceeding of certification before the First Basic Court in Belgrade.

The statement of the First Basic Court in Belgrade signed by V. L., Deputy Acting President of the Court, VI Su. no. 60– 560/2012 dated 19 April 2012 states the following:

- That the Law on Certification of Signatures, Manuscripts and Transcripts prescribes the modalities of certification of signature of persons with visual impairment;
- That Article 6, paragraph 1 of this Law prescribes that when the signature of blind persons or signature or fingerprint of persons who cannot read is certified the party shall be read the document on which the signature or fingerprint is certified, after which the person shall sign the document or put his/her fingerprint;
- That the certification desk officers employed in the Court acted in accordance with the quoted provision related to Article 4 of the same Law and that this was the reason why M. S. was not allowed to use the facsimile in the proceeding of certification of his signature, since only the signature or fingerprint can be certified and not the stamp with the engraved signature.

The Commissioner for Protection of Equality analyzed all the allegations contained in the complaint, the statement, the relevant regulations governing the modalities of signature, manuscript and transcript certification as well as relevant regulations in the field of protection from discrimination.

On the basis of the allegations from the complaint and the statement it has been established that on 31 January 2012 M. S. was not allowed to conclude the certification procedure of his signature before the First Basic Court in Belgrade (court's building in 14, Ustanička Street) due to the fact that for the purposes of signing the documents he uses the stamp with his name and surname which is written in technical letters (hereinafter: facsimile), as he cannot put his handwritten signature due to visual

impairment. It has been also established that M. S. was requested to place his fingerprint on the document instead of his handwritten signature.

The Commissioner for Protection of Equality shall first state that the Republic of Serbia on 29 May 2009 ratified the UN Convention on the Rights of Persons with Disabilities<sup>37</sup> with the purpose to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity<sup>38</sup>. The provision of Article 2 prescribes that discrimination on the basis of disability means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. By ratifying this Convention, Serbia committed to ensure and promote the full enjoyment of all human rights and fundamental freedoms of all persons with disabilities as well as to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that represent discrimination against persons with disabilities<sup>39</sup>.

The Constitution of the Republic of Serbia<sup>40</sup> prescribes that 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<sup>41</sup>.

The constitutional prohibition of discrimination is elaborated in more detail in the Law on the Prohibition of Discrimination where, in Article 4, the principle of equality is stipulated so that all persons are equal and enjoy equal status and equal legal protection regardless of personal characteristics and that everyone is obliged to respect the principle of equality, that is to say, the prohibition of discrimination. The provisions of Article 8 of the Law on the Prohibition of Discrimination prescribe that a violation of the principle of equal rights and obligations shall occur if an individual or a group of persons, on account of his/her or their personal characteristics, is unwarrantedly denied rights and freedoms or has obligations imposed that, in the same or a similar situation, are not denied to or imposed upon another person or group of persons, if the objective or the consequence of the measures undertaken is unjustified, and if the measures undertaken are not commensurate with the objective achieved through them.

The provisions of Articles 5-14 of the Law on the Prohibition of Discrimination define diverse forms of discriminatory conduct. Article 15 prescribes that everyone shall have the right to equal access to and equal protection of his/her rights before courts of law and public administration organs, while Article 26, paragraph 1 of this Law prescribes that discrimination of disabled persons shall be considered to occur in the case of conduct contrary to the principle of observing the equal rights and

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37 Law on Ratification of the Convention on the Rights of Persons with Disabilities, Official Gazette of RS – International Treaties, no. 98/2006.

38 Article 1, paragraph 1 of the Convention on the Rights of Persons with Disabilities.

39 Article 4, paragraph 1, point b) of the Convention on the Rights of Persons with Disabilities.

40 Official Gazette of RS, no. 98/2006.

41 Article 21 of the Constitution of the Republic of Serbia.

freedoms in political, economic, cultural and other aspects of public, professional, private and family life.

The Law on Prevention of Discrimination against Persons with Disabilities<sup>42</sup> is based on principles of the prohibition of discrimination against persons with disabilities, respect for human rights and dignity of persons with disabilities, inclusion of persons with disabilities in all areas of social life on equal footing, inclusion of persons with disabilities in all decision-making processes regarding their rights and duties and equality of rights and duties. According to Article 11 public administration organs must not discriminate against persons with disabilities through any action or omission. Discrimination against persons with disabilities by public administration organs implies, *inter alia*, conducting a proceeding of the realization of a right belonging to persons with disabilities that actually prevents or significantly hinders the realization of that right.

In its statement the First Basic Court in Belgrade, invoking Article 6, paragraph 1 of the Law on Certification of Signatures, Manuscripts and Transcripts, which regulates the certification of signatures of blind persons and signature or fingerprint of persons who cannot read, and Article 4, which regulates the authentication of a signature, states that M. S. “could absolutely not be allowed to use the facsimile in the proceeding of the certification of his signature.”

While taking a stand in the present case the Commissioner for Protection of Equality evaluated all claims of the statement, bearing in mind that the certification of a signature is regulated by the Law on Certification of Signatures, Manuscripts and Transcripts<sup>43</sup> and that the modality of certification is elaborated in more detail in the Instruction on Forms and Modalities of Maintenance of Registers and on Modalities of Signature, Manuscript and Transcript Certification<sup>44</sup>, while there are no specific legal regulations regarding the use of facsimile during the signature certification.

Bearing in mind the circumstances of the present case, legal regulations that forbid violation of the principle of equal rights and obligations are relevant for its consideration. The violation of this principle is regulated by Article 8 of the Law on Prohibition of Discrimination as well as by Article 7 of the Law on Prevention of Discrimination against Persons with Disabilities, which prescribes that a violation of the principle of equal rights and obligations shall occur if an individual that is discriminated against exclusively or mainly on account of his/her personal characteristics is unwarrantedly denied rights and freedoms or has obligations imposed that, in the same or a similar situation, are not denied to or imposed upon another person or group of persons, if the objective or the consequence of the measures undertaken is unjustified, and if the measures undertaken are not commensurate with the objective achieved through them.

In order to examine whether the First Basic Court in Belgrade violated the principle of equal rights and obligations by such treatment it is necessary to consider

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42 Official Gazette of RS, no. 33/2006.

43 Official Gazette of RS, no. 39/1993.

44 Official Gazette of RS, no. 74/1993.

if there is an objective and reasonable justification to not allow the use of facsimile to persons with disabilities who are not able to place their handwritten signature, that is:

- Whether the objective or the consequence of the measure undertaken is justified;
- Whether the measures undertaken are commensurate with the objective achieved through it.

Namely, it is indisputable that the existing regulations do not explicitly regulate possibilities or modalities of facsimile certification for persons who are not able to place their handwritten signature. However, it is evident that legal norms, if interpreted in a targeted way, do not forbid the use of facsimile and offer a possibility of certification of a signature that has an alternative form, including the facsimile.

The analysis of the Law on Certification of Signatures, Manuscripts and Transcripts, and the Instruction on Forms and Modalities of Maintenance of Registers and on Modalities of Signature, Manuscript and Transcript Certification shows that actions undertaken by the First Basic Court in Belgrade in the present case do not have an objective justification, i.e. they lead to unjustified consequences for certain persons with disabilities.

According to the provision of Article 4 of the Law on Certification of Signatures, Manuscripts and Transcripts there are two prescribed equally appropriate methods for the authentication of a signature: a) the possibility that the person who signs places his/her handwritten signature on the statement in the presence of an official, or b) the possibility to recognize the existing signature on the document as his/her own. According to the provision of Article 6 of this Law, when certifying the signature of a *blind* person or signature or fingerprint of the persons who cannot read, the document on which the signature or fingerprint is certified must be read to the submitter, and when certifying the signature or fingerprint of the deaf person who cannot read the document on which the signature or the fingerprint is certified must be read to the submitter with the assistance of an interpreter. Article 8 of the Law prescribes that prior to the certification of the signature, fingerprint or manuscript an official shall establish the identity of the submitter by inspecting the ID issued by a competent authority or by the testimony of two adult and credible witnesses who the official knows personally, that is, whose identity is established following the inspection of their IDs, while the receipt of certification should contain a remark on the modality in which the official established the identity of the person who submitted the request.

In order to examine whether the First Basic Court in Belgrade by its treatment violated the principle of equal rights and obligations it is necessary to consider the objective of the signature certification. In accordance with Article 1 of the Law on Certification of Signatures, Manuscripts and Transcripts certification of the signature confirms its authenticity, i.e. it confirms that the certified signature is truly of the person whose signature is certified. In order to prove this fact the person who wishes to have his/her signature certified shall place a handwritten signature before the official who then certifies the signature, or recognizes the signature already placed at the document as his/her own while the official establishes the identity of the person whose signature is certified. The authenticity of the signature is verified by linking the identity of a person

with a certain signature in accordance with the provisions regulating the certification of a signature. The Commissioner for Protection of Equality is of the opinion that the authenticity of the facsimile can be verified if a person recognizes before an official the print of the facsimile already placed on the document as his/her own, while the official establishes the identity of the person who made such a statement. Therefore, it can be concluded that the authenticity of the signature is verified when a person who is not able to place his/her handwritten signature places the print of the facsimile stamp on the document in place of his/her handwritten signature and who in the direct presence of the official *states* that the signature already placed on the document is his/her own, while proving his/her identity by an ID. In this regard, the Commissioner for Protection of Equality is of the opinion that the claims of the First Basic Court in Belgrade that M. S. “could absolutely not be allowed to use the facsimile during the proceeding of certification of his signature” are unacceptable. After all, this is also confirmed by the fact that in the procedure upon the complaint file no. 280/2012 which was conducted before the Commissioner for Protection of Equality acting at the request of the party N. S. from Belgrade on 10 May 2011 the First Basic Court in Belgrade certified the facsimile belonging to N. S., who is a person with a disability unable to sign.

The Commissioner for Protection of Equality shall also point out the fact that the procedure of the signature, manuscript and transcript certification before a competent organ is regulated in detail by the Instruction on Forms and Modalities of Maintenance of Registers and on Modalities of Signature, Manuscript and Transcript Certification. Namely, this Instruction prescribes the possibility of providing certification services to persons with disabilities who are not able to sign. The official who conducts the certification proceeding is obliged to enter the data relevant for certification into the certification register<sup>45</sup>, i.e. in the columns that are a part of this register<sup>46</sup>. Article 6 of the Instruction on Forms and Modalities of Maintenance of Registers and on Modalities of Signature, Manuscript and Transcript Certification prescribes the obligation and modality of entering the note by the official in the case when in the place of signature or manuscript a statement of a person who does not have both hands, who cannot read or who is blind is certified by placing one of the following notes in column 7: ‘does not have both hands’, ‘cannot read’, ‘blind’. Other circumstances regarding certification that need to be highlighted for further clarification and pertaining to disability of the person who receives the service, as well as the specificity of the service provided (e. g. “cannot use his/her hands”, “certified facsimile” etc.) are also noted in column 7.

The Commissioner for Protection of Equality shall additionally point out that point 12 of the Instruction on Forms and Modalities of Maintenance of Registers and on Modalities of Signature, Manuscript and Transcript Certification prescribes that the confirmation of the signature certification, that is, of the manuscript states as follows: “It is certified that (name and surname, place of residence, street and number) placed his handwritten signature on this document” or “recognized his/her signature on this document”. Also, point 9 of the aforementioned Instruction prescribes that the person

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45 Point 3 of the Instruction on Forms and Modalities of Maintenance of Registers and on Modalities of Signature, Manuscript and Transcript Certification.

46 Point 6 of the Instruction on Forms and Modalities of Maintenance of Registers and on Modalities of Signature, Manuscript and Transcript Certification.



who cannot write places his/her fingerprint on the document and that the modality of placing a fingerprint is also regulated, while according to point 11 of the Instruction it is prescribed that the signature can be a full name and surname, initials or fingerprint. In accordance with the aforementioned, when a person in the proceeding of certification before the court states that the facsimile print on the document belongs to him/her there is no reasonable and justified reason for the court to refuse certification with the receipt stating “recognized the signature on this document as his/her own”. On the contrary, a targeted interpretation of the relevant regulations from this field, as stated above, enables the recognition of the signature as one’s own, which also implies recognition of the facsimile stamp as one’s own in the situation where a person is not able to place a handwritten signature due to his/her disability.

Bearing in mind the allegations from the complaint and the statement as well as legal regulations the Commissioner is of the opinion that in the present case M. S. who uses the facsimile stamp due to his inability to place a handwritten signature did not receive equal treatment before the court during the signature certification procedure in comparison to those persons who are able to place a handwritten signature and thus recognize the authenticity of their signatures. In addition, regarding the First Basic Court in Belgrade certification desk officers’ request to M. S. to place his fingerprint on the document because of his inability to place a handwritten signature, the Commissioner for Protection of Equality takes the stand that such treatment led to unjustifiably imposing this obligation to M. S. Namely, bearing in mind that M. S. was able to personally state before the court that the facsimile print which had been already placed on a document was his own, the principle of equal rights and obligations was violated by requesting from M. S. to place his fingerprint on the document, since this obligation is not imposed to a person who is able to place his/her handwritten signature and who states before the court that he/she recognizes as his/her own the handwritten signature already placed on the document.

The fact that should be kept in mind is that refusing the certification of the facsimile to M. S. as well as to other persons with disabilities who are not able to write creates unjustified consequences for persons who do not have another way to sign except by using the facsimile. Such a practice entirely prevents persons with disabilities who are not able to sign to realize all the rights conditioned by the signature certification. Bearing that in mind, it is evident that the objective and the consequence are incommensurate, i.e. the adverse consequences caused by the refusal to certify the facsimile print of the persons who are not able to sign in the place of a signature are incommensurably serious.

Considering that there is no law that prohibits the use and certification of facsimile, and taking into consideration the quoted provisions of the regulations governing the signature certification, the Commissioner for Protection of Equality shall point out that it is necessary to enable persons with disabilities who are not able to sign to have their facsimile prints certified as their signature before the competent authority.

As for the possible doubt regarding the authenticity of the facsimile, the Commissioner for Protection of Equality is of the opinion that an analogy can be applied. Namely, an official who works on certifications fully and indisputably verifies

the authenticity of a handwritten signature by a simple statement of the person who submits the application that he/she recognizes the signature on the document as his/her own, bearing in mind Article 4, paragraph 1, point 2 of the Law on Certification of Signatures, Manuscripts and Transcripts. Therefore, there is no reasonable justification to not do the same concerning the facsimile print that the person recognizes as his/her own. By placing the appropriate note about the specificity of such certification the official who conducts the certification proceeding fully performs the assigned task, considering that the law fully equates the handwritten signature and the recognition of a signature as one's own. Also, it should be kept in mind that the identity of the person who recognizes the print of his/her facsimile, that is, the signature, is established in the same way as in the case of a person who recognizes his/her handwritten signature or fingerprint, which prevents abuses and fully equates the persons who sign with a facsimile with persons who sign with a handwritten signature in regard to the rights and obligations.

Bearing all this in mind, the Commissioner for Protection of Equality is of the opinion that by refusing to certify the facsimile in place of the handwritten signature the First Basic Court in Belgrade treated persons with disabilities who are not able to place a handwritten signature unequally in comparison to persons who are able to place their handwritten signature on a document, thus committing an act of discrimination – violation of the principle of equal rights and obligations. The First Basic Court in Belgrade is therefore required to enable the unhindered certification of facsimiles to persons who are not able to personally sign using a handwritten signature.

Evaluating the established facts and legal regulations, the Commissioner for Protection of Equality, in accordance with Article 33, paragraph 1, point 9 of the Law on the Prohibition of Discrimination, issued this Opinion and Recommendation to the First Basic Court in Belgrade to undertake appropriate actions in order to eliminate the consequences of its discriminatory treatment.

In accordance with Article 40 of the Law on the Prohibition of Discrimination, if the First Basic Court in Belgrade fails to act upon the Recommendation within 30 days of the day of receiving it, the Commissioner shall issue the measure of caution by passing a decision against which it is not allowed to lodge a complaint; if the First Basic Court in Belgrade fails to implement the measure of caution, the Commissioner for Protection of Equality shall inform the public about it through the media and in other appropriate ways.

### **4.3. The complaint of O. z. lj. p. against City of Niš against discrimination on the basis of disability in the field of the use of public spaces (File no. 1181 dated 29 August 2012)**

Acting within the jurisdiction stipulated by law to receive and consider complaints filed pertaining to violations of provisions of the Law on the Prohibition of Discrimination, to issue opinions and recommendations and pass measures stipulated by law (Article 33, paragraph 1, point 1 of the Law on the Prohibition of Discrimination, Official Gazette of the Republic of Serbia, no. 22/2009), concerning the complaints of O. z. lj. p., from N. on behalf and with the consent of C. z. s. ž. i. N., U. p. N. o., N. u. s. s. h., U. d. N. and D. o. o. c. i. d. p. N. against City of Niš and the Public Company Directorate for Construction of City of Niš, the Commissioner for Protection of Equality issues the following

#### **OPINION**

The Public Company Directorate for Construction of the City of Niš has not undertaken measures within its competence to carry out the work on sloping the curb of the pavements and adapting the pavements to safely overcome the height difference between the sidewalks and roadways in Ratka Vukićevića Street, Somborski Boulevard and Boulevard Medijana in Niš, in accordance with technical standards of accessibility, whereby it discriminated against persons with disabilities, especially those who use wheelchairs, on the basis of their personal characteristic - disability, prohibited by Article 17, paragraph 2 of the Law on the Prohibition of Discrimination and Article 13, paragraphs 1 and 4, and Article 16 of the Law on the Prevention of Discrimination against Persons with Disabilities.

The Commissioner for Protection of Equality, pursuant to Article 33, paragraph 1, point 1 and Article 39 paragraph 2 of the Law on the Prohibition of Discrimination, issues to the Public Company Directorate for Construction of City of Niš the following

#### **RECOMMENDATION**

1. The Public Company Directorate for Construction of the City of Niš shall undertake all necessary measures in order to implement works on proper sloping and adapting the curb of pavements to safely overcome the height difference in Ratka Vukićevića street, Somborski Boulevard and Medijana Boulevard in Niš, in accordance with technical standards of accessibility, thus enabling unhindered movement and use of public spaces to persons with disabilities who use wheelchairs to move around.

2. The Public Company Directorate for Construction of the City of Niš shall inform the Commissioner for Protection of Equality about the measures undertaken in order to act in line with the Recommendation within 30 days of the day of receiving this Opinion with Recommendation.

### *Rationale*

The Commissioner for Protection of Equality was contacted with the complaints on 15 June 2012 by the Committee for Human Rights from Niš on behalf and with the consent of the Center for Independent Living of Persons with Disabilities in Niš, Nišava District Paraplegic Association, Niš Association of Students with Disabilities, Muscular Dystrophy Association of Niš, Association of Persons with Cerebral Palsy and Polio Niš, wherein it was alleged that the persons with disabilities, especially those who use wheelchairs, were discriminated against by the failure of the Public Company Directorate for Construction of the City of Niš to act, i.e. by not adapting the sidewalks in Ratka Vukićevića Street, Somborski Bouleverd and Medijana Bouleverd in Niš.

In the complaints, *inter alia*, the following is alleged:

- That during the reconstruction of Ratka Vukićevića Street, and the construction of the Mediana Boulevard and Somborski Boulevard in Niš the provisions of the Law on Planning and Building and the provisions of Regulation on conditions for planning and design of the buildings related to unhindered movement of children, the elderly, the handicapped and disabled, which was in force in the time of reconstruction and construction of these streets, were not observed;
- That the curbs of the pavements in these streets have not been sloped and the inclined curbs for overcoming the height difference between the sidewalks and roadways have not been placed, whereby the persons with disabilities do not have equal access to public spaces and that in this way discrimination is committed against persons with disabilities, which is prohibited by the Law on the Prohibition of Discrimination and by the Law on the Prevention of Discrimination against Persons with Disabilities;
- That Ratka Vukićevića Street in Niš is a very busy one, bearing in mind that it is situated near the park “Čair” and that the local branch of the National Employment Service is also situated in the street;
- That Medijana Boulevard in Niš is a 730 meters long newly built street, opened to traffic at the end of 2011;
- That the curbs of the pavement in Somborski Boulevard in Niš have been sloped but that this was not done properly, i.e. overcoming of height difference between the sidewalk and the roadway is not safe for persons with disabilities, considering that after the sloping of the curb the height difference of several centimeters between the sidewalk and roadway remained;
- That the complainants appealed several times to the competent authorities of the City of Niš to adapt at least the new buildings in public use so that they can be in line with relevant regulations regarding accessibility.

In addition to the complaints the photographs of the streets the complaints refer to have been submitted as well. On 26 June 2012 the complainants also delivered to the Commissioner for Protection of Equality the text “Yearly press conference – important results” dated 30 December 2011 and published on the official website of the Public

Company Directorate for Construction of the City of Niš as evidence. The text quotes the statement of the Company's Executive Director B. J., who among other things stated that the Directorate carried out very serious construction work with the funds of the National Investment Plan (NIP) of the Republic of Serbia "amounting to a record sum of one billion Dinars, based on projects defined by the experts from the Directorate for Construction of the City of Niš (Somborski Boulevard, Medijana Boulevard (...))".

In addition to this, on 17 July 2012 the complainants delivered the supplement to the complaint related to the inaccessibility of Ratka Vukićevića Street, wherein they allege that from the moment of submitting the complaint certain works were carried out in this street with the aim of adaptation, that is, sloping the curb. Namely, in the supplement to the complaint it is pointed out that on the junction of Ratka Vukićevića Street and Devete brigade Street, as well as at the pedestrian crossing at the end of the street the curbs were sloped and that the streets are now accessible and functional for persons with disabilities but that at the traffic roundabout, which connects four other streets with Ratka Vukićevića Street, the relevant regulations on adapting the curbs were not observed, and that this part of the street is not safe for movement of persons with disabilities, the width of the curb being between 80 and 85 centimeters. In the amendment of the supplement to the complaint the complainants delivered photographs of Ratka Vukićevića Street dated 16 July 2012.

The Commissioner for Protection of Equality conducted the procedure in order to determine the legally relevant facts and circumstances in accordance with Article 35, paragraph 4 and Article 37, paragraph 2 of the Law on the Prohibition of Discrimination and in the course of the procedure obtained statements from the Public Company Directorate for Construction of the City of Niš, wherein the following is stated:

- That the works on the reconstruction of Ratka Vukićevića Street were carried out on the basis of the contract that was concluded between the Ministry of Economy and Regional Development as the investor, the City of Niš as co-investor and "M. G." d. o. o. from N. as the contractor, and the works were also carried out on the basis of the Decision on the building permit issued by the Directorate for Planning and Construction of the City of Niš;
- That the reconstruction begun on 21 November 2011, after having obtained the Notification of the Works, and that the Director of the Public Company Directorate for Construction of the City of Niš nominated M. M. as the supervisor of the works;
- That during the course of the construction works the supervisor established that the Main design for the junction of Ratka Vukićevića Street and streets Sestara Baković, Tome Roksandića, Filipa Višnjića and Učitelj Miline, did not foresee placing the access ramps that would enable the movement of people with disabilities;
- That on 19 May 2012, by entering a note in the Construction log book the supervisor requested the contractor to execute the demolition of curbs on the left and right sides of the junction of Devete brigade Street and Ratka Vukićevića

Street and to build access ramps so that persons with disabilities could cross the street;

- That the contractor acted in line with the request of the supervisor and that the works on the reconstruction of Ratka Vukičevića Street were completed on 21 May 2012;
- That the Public Company Directorate for Construction of the City of Niš is not legally competent to monitor the construction of Medijana Boulevard and Somborski Boulevard in Niš and that it does not perform expert supervision of the works, and thus it cannot make a statement concerning the allegations of the complaint, which refers to the accessibility of Medijana Boulevard and Somborski Boulevard;
- That the construction of Medijana Boulevard and Somborski Boulevard are financed from joint investors' funds of the Republic of Serbia through the National Investment Plan and the City of Niš as the user of the funds, and that therefore the expert supervision of works in these boulevards is performed by "N. P." d. o. o. from N. to whom the complaints with the request for statement in these cases should be delivered.

In the supplement to the statement of the Public Company Directorate for Construction of the City of Niš the following evidence were delivered: a copy of the Contractor agreement and a copy of the Decision on the building permit for construction works in Ratka Vukičevića Street; copies of the Notification of the Works, decisions on the nomination of the supervisor and authorized contractor, and the Construction log book sheets from the beginning of construction works with the registration of the order for the placement of the access ramps for persons with disabilities in Ratka Vukičevića Street.

The decision on forming the Public Company Directorate for Construction of the City of Niš<sup>47</sup> prescribes that the founder of the company is the City of Niš. The Commissioner for Protection of Equality informed the City of Niš in the correspondence no. 262/2012 dated 1 July 2012 about the content of the submitted complaints and the initiated procedures. Nevertheless, the Commissioner did not conduct the procedure against the City of Niš, bearing in mind the specific activities of the Public Company Directorate for the Construction of City of Niš, since this issue is in their exclusive competence.

The Commissioner for Protection of Equality conducted a single procedure in accordance with Article 117 of the Law on General Administrative Procedure<sup>48</sup> in connection to Article 40, paragraph 4 of the Law on the Prohibition of Discrimination in order to establish legally relevant facts and circumstances.

The Commissioner for Protection of Equality analyzed all the allegations contained in the complaint and the statement, as well as the relevant anti-discrimination regulations.

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47 Official Gazette of City of Niš, no. 23, dated 13 May 2010.

48 Official Gazette of the FRY, nos. 33/97 and 31/01; and Official Gazette of RS, no. 30/10.

In the course of the procedure it was established that during 2011 and 2012 construction works for the reconstruction of Ratka Vukičevića Street and the construction of Medijana Boulevard and Somborski Boulevard in Niš were carried out, and that during the supervision of the reconstruction of Ratka Vukičevića Street the supervisor established that the Main Design for the junction of Ratka Vukičevića Street and the streets Sestara Baković, Tome Roksandića, Filipa Višnjića and Učitelj Miline did not include elements of accessibility for the unhindered movement of persons with disabilities at this junction. Also, by the inspection of the supplement to the complaint and the statement it has been established that subsequently, upon the order of the supervisor, demolishing of the curb on the left and right side of the junction of the streets Ratka Vukičevića and Devete brigade has been carried out and that this part of Ratka Vukičevića Street became accessible for persons with disabilities.

It should be noted that the Commissioner for Protection of Equality is an independent state authority with the competence to, *inter alia*, conduct procedures upon complaints pertaining to acts of discrimination and therefore the subject of analysis in the present procedure is exclusively limited to establishing the fact as to whether persons with disabilities can safely move around in these public spaces. Hence, the Commissioner for Protection of Equality was not involved in verifying whether the technical standards of accessibility in these streets were fulfilled, since other state authorities and institutions are competent for this kind of inspection.

With the aim of accurately establishing the facts two representatives of the Professional Service of the Commissioner for Protection of Equality performed an on-site inspection, i.e. visited Ratka Vukičevića Street, Medijana Boulevard and Somborski Boulevard in Niš. P. R., member of U. d. N. and wheelchair user assisted the inspection in Ratka Vukičevića Street and in Somborski Boulevard. P. R. tried to move around these streets and overcome the height differences between the sidewalks and roadways.

Following the on-site inspection of Ratka Vukovića Street in Niš it has been established that a traffic roundabout was built at the end of this street connecting the following streets: Sestara Baković, Tome Roksandića, Filipa Višnjića and Učitelj Miline with Ratka Vukičevića Street, where the primary school „Ratko Vukičević“ and the local branch of the National Employment Service are situated, and there are several pedestrian crossings where the curbs of the pavements were subsequently sloped. The representatives of the Professional Service established that in several parts of this street coping with height differences between sidewalks and roadways is either difficult or impossible for persons with disabilities despite the existence of the sloped sidewalk curbs. For instance, in an area with a sloped sidewalk curb (angle of Ratka Vukičevića Street and Sestara Baković Street) there is a hole where a wheelchair can easily fall in and is released with difficulties. Furthermore, on the sidewalk leading to the pedestrian crossing (entrance to Filipa Višnjića Street) the passage for a wheelchair is not wide enough and persons with disabilities cannot cross the street from that place. Also, it has been observed that on certain pedestrian crossings the sidewalks are noticeably higher than the roadway level, which is why such an inclination provoked risky lifting and bending of the motor wheelchair wheels of the user of the wheelchair who was present at the on-site inspection.



Following the on-site inspection of Somborski Boulevard it has been established that it was a newly built long boulevard with very high curbs along the entire street and it can be determined that the curb was subsequently cut and removed in some parts of the sidewalk and the procedure of adapting of certain parts of the sidewalk where the curbs are sloped has not yet been finished. It can be observed that, at present, persons with disabilities cannot move around on the sidewalks of this boulevard and that they are forced to use the roadway. Namely, on certain parts of the cut pavement there are stones and the considerable height difference between the edge of the cut sidewalk and the continuation of the sidewalk; in certain places where the curb was adapted and reduced there is a visible inclination but those curbs are still markedly high and unsafe for moving around of persons with disabilities. As for the traffic roundabout which was built in one part of this boulevard it has been established that the sidewalk curbs were not sloped at all and the situation is the same also at the passage through the pedestrian refuge in the middle of the roadway of this traffic roundabout. Also, in some parts of the sidewalk the width of the cut part is insufficient for the passage of the wheelchair. Furthermore, the wheelchair user who was present at the on-site inspection repeated several times that he had noted several inclinations from the edge to the continuation of the sidewalk, which cause difficulties in safely moving around. It has been also noted that once the adaptation of the sidewalks in this boulevard is completed there will be parts where the movement will be safe and crossing the street for persons with disabilities will be enabled.

Medijana Boulevard is also a newly built boulevard of Niš, where several well-known chain stores are situated. The representatives of the Professional Service of the Commissioner for Protection of Equality have established that this boulevard is inaccessible for persons with disabilities because the curbs are not sloped neither along the sidewalks towards the pedestrian crossings nor on pedestrian refuges. Also, it is visible that the curbs of the sidewalks in this street are very high, similar to stairs.

The Commissioner for Protection of Equality shall first state that the Republic of Serbia ratified the UN Convention on the Rights of Persons with Disabilities<sup>49</sup>, with the purpose to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity<sup>50</sup>. By ratifying this Convention Serbia committed to take appropriate measures to ensure to persons with disabilities equal access to the physical environment in order to enable persons with disabilities to live independently and participate fully in all aspects of life. These measures shall include, *inter alia*, the identification and elimination of obstacles and barriers to accessibility to buildings, roads, transportation and other indoor and outdoor facilities. The Republic of Serbia also committed to take appropriate measures in order to *develop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public*<sup>51</sup>.

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49 Law on Ratification of the Convention on the Rights of Persons with Disabilities, Official Gazette of RS – International Treaties, no. 42/09.

50 Article 1, paragraph 1 of the Convention on the Rights of Persons with Disabilities.

51 Article 9, paragraphs 1 and 2 of the Convention on the Rights of Persons with Disabilities.



What is particularly important regarding the rights of persons with disabilities are the 1993 UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities, which the Republic of Serbia accepted in 1995. Although these Rules are not legally binding, UN Member States have a moral and political obligation to implement them. The purpose of the Standard Rules is to ensure that persons with disabilities enjoy equal rights and obligations, just like other members of society, whereby accessibility to the physical environment is also especially significant. Namely, in order to ensure accessibility it is necessary to include accessibility requirements in the design and construction of the physical environment from the very beginning of the designing process, while local organizations of persons with disabilities should be consulted from the initial planning stage when public construction projects are being designed<sup>52</sup>.

The Constitution of the Republic of Serbia<sup>53</sup> prescribes that 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<sup>54</sup>.

The constitutional prohibition of discrimination is elaborated in more detail in the Law on the Prohibition of Discrimination where, in Article 4, the principle of equality is stipulated so that all persons are equal and enjoy equal status and equal legal protection regardless of personal characteristics and that everyone is obliged to respect the principle of equality, that is to say, the prohibition of discrimination. The provision of Article 17 paragraph 2 of the Law on the Prohibition of Discrimination stipulates that everyone has the right to equal access to buildings in public use, as well as public spaces (parks, squares, streets, pedestrian crossings and other public transport routes and the like), in accordance with the law. This right is related to the duty of the competent public authorities to undertake measures in order to remove the barriers that hinder or hamper persons with disabilities to access buildings and surfaces in public use, which is only one of the elements of the broader right to access, which implies that persons with disabilities have equal possibilities to enjoy human rights and freedoms, like all other persons. Article 26 paragraph 1 stipulates that discrimination shall be considered to occur if one acts contrary to the principle of equal rights and freedoms of persons with disabilities in the political, economic, cultural and other aspects of public, professional, private and family life, while paragraph 2 provides that the manner of realizing and protecting of the rights of persons with disabilities shall be regulated by a special law.

The Law on the Prohibition of Discrimination of Persons with Disabilities,<sup>55</sup> in addition to regulating the general regime of discrimination on the basis of disability, also stipulates the special case of discrimination related to the provision of services and using buildings and surfaces. Namely, in Article 13, paragraph 1 discrimination on the

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52 Chapter II, rule no. 5, paragraph a), points 3 and 4 of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities.

53 Official Gazette of RS, no. 98/06.

54 Article 21 of the Constitution of the Republic of Serbia.

55 Official Gazette of RS, no. 33/06.

basis of disability is explicitly prohibited regarding the accessibility of public surfaces including, according to paragraph 4, pedestrian crossings and other public roads. Additionally, Article 16, paragraph 1 of this Law stipulates that the owner of a building in public use, as well as the *public company in charge of the maintenance of public surfaces, are obliged to ensure access* to a building in public use, i.e. to a *public surface*, to all persons with disabilities, regardless of the type or the degree of their disabilities. Furthermore, Article 33 stipulates the legal obligation of the local self-government unit to undertake measures with an aim to make the physical environment, buildings, public surfaces and means of transportation accessible to persons with disabilities.

The Strategy for Improving the Position of Persons with Disabilities in the Republic of Serbia<sup>56</sup> establishes the plans of activities for all social actors in the Republic of Serbia. The goals of the Strategy cover the period from 2007 until 2015 and Objective 13 requires ensuring that all *new facilities open or provided to the public, public transport infrastructure and facilities used for the public transport of passengers in all modes of transport, are accessible to persons with disabilities*. One of the activities for realizing this objective is consistent application of regulations that prescribe the *obligatory application of accessibility standards*, monitoring the implementation of these regulations, and application of sanctions to violators. Also, Objective 14 of the Strategy requires, *inter alia*, the gradual and continued adaptation of existing public facilities and transport infrastructure to render them accessible to persons with disabilities.

The Rulebook on Technical Standards of Accessibility<sup>57</sup> is the regulation that determines in more detail the technical standards of accessibility for the unhindered movement of persons with disabilities. This Rulebook prescribes very clearly and in detail conditions for space planning and the design of buildings for persons with disabilities as well as the elements of accessibility to public transportation. Thus, Article 7 of this Rulebook prescribes the standards to be applied to access ramps for pedestrians and wheelchairs for coping with height differences up to 76 centimeters, while Articles 32, 33 and 35 prescribe standards of accessibility for sidewalks, walking trails and pedestrian crossings. The standards refer to width, inclinations and quality of the surfaces of the ramps, passages and sloped curbs.

According to the decision that established the Public Company Directorate for the Construction of the City of Niš, the Directorate performs the activities related to, *inter alia*, the planning and maintenance of streets and roads, and in the framework of this activity the Directorate may demolish buildings, build public transport routes (roads, streets and other transport routes, bicycle and pedestrian paths) and may perform activities related to the design of buildings and other architectural and engineering activities, as well as provide technical advice.

Bearing in mind the aforementioned decision and the activities of the Public Company Directorate for the Construction of the City of Niš (hereinafter: the Directorate), as well as Article 16, paragraph 1 of the Law on Prevention of Discrimination against Persons with Disabilities, it is clear that the Directorate, as a public company competent

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<sup>56</sup> Official Gazette of RS, no. 1/07.

<sup>57</sup> Official Gazette of RS, no. 19/12.

for maintenance of public spaces, has an obligation to ensure access to the streets in Niš to all persons with disabilities. Bearing this in mind, the Commissioner for Protection of Equality considers the claims from the Directorate unacceptable, which said in a statement that the company is not competent in relation to the issue of accessibility to persons with disabilities of the Somborski Boulevard and Medijana Boulevard since it did not supervise the construction of these streets.

While considering the circumstances of the present case, having inspected the complaints and the statement the Commissioner for Protection of Equality particularly evaluated the circumstance that all the streets the complaints refer to are newly constructed, that is, reconstructed, and that significant funds were spent for the construction project of several buildings and public transport routes.

The Commissioner for Protection of Equality shall state that accessibility represents one of the basic preconditions for the equal participation of persons with disabilities in all spheres of public life. By not carrying out the works for sloping the curb in Medijana Boulevard, persons with disabilities are completely prevented from moving around on this street, accessing their homes or those of other persons, visiting chain stores and using this street in an unhindered way like all other persons without disability. In this way persons with disabilities are placed in a situation of powerlessness and without the right to an independent life and freedom of movement in the public spaces of their choice.

As for the accessibility of Ratka Vukićevića Street and Somborski Boulevard in Niš, the Commissioner for Protection of Equality evaluated the endeavors to slope the curbs and make passages for persons with disabilities in these streets. However, it should be noted that ensuring accessibility of the streets is a very serious and important task that represents not only a technical problem but also a way for realizing the equal status of persons with disabilities, and therefore it cannot be approached in a superficial manner or without the due attention. It is unacceptable that after the sloping of the curb the passages are still not safe, that there are holes in the passages, that they are not wide enough for the passage of wheelchairs, and that they disable and complicate the movement of persons with disabilities in any other way. The incorrect sloping of the curb in Ratka Vukićevića Street and in Somborski Boulevard, in addition to discrimination against persons with disabilities, also represents a risk of injury for these persons, which is why it is very important when undertaking works to ensure accessibility to the streets and to *always* act in accordance with the standards prescribed by the Rulebook on Technical Standards of Accessibility.

Therefore, it can be concluded that the omission of the Directorate, as a public company competent for the maintenance of public spaces to perform its legal obligation in relation to ensuring accessibility, led to discrimination against all persons with disabilities, especially persons who use wheelchairs regarding accessibility of public spaces, which is explicitly prohibited by Article 13 of the Law on Prevention of Discrimination against Persons with Disabilities as one of the special cases of discrimination. The consequences of this omission are reflected in the limitation of possibilities of persons with disabilities, especially those who use wheelchairs, to enjoy civil, political, social, economic, cultural and other human rights and freedoms under equal conditions.

The Commissioner also learned that there is still a certain number of public spaces in the territory of the City of Niš which are not accessible to persons with disabilities and that this situation represents a large problem for those who move around using a wheelchair. Bearing in mind the possibility that the slow adaptation of public spaces in Niš is caused by limited funding, the Commissioner considers that in this case, what is of particular concern is the fact that even with the *record* funds for construction and reconstruction of the streets in Niš, according to the statement of the Directorate's Executive Director, necessary funds were not allocated for ensuring that these public transport routes become fully accessible for persons with disabilities.

In addition to this, the City of Niš and the Directorate for the Construction of the City of Niš, as a public company competent for the maintenance of public spaces, have an accentuated obligation to respect strategic goals and all other legal regulations prohibiting discrimination and to introduce measures and rules to improve the status of persons with disabilities as equal citizens who enjoy all rights and responsibilities.

Evaluating the established facts and legal regulations, the Commissioner for Protection of Equality, pursuant to the Article 33, points 1 and 9 of the Law on the Prohibition of Discrimination issued the Opinion and Recommendation to the Public Company Directorate for the Construction of the City of Niš to undertake measures with the aim of eliminating the consequences of discrimination and performing legal obligations prescribed by the Law on Prevention of Discrimination against Persons with Disabilities in accordance with the standards prescribed by the Rulebook on Technical Standards of Accessibility.

In accordance with Article 40 of the Law on the Prohibition of Discrimination, if the Public Company Directorate for the Construction of the City of Niš fails to act upon the Recommendation within 30 days of the day of receiving it, the Commissioner shall issue the measure of caution by passing a decision against which it is not allowed to lodge a complaint; if the Public Company Directorate for the Construction of City of Niš fails to implement the measure of caution, the Commissioner for Protection of Equality shall inform the public about it through the media and in other appropriate ways.

## **5. DISCRIMINATION COMPLAINTS ON THE BASIS OF POLITICAL OPINION AND RELIGIOUS BELIEF**

### **5.1. The complaint of the Association A. S. against the Faculty of Orthodox Theology against discrimination on the basis of religious belief in the field of education (File no. 1065 dated 15 October 2012)**

Acting within the jurisdiction stipulated by law to receive and consider complaints filed pertaining to violations of provisions of the Law on the Prohibition of Discrimination, to issue opinions and recommendations and pass measures stipulated by law (Article 33, paragraph 1, point 1 of the Law on the Prohibition of Discrimination, Official Gazette of the Republic of Serbia, no. 22/2009) concerning the complaint of the association A. S. against the Faculty of Orthodox Theology, University of Belgrade, the Commissioner for Protection of Equality issues the following

#### **OPINION**

The Faculty of Orthodox Theology, University of Belgrade in its Statute prescribed that for enrollment in the basic academic studies and in master academic studies a person is required to obtain the consent from the competent bishop (Art. 58, paragraph 1 and Art. 61, paragraph 3), as well as that only persons who have the consent (blessing) of the competent bishop are entitled to apply for the professional rank of teacher, lecturer, associate and researcher (Art. 86). Prescribing this condition does not violate regulations of the Law on the Prohibition of Discrimination.

#### *Rationale*

The Commissioner for Protection of Equality was contacted with the complaint by the Association A. S., which stated that the “orthodox priest” could arbitrarily deny “the blessing” or the permission to a potential student for enrollment in the University of Belgrade. The complaint alleges, *inter alia*, the following:

- That the Faculty of Orthodox Theology of the University of Belgrade discriminates against students and professors of the Faculty of Orthodox Theology on the basis of religious belief;

- That Article 58, paragraph 1 of the Statute of the Faculty of Orthodox Theology prescribes, *inter alia*, obtaining the “consent of the competent bishop” as a necessary condition for enrollment in the academic studies. Article 61, paragraph 3 also requires the candidate to “obtain the consent of the competent bishop”, while Article 86 states that the principal condition for acquiring the rank of teacher or lecturer is the “consent (blessing) obtained from the competent bishop, in addition to other prescribed conditions”;
- That an utterly arbitrary condition for studies and work is set in an institution that “allegedly” should be educational, and that it depends on the subjective and precarious will of a religious superior;
- That according to the Statute of the University of Belgrade and the Statute of the Faculty of Orthodox Theology, a religious superior decides by his own subjective discretion who is suitable and who is not suitable to become a student, teacher or lecturer at the University of Belgrade;

A copy of the Statute of the Faculty of Orthodox Theology was delivered as evidence with the complaint.

The Commissioner for Protection of Equality conducted the procedure aimed at establishing the legally relevant facts and circumstances in accordance with Article 35, paragraph 4 and Article 37, paragraph 2 of the Law on the Prohibition of Discrimination; during the procedure, a request was sent to the Faculty of Orthodox Theology of the University of Belgrade to provide a statement on the allegations and the grounds of the complaint.

The Faculty of Orthodox Theology of the University of Belgrade delivered the statement in which, *inter alia*, it is stated:

- That the complainant does not have the standing (*locus standi*) to file the complaint since the Article 35, paragraph 1 of the Law on the Prohibition of Discrimination prescribes that a person who considers himself/herself discriminated against shall lodge a complaint in writing to the Commissioner or, under exceptional circumstances, orally for the record, without being obligated to pay a tax or any other charges. In the present case the person who filed the complaint and the legal entity on whose behalf the complaint was lodged did not state what was the act of discrimination they suffered, that is, why they believed to have suffered discrimination;
- That the Commissioner for Protection of Equality made an omission in relation to Article 36, paragraph 2 of the Law on the Prohibition of Discrimination, which prescribes, *inter alia*, that the Commissioner for Protection of Equality shall not take any steps concerning a complaint if it is evident that no violation of rights pointed to by the person having lodged the complaint has actually occurred;
- That Article 1 of the Constitution of the Republic of Serbia foresees, *inter alia*, that the Republic of Serbia is a state of Serbian people and all citizens who live in it, based on human rights and freedoms, and commitment to European principles and values, while Article 18, paragraph 3 prescribes that provisions on human

and minority rights shall be interpreted pursuant to valid international standards in human and minority rights, as well as the practice of international institutions which supervise their implementation, and Article 44 guarantees the autonomy of Churches and religious communities;

- That the Faculty of Orthodox Theology is of the stand that the aforementioned provisions of the Constitution not only enable but require to interpret, view and practice the prohibition of discrimination in accordance with European principles and values, as well as the practice of international institutions overseeing the implementation of human rights and freedoms;
- That one of the most important acts of European Law which prohibits discrimination on the basis of religion and resolves the issue of the possible conflict between observance of state law and church law, i.e. respect for the status of Churches and religious communities according to state law and the interest to prohibit discrimination is the Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation. The Directive, together with the Council Directive 2000/43/EC of 2000 implementing the principle of equal treatment between persons regardless of their racial or ethnic origin, was adopted in order to consistently regulate the prohibition of discrimination at the European level. The aforementioned Directives represented the basis for the approval of funds for the project implemented by several Ministries of the Government of the Republic of Serbia, and the principal result was the adoption of the Law on the Prohibition of Discrimination and the establishment of the institution of the Commissioner for Protection of Equality;
- That according to Article 1 of the Directive 2000/78/EC its purpose is to lay down a general framework for combating discrimination on the grounds of, *inter alia*, religion regarding employment and occupation. The Directive defines its range of implementation by foreseeing that it shall apply to all persons in both the public and private sectors, including public bodies, in relation to the conditions for access to employment, to self-employment or to occupation, access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, employment and working conditions, including dismissals and pay, membership of and involvement in an organization of workers or employers. The Directive foresees a substantial number of exceptions and in this sense it should be pointed out that the Directive prescribes that Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds on which discrimination is prohibited shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is justified. In terms of occupational requirements, the Directive explicitly prescribes that Member States may stipulate that in the case of occupational activities within churches and other public or private organizations, the ethos of which is based on religion, a difference of treatment based on a person's religion shall not constitute



discrimination, where a person's religion constitutes a genuine, legitimate and justified occupational requirement;

- That, taking into consideration the aforementioned provisions of the Directive, a question arises: is it reasonable and justified that persons who do not share the value system that this Faculty teaches become professors and lecturers at it? Could the Faculty maintain its identity and autonomy if an obligation is imposed to admit such persons? The main conclusion that can be made on the basis of such reasoning is that the religion constitutes a genuine, legitimate and justified occupational requirement for professors and lecturers of the Faculty of Orthodox Theology;
- That the provisions of the Statute of Faculty of Orthodox Theology do not stipulate the orthodox religious faith as a condition for employment at the Faculty or for admission of students, but only the blessing of the competent bishop. There is also the possibility, which occurred several times, of granting a blessing to persons who are not Orthodox Christians but who wish to study at the Faculty of Orthodox Theology. In addition, the University of Belgrade recognizes diplomas obtained at foreign religious higher education institutions on the basis of the justified proposal by the Faculty of Orthodox Theology, and not only Christian institutions but also Islamic and Jewish, and others as well upon request. This is why we believe that the present case does not regard by any means an unjustified differentiation or unequal treatment or discrimination;
- That the institute of blessing or *missio canonica* is well known and customary in European legislation and that the Roman Catholic Church realizes this right in many European states;
- That the acts of the Faculty of Orthodox Theology, Statute included, in several occasions underwent the inspection of state institutions (University of Belgrade, Commercial Court, Commission for Accreditation of Higher Education Institutions);
- That the Faculty of Orthodox Theology is not a "foreign body" at the state University of Belgrade but one of its founders, along with the Faculty of Law, Faculty of Philosophy, Technical Faculty and Faculty of Medicine (Law on University, "Srpske novine" "Official Gazette of the Kingdom of Serbia", 12 March 1905);
- That the Commissioner for Protection of Equality does not have the grounds to conduct a procedure upon this complaint since there is no breach of law that the complainant indicates. On the contrary, forwarding the groundless complaint lodged by a person who does not have standing because he/she could not consider himself/herself discriminated against in any way, represents an act which actually places the Faculty of Orthodox Theology, its students, professors and employees, and the whole University of Belgrade, for the umpteenth time in a position where they have to warn that the claim that diversity means discrimination represent the harshest harassment and public humiliation of someone who is different. In addition, Article 12 of the Law on the Prohibition of Discrimination stipulates



that the harassment and humiliating treatment aiming at or constituting violation of an individual's or a group of persons' dignity, especially if it induces fear or creates a hostile, humiliating or offensive environment represents a form of discrimination. We believe that the claims that the blessing of the competent bishop the Statute prescribes for students, lecturers and professors constitutes discrimination actually represent harassment and the creation of a hostile and offensive environment.

With the aim of establishing the legally relevant facts and circumstances the Commissioner for Protection of Equality also requested a statement on the grounds of the complaint from the University of Belgrade. The statement on the grounds of the complaint was requested from the University of Belgrade, bearing in mind that in accordance with Article 160 of the Statute of the University of Belgrade granting consent for the statutes of the higher education units falls within the competence of the University.

The University of Belgrade delivered their statement wherein it is stated:

- That the Board for Statutory Issues concluded that the case does not pertain to the discriminatory ground for studies and work, bearing in mind the specificities of the Faculty of Orthodox Theology in regard to other faculties within the University of Belgrade, since studying and working in this higher education institution implies a necessary link between the vocation and religion (the legislation and case law of the European Union clearly determines the conditions under which affiliation to a certain religion can be requested for employment).

It should be noted at the outset that in the present case the regulations prescribing the consent (blessing) of the competent bishop as a condition for enrollment to the study programs of the Faculty of Orthodox Theology and the condition for selection into certain professional ranks are analyzed only from the aspect of anti-discrimination regulations, bearing in mind the competences of the Commissioner for Protection of Equality.

In accordance with this, it has not been evaluated whether the condition of obtaining the consent (blessing) of a religious dignitary set by a higher education institution in regard to enrollment in the studies or selection to a professional rank is in accordance with legal regulations, since this is not the competence of the Commissioner.

The Commissioner for Protection of Equality analyzed all allegations contained in the complaint and the statements on the complaint, the delivered evidence as well as relevant legal regulations in the field of protection from discrimination.

First of all, regarding the allegations on the absence of the standing (*locus standi*) of the complainant contained in the statement, the Commissioner shall first state that in accordance with Article 35 of the Law on the Prohibition of Discrimination and Article 15 of the Rules of the Procedure of the Commissioner for Protection of Equality a person who considers himself/herself discriminated against, be it an individual or a legal entity, is entitled to lodge a discrimination complaint, while in the case of discrimination against a specific individual an organization engaged in

the protection of human rights may lodge a complaint on his/her behalf and with his/her agreement. In cases of discrimination against a group of persons an organization engaged in the protection of human rights may lodge a complaint on its own behalf without an agreement by the members of the group. This is corroborated by the fact that Article 46, paragraph 2 of the Law on the Prohibition of Discrimination prescribes the possibility for an organization engaged in the protection of human rights or the rights of a certain group of people to initiate a lawsuit whereas the consent given in writing is necessary only if discriminatory treatment solely affects a particular person. *Argumentum a contrario*, if discriminatory treatment affects a group of persons the plaintiffs may initiate a lawsuit without the consent of the members of the discriminated group. Therefore, if an organization engaged in the protection of human rights or the rights of a certain group of people may initiate the lawsuit for protection against discrimination without the consent of members of the discriminated group, everyone can lodge a complaint to the Commissioner for Protection of Equality.

A. S. is an association founded with the aim of realizing goals in the field of the right to freedom of thought and secularity in public life, and as such it represents an organization that is engaged in the protection of human rights. Bearing in mind that the complaint points to discrimination on the basis of religious belief, the Association does have standing, that is, it is authorized to lodge a complaint against this type of discrimination. Namely, considering that legal regulations, by their nature, cannot prescribe what is the content of religion and religious belief, the right to legal protection from discrimination on the basis of religious belief that is prohibited by Article 21 of the Constitution of the Republic of Serbia and Article 18 of the Law on the Prohibition of Discrimination, belongs also to atheists, agnostics, skeptics and undeclared. This attitude is expressed in many decisions of the European Court for Human Rights. Taking into consideration all the aforementioned circumstances it is evident that the objection of the Faculty of Orthodox Theology of the University of Belgrade that the association A. S. does not have *locus standi* for lodging this complaint against discrimination is groundless.

The Commissioner for Protection of Equality has established that the Statute of the Faculty of Orthodox Theology (hereinafter: Statute) in Article 58, paragraph 1 prescribes that enrollment in the first year of basic academic studies is extended to a person who has completed a four-year secondary school or a higher education level and who has obtained the written consent of the competent bishop. Article 43 separately regulates the situation when a foreign citizen wishes to enroll in the study program – besides the fulfillment of other conditions, it is necessary that he/she obtains the consent for enrollment (blessing) from the Serbian Patriarch. For enrollment in graduate academic studies (master) Article 61, paragraph 3 prescribes that a student who graduated from other faculties may apply for admission to graduate academic studies of 120 ECTS if he/she previously passed a certain number of qualifying examinations and if he/she obtains the consent of a competent bishop. The consent of a bishop is also required in Article 86, which states that a person who wishes to apply for the rank of teacher, lecturer, associate and researcher at the Faculty, besides other prescribed conditions, needs to have the consent (blessing) from the competent bishop.

Article 9, paragraph 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms prescribes that everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his/her religion or belief and freedom, either alone or in community with others and in public or private, to manifest his/her religion or belief, in worship, teaching, practice and observance. Paragraph 2 of the same article prescribes that freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others. General prohibition of discrimination is prescribed in Article 14, thus providing that the enjoyment of the rights and freedoms set forth in the European Convention on the Protection of Human Rights and Fundamental Freedoms shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. It should be noted that Protocol no. 12 to the European Convention on the Protection of Human Rights and Fundamental Freedoms establishes a more general prohibition of discrimination and that this Protocol provides additional protection from discriminatory treatment in states that ratified this treaty. In addition, Article 2 of the Protocol no. 1 to the European Convention on the Protection of Human Rights and Fundamental Freedoms is important in the context of the right to education and prescribes, *inter alia*, that no person shall be denied the right to education.

The Council of the European Union Directive 2000/78/EC establishes a general framework for equal treatment in employment and occupation and in the introductory part states that in very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate. Also, it prescribes that Member States may maintain or lay down specific provisions on genuine, legitimate and justified occupational requirements that might be required for carrying out an occupational activity. The purpose of the Directive is prescribed in Article 1 as laying down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation regarding employment and occupation with a view to putting into effect in the Member States the principle of equal treatment. Article 4 regulates occupational requirements in such a way that Member States may provide that a difference of treatment based on a characteristic related to any of the grounds shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate. In addition, in case of occupational activities within churches and other public or private organizations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organization's ethos.

Article 11 of the Constitution of the Republic of Serbia prescribes that the Republic of Serbia is a secular state and that Churches and religious communities shall be separated from the state, as well as that no religion may be established as the state or mandatory religion. Furthermore, Article 21, paragraph 3 prescribes that 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. Freedom of thought, conscience and belief is prescribed in Article 43 where paragraph 1 guarantees freedom of thought, conscience, beliefs and religion as well as the right to stand by one's belief or religion or change them by choice; and paragraph 2 guarantees that no person shall have the obligation to declare his/her religious or other beliefs. Article 44 of the Constitution is also important and prescribes that Churches and religious communities are equal and separated from the state, as well as that Churches and religious communities shall be equal and free to organize their internal structure and religious matters independently, to perform religious rites in public and to establish and manage religious schools, social and charity institutions, in accordance with the law. In addition to the aforementioned, it should be noted that the right to education is stipulated in Article 71 of the Constitution of the Republic of Serbia. Paragraph 1 prescribes that everyone shall have the right to education and paragraph 3 prescribes that all citizens shall have access under equal conditions to higher education.

Article 18 of The Law on the Prohibition of Discrimination prescribes the prohibition of religious discrimination, which states that discrimination shall be considered to occur in the case of conduct contrary to the principle of free expression of faith or beliefs or if an individual or a group of persons is denied the right to acquire, maintain, express and change faith or beliefs, or the right to express, be it privately or publicly, or act in accordance with his/her beliefs. The provisions of Article 16 of the Law on the Prohibition of discrimination prohibit discrimination in the sphere of labor, that is to say, to violate the principle of equal opportunity for gaining employment or equal conditions for enjoying all the rights pertaining to the sphere of labor. Discrimination in the sphere of education and professional training is regulated in Article 19, paragraph 1 stipulating that everyone shall have the right to pre-school, primary school, secondary school and higher education and professional training under equal circumstances in accordance with the law, while paragraph 2 prescribes, *inter alia*, that it is forbidden to obstruct or prevent entry into an educational institution to an individual or a group of persons on the grounds of his/her or their personal characteristics.

Article 1 of the Law on Churches and Religious Communities prescribes the freedom of religion as the right to freedom of conscience and religion that is guaranteed to everyone in accordance with the Constitution. In terms of this law freedom of religion includes: freedom to have or not to have, to hold or to change religion or religious conviction, that is freedom of belief, freedom to profess faith in God; freedom to manifest belief or religious conviction either individually or in community with others, in public or in private, by participating in religious services and performing religious ceremonies, through religious teachings and instructions, cherishing and developing religious tradition; freedom to develop and improve religious education and culture.

The prohibition of religious discrimination is prescribed in Article 2 so that no one shall be subject to coercion that could impair freedom of religion, or be compelled to declare his/her religious belief and religious conviction or absence thereof. In addition, Article 2, paragraph 2 prescribes that no one shall be harassed, discriminated or privileged for his/her religious convictions, belonging or not belonging to a religious community, participating or not participating in religious services and religious ceremonies and exercising or not exercising guaranteed religious freedoms and rights, as well as that there shall be no state religion. The Law on Churches and Religious Communities also regulates educational activity in Articles 34-40, stipulating that Churches and religious communities may establish institutions for the purpose of educating future priests and religious officials and improving spiritual and theological culture and other related goals. In addition, a Church or religious community may initiate the procedure of verification and accreditation of a religious educational institution with the aim of incorporating it in the educational system in accordance with the law on education; religious educational institutions incorporated in the educational system are obliged to observe conditions and standards applicable within the educational system in accordance with the law on education.

The Law on Higher Education governs the system of higher education, conditions and manner of carrying out higher education activities, financing, etc. One of the objectives of higher education stipulated in Article 3 of this Law is to provide equal access to higher education to individuals. The right to higher education is prescribed in Article 8 as the right of all persons who have completed their secondary education irrespective of the race, color, 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. The higher education institution shall establish, in accordance with the law, the requirements to be fulfilled in screening and selecting successful applicants (academic achievement in previous education, type of education previously completed, special knowledge, skills or aptitude, etc.). The Law on Higher Education prescribes the conditions for the employment contract and the acquisition of the rank of teacher and associate (Arts. 64-73), while Article 70 of the Law on Scientific-Research Activity establishes the conditions for the acquisition of the rank of researcher.

The key question which rises in the present case is whether prescribing conditions which require the consent of the competent bishop for enrollment in basic and master academic studies of the Faculty of Orthodox Theology of the University of Belgrade, that is, for achieving the rank of teacher, lecturer, associate and researcher at this Faculty constitutes discrimination prohibited by the regulations of the Republic of Serbia. Not entering into religious essence and religious significance of the consent (blessing), it is certain that by prescribing the consent (blessing) as a condition for enrollment in academic studies, that is, for achieving a professional rank, it became a legally relevant condition which is subject to evaluation from the aspect of anti-discrimination regulations, since the Faculty is a part of the higher education system.

The analysis of the regulations prescribing the consent (blessing) as a condition for enrollment in academic studies, that is, for achieving a professional rank at the Faculty of Orthodox Theology shows that this condition applies to all potential candidates.

Therefore, in order to consider this condition from the aspect of anti-discrimination regulations, the provisions prohibiting indirect discrimination are relevant. According to Article 7 of the Law on the Prohibition of Discrimination indirect discrimination shall occur if an individual or a group of individuals, on account of his/her or their personal characteristics, is placed in a less favorable position through an act, action or omission that is apparently based on the principle of equality and prohibition of discrimination, unless it is justified by a lawful objective and the means of achieving that objective are appropriate and necessary.

Bearing in mind that obtaining the consent (blessing) represents the condition which applies to all persons who intend to enroll in basic and master academic studies, that is, who intend to apply for achieving the rank of teacher, lecturer, associate and researcher, this condition by itself does not place any person in a less favorable position on the basis of his/her religion or religious belief. Namely, even though it is entirely unclear what are the criteria on the basis of which a competent bishop grants the consent (blessing), it is not alleged in the complaint, and there had not been a documented case that a person was denied the consent (blessing) because of his/her religion or religious belief. Therefore the claim of the complainant that “the Faculty of Orthodox Theology discriminates against students and professors on the basis of religious belief” by prescribing in the Statute of the Faculty of Orthodox Theology of the University of Belgrade that for enrollment in basic and master studies at this Faculty, that is, for achieving the rank of teacher, lecturer, associate and researcher of this Faculty is groundless. Should the Commissioner for Protection of Equality be contacted with the complaint in which it would be stated that on the occasion of obtaining the consent (blessing) for enrollment in the study program of the Faculty of Orthodox Theology, that is, for selection into a certain professional rank, a person was discriminated against on the grounds of his/her religion or religious belief or other personal characteristics, the merits of the complaint would be examined from the aspect of anti-discrimination regulations in force, in accordance with international standards on the right to freedom from discrimination and the practice of international institutions working in this field.

Nonetheless, the Commissioner shall point out that the provisions of the Statute prescribing consent (blessing) as a condition for enrollment in basic and master academic studies, that is for acquiring certain ranks at the Faculty of Orthodox Theology, may cause a whole range of problems precisely because they open the possibility of indirect discrimination since:

- There are no prescribed criteria for obtaining the consent (blessing);
- There is no prescribed procedure and modality of granting the consent (blessing).

Because of all these circumstances, it is evident that the consent (blessing) is an act that is granted or denied by a bishop on the basis of broad discretion. The overall consequence is the creation of an absolute legal uncertainty as a consequence of the unpredictability of the outcome of the procedure for obtaining the consent (blessing). Not entering into the religious nature of the blessing, it is certain that its introduction into the Faculty's Statute requires that it is treated as any other condition for enrollment in the study program, that is, for applying for a certain professional rank, which implies

that this condition is evaluated on the basis of the objective criteria which are known in advance, and which are thereby in accordance with anti-discrimination standards. Therefore, with the aim of preventing indirect discrimination, the Commissioner recommends obtaining the consent (blessing) either to be removed from the Statute or to be precisely regulated in regard to the criteria and modalities of granting this consent (blessing), fully respecting the regulations on the prohibition of discrimination that are binding for all institutions of higher education.

## **6. DISCRIMINATION COMPLAINTS ON ANY OTHER BASIS**

### **6.1. The complaint of J. M. against the Mayor of Belgrade concerning the violation of the principle of equal treatment in the proceeding conducted before public administration organs (File no. 72 dated 16 January 2012)**

Acting within the jurisdiction stipulated by law to receive and consider complaints filed pertaining to violations of provisions of the Law on the Prohibition of Discrimination, to issue opinions and recommendations and pass measures stipulated by law (Article 33, paragraph 1, point 1 of the Law on the Prohibition of Discrimination, Official Gazette of the Republic of Serbia, no. 22/2009) concerning the complaint of J. M. from B., the Commissioner for Protection of Equality issues the following

#### **OPINION**

In line with the Conclusions adopted by the Mayor of the City of Belgrade on the basis of which the quarterly financial assistance of 4,000 Dinars is paid to the pensioners who reside in the territory of the City of Belgrade and whose pension income is lower than 13,000 Dinars per month, this right to financial assistance is recognized only to those pensioners who spent their entire pensionable service in the Republic of Serbia, thus discriminating against the retirees who spent a part of their pensionable service in other states and who find themselves in the same situation, i.e. they are permanent residents in the territory of the City of Belgrade and their total income from pension is less than 13,000 Dinars per month.

The Commissioner for Protection of Equality, pursuant to Article 33, paragraph 1, point 1 and Article 39 paragraph 2 of the Law on the Prohibition of Discrimination, issues to the Mayor of the City of Belgrade the following

#### **RECOMMENDATION**

1. The Conclusions on the basis of which the future payment of quarterly financial assistance shall be effectuated to the pensioners who have permanent residence in the territory of the City of Belgrade, and whose pensions do not exceed the determined amount, shall prescribe precise criteria and appropriate modalities of



proving their fulfillment in order to ensure that the pensioners who permanently reside in the territory of the City of Belgrade and whose pension income does not exceed a certain determined amount become equal in regard to realizing the right to financial assistance, regardless of whether they realized their pensionable service entirely in the Republic of Serbia or spent a part of their working life in other states.

2. The Mayor of the City of Belgrade shall inform the Commissioner for Protection of Equality within 30 days from the day of receiving this Opinion and Recommendation about the measures to be undertaken in order to act in line with the Recommendation.

### *Rationale*

J. M. from B. contacted the Commissioner for Protection of Equality with the complaint on 15 November 2011 in which she states that she was discriminated against by the decision of the Mayor of the City of Belgrade regarding financial assistance to retirees permanently residing in the territory of the City of Belgrade, since the decision places two groups of pensioners in different positions based only on the place where they worked and achieved their pensionable service. In a proceeding of providing material assistance to the pensioners who are economically and socially endangered. J. M. also states that she is a citizen of the Republic of Serbia, that she lives in Belgrade since 1984 and that she realized 22 years of her total pensionable service in Belgrade and 13 years in Tuzla (Bosnia and Herzegovina) as well as that she cannot obtain the financial assistance for the pensioners residing in the City of Belgrade because she is receiving a proportionate pension.

The following documents were delivered with the complaint: the correspondence to Pension and Disability Insurance Fund (PDIF) dated 6 November 2009; the correspondence of the Republican PDIF, Belgrade branch, no. D-731157 dated 17 November 2009; the correspondence of J.M. to the Director of PDIF dated 26 November 2009; the correspondence of the Republican PDIF, Belgrade branch, no. D-731157 dated 7 December 2009; the correspondence of J. M. to PDIF dated 12 January 2010; the correspondence of the Republican PDIF, Belgrade branch, no. D-731157 dated 18 January 2010; a copy of the payment order in the name of J. M. for the first part of the income for March 2011 Republican PDIF, Belgrade branch; correspondence of J. M. to PDIF, Belgrade branch, and to the Ombudsman dated 18 April 2011; the correspondence of PDIF, Sector for Financial Affairs no. 22 181-10/1598 dated 10 May 2011; the correspondence of the Ombudsman, File no. 11308 dated 7 June 2011; the correspondence of the Ombudsman of the City of Belgrade, File no. ZG-181-5/2011 dated 21 June 2011; the correspondence of J. M. dated 7 June 2011; the correspondence of the Ministry for Human and Minority Rights, Public Administration and Local Self-Government no. 119-07-00-00171/2011-09 dated 11 July 2011; the correspondence of PDIF, Sector for Financial Affairs no. 22 181-4205/11 dated 18 July 2011; and the correspondence of the City Administration of City of Belgrade XXVI-01 no. 339/11 dated 19 July 2011.

The Commissioner for Protection of Equality conducted the procedure for the purpose of establishing the legally relevant facts and circumstances, and in accordance with Article 35, paragraph 4 and Article 37, paragraph 2 of the Law on the Prohibition of Discrimination, and the Mayor of the City of Belgrade was requested to provide a statement about the grounds of the complaint.

The Secretariat for Social and Children's Protection of the City Administration of the City of Belgrade delivered the statement no. XIX-01-07-983/11 dated 8 December 2011 wherein the following is alleged:

- That the request which the Commissioner for Protection of Equality addressed to the Mayor of Belgrade has been forwarded to the Secretariat for Social and Children's Protection;
- That since November 2008 the Secretariat for Social and Children's Protection has been implementing the proceeding of quarterly payments of 4,000 Dinars financial assistance for pensioners who reside in the territory of the City of Belgrade and whose income from pension on the day of 30 September 2008 was equal to or less than 13,000 Dinars;
- That the payment of the fourth rate of assistance for 2011 will be completed for the pensioners whose income on the day of 30 September 2011 was equal to or less than 16,157.60 Dinars;
- That this financial assistance is paid four times a year based on a record (an electronic list of pensions paid on a certain date), which the Directorate of the Pensions and Disability Insurance Fund – Sector for Financial Affairs delivers for the needs of the City Administration of the City of Belgrade;
- That the circle of persons to whom this assistance is provided is limited to the retirees who spent their years of service in the Republic of Serbia since the records on the basis of which the payment is effectuated contain the names of pension beneficiaries for whom PDIF has accurate data on amounts paid, i.e. the pensioners who are not beneficiaries of the so called “proportionate pensions”;
- That during the preparations for the first payment of this financial assistance representatives of PDIF – Sector for Financial Affairs pointed out to the representatives of the City Administration of the City of Belgrade that their records cover those pension beneficiaries who spent their entire work life in the Republic of Serbia and that PDIF was not able to deliver accurate data on pension beneficiaries who had spent their pensionable service proportionally in other states;
- That the beneficiaries of proportionate pensions with the amounts higher than the amount determined are not included in PDIF records because the list contains only the data on incomes lower than or equal to the determined amount;
- That in this way the City Administration of the City of Belgrade wishes to alleviate the position of around 65,000 pensioners with low income who live in Belgrade, taking into account the costs of living in the capital city;

- That in the City Administration of the City of Belgrade there is no special decision of the Mayor on the basis of which financial assistance is paid to the pensioners;
- That the Mayor makes decisions in the form of a Conclusion regarding every rate of payment on the basis of the powers stipulated in Article 24, point 6 of the Capital City Bill and Article 52, paragraph 1, point 6 of the Statute of the City of Belgrade.

Article 21 of the Constitution of the Republic of Serbia prohibits all direct or indirect discrimination based on any grounds.

Article 4 of the Law on the Prohibition of Discrimination prescribes general prohibition of discrimination stipulating that all persons shall be equal and shall enjoy equal status and equal legal protection regardless of personal characteristics, and that everyone shall be obligated to respect the principle of equality.

Article 8 of the Law on the Prohibition of Discrimination prescribes that a violation of the principle of equal rights and obligations shall occur if an individual or a group of persons, on account of his/her or their personal characteristics, is unwarrantedly denied rights and freedoms or has obligations imposed that, in the same or in a similar situation, are not denied or imposed upon another person or group of persons if the objective or the consequence of the measures undertaken is unjustified, and if the measures undertaken are not commensurate with the objective achieved through them.

Analyzing the submitted complaint and the statement of the City Administration of City of Belgrade, the Commissioner for Protection of Equality has established that the persons who live in the territory of the City of Belgrade and who have proportionately achieved pensionable service in other states are placed in a less favorable position in comparison to persons who live in the territory of the City of Belgrade and who have achieved their entire pensionable service in the Republic of Serbia.

In order to examine whether the principle of equal rights and obligation has been violated by the Conclusion of the Mayor of City of Belgrade it is necessary to consider:

- Whether the objective achieved through this measure is allowed and justified;
- Whether the objective (or objectives) can be achieved by the prescribed measure, that is, whether the undertaken measures are commensurate with the objective achieved through it;
- Whether there is an objective and reasonable justification to deny the rights foreseen by the Mayor's Conclusion to certain categories of the retirees who reside in the City of Belgrade.

In the statement of the City Administration of City of Belgrade it is stated that since November 2008 the Secretariat for Social and Children's Protection has been implementing the procedure of quarterly payments of financial assistance to the retirees who have permanent residence in the territory of the City of Belgrade and whose pension income on 30 September 2008 was equal or lower than 13,000 Dinars, that is, whose pension income on 30 November 2011 was equal to or lower than

16,157,60 Dinars. It is also stated that the objective of this measure is to “alleviate the position of around 65,000 pensioners with low income who live in Belgrade, taking into account the cost of living in the capital city”.

Regarding the question if the objective is allowed and justified it is indisputable that the Mayor of the City of Belgrade is authorized, as the principal authority for execution of the budget, to issue acts by which financial assistance is regulated for the socially and economically endangered category of senior citizens from the funds of the City budget. The objective that is achieved by the decision of the Mayor of the City of Belgrade is to provide from the City budget one-time financial assistance for the pensioners with low income. In accordance to this, the Commissioner for Protection of Equality believes that the objective of the measure of one-time assistance to economically and socially endangered pensioners from the City of Belgrade is allowed and justified.

While reaching a decision in the present case the Commissioner for Protection of Equality analyzed all evidence submitted with the complaint, the statement of the City Administration and relevant regulations from the field of protection from discrimination, taking into consideration that the City Administration of the City of Belgrade did not deliver the document on the basis of which it effectuated payments to the pensioners starting in November 2008 or the Conclusion on the basis of which the payment of the fourth rate of assistance for 2011 will be effectuated to the pension beneficiaries whose income on 30 November 2011 was equal to or lower than 16,157.60 Dinars, although these documents were requested together with the statement on the grounds of allegations from the complaint.

Having analyzed the statement of the City Administration it has been concluded that the necessary conditions for eligibility for financial assistance of the City of Belgrade were the following:

- That the person is a retiree with permanent residence in the territory of the City of Belgrade, and
- That the pension income on 30 September 2008 was equal to or lower than 13,000 Dinars, that is, equal to or lower than 16,157.60 Dinars on 30 November 2011.

In the statement of the City Administration of the City of Belgrade it is pointed out that “the beneficiaries of proportionate pensions with the amounts higher than the determined amount are not included in PDIF records because the list contains only the data on incomes equal to or lower than the determined amount, i.e. the retirees who are not beneficiaries of the so called ‘proportionate pensions’” and that the PDIF – Sector for Financial Affairs is not able to provide accurate data for the beneficiaries of pensions proportionally achieved in other states. This means that the financial assistance provided by the City of Belgrade is paid to the retirees who have permanent residence in the territory of the City of Belgrade and whose income was equal to or lower than 16,157.60 Dinars on 30 November 2011, while it is denied to all those pensioners permanently residing in the territory of the City of Belgrade who are not included in the list of PDIF – Sector for Financial Affairs, regardless of the fact that their total pension income does not exceed the determined amount.

From all the aforementioned it follows that all retirees with permanent residence in the territory of the City of Belgrade who on a certain date receive a pension for a certain amount have the right to financial assistance but that the City Administration of the City of Belgrade can obtain data from PDIF for only one number of pensioners who fulfill these conditions. The Commissioner for Protection of Equality takes the stand that this circumstance should not be the reason for denying the right to financial assistance to the pensioners who achieved their pensionable service in other states and who receive so called „proportionate pension“ in Serbia. Namely, the amount of the part of the pension that this category of pensioners realizes from other states can be established by the inspection of the pension check or the decision determining the amount of pension as well as the statement of the bank through which a part of the pension is paid.

Accurate determination of the criteria for realizing the right to financial assistance, i.e. issuing the decision determining the conditions for realizing the right as well as the modality of proving the fulfillment of conditions, would redress the violation of the principle of equality and discrimination against those citizens who fulfill the essential condition for the realization of the right to financial assistance (total pension income equal to or lower than the amount prescribed) but are unable to realize this right because the payment is effectuated exclusively on the basis of the PDIF records that include only pension beneficiaries who achieved their entire pensionable service in the Republic of Serbia, while PDIF is unable to provide accurate data for the pension beneficiaries who achieved their pensionable service proportionally in other states.

Considering the aforementioned arguments it is evident that there had been no justified and reasonable reasons for placing the pensioners who permanently reside in the territory of City of Belgrade and are beneficiaries of the so-called “proportionate pensions”, whose income on 30 November 2011 was equal to or lower than 16,157.60 Dinars in unequal position compared to pensioners who permanently reside in the territory of the City of Belgrade, whose income on 30 November 2011 was equal to or lower than 16,157.60 Dinars and are registered in PDIF records. Different treatment of these categories of citizens, to whom the right which is granted to other persons in the same situation is denied on the basis of the fact that they did not achieve pensionable service entirely in the Republic of Serbia does not have an objective and reasonable justification, especially considering the fact that two groups of pensioners in an identical position are concerned – both have permanent residence in the territory of the City of Belgrade, both have total pension income lower than the amount determined and both are equally affected by the high costs of living in the capital city.

Evaluating the established facts and legal regulations the Commissioner for Protection of Equality pursuant to Article 33, points 7 and 9 of the Law on the Prohibition of Discrimination issues the recommendation to the Mayor of the City of Belgrade to undertake actions to redress the violation of the principle of equality regarding those categories of citizens who have been unjustifiably denied the right to one-time financial assistance on the basis of the fact that they did not reach their pensionable service entirely in the Republic of Serbia.

## **6.2. The complaint of T. Š. Against the company M. against discrimination on the basis of family status in the field of work and employment (File no. 1839 dated 15 November 2012)**

### **OPINION NO. 392/2012**

This Opinion has been issued in the procedure upon the complaint lodged by T. Š. from A. against the employer – company M. c. d. o. o. from A. because she was reassigned to a lower position upon returning to work from special child care leave.

#### **1. COURSE OF THE PROCEDURE**

1.1. The Commissioner for Protection of Equality was contacted with a complaint on 27 August 2012 by T. Š. from A. because of reassignment to a lower position upon returning to work from special child care leave, by her employer “M. c” d.o.o. from A.

1.2. In the complaint she alleged:

- That she is a mother of three children and that she was absent from work for special child care due to problems that occurred during childbirth and the subsequent diagnosis of her child, and after she returned to work from her leave she was not allowed to resume her job;
- That she returned to work on 31 July 2012, which was the due date, and that her colleagues who were present in the company on that day told her that they did not have any information on what she was going to do because the director S. K. was on vacation and left no instructions regarding the job;
- That it was obvious that her position was no longer available and that she was sitting in front of the company when her colleagues told her she was free to go home;
- That she went to work the next day and that under the threat of termination of employment a contract annex was offered to her that did not correspond to her vocational education or the work assignments she was previously performing;
- That her position was not abolished and that according to the rulebook of the employer that specific position requires the employment of three persons in order to adequately meet the job requirements;
- That there are other vacant positions that the employer did not offer to her and that she regards the offer she was made an act of discrimination and degradation.

- 1.3. The following evidence was submitted with the complaint: 1) the employment contract no. 12 dated 17 September 2007; 2) the employment contract annex no. 12/a dated 17 December 2007; 3) the annex no. 1I dated 12 October 2010; 4) the proposal for conclusion of the annex 3 of the employment contract no. 229-1/12 dated 1 August 2012; 5) the annex no. 3 of the employment contract no. 243-1/12 dated 10 August 2012; 6) the decision on the recognition of the right to salary compensation during leave for special child care dated 4 January 2012; 7) the decision on the recognition of the right to salary compensation during the leave due to special child care dated 21 January 2011; 8) the decision on the recognition of the right to salary compensation during the leave due to the special child care dated 1 June 2011; and 9) the decision on annual leave dated 15 June 2012.
- 1.4. The Commissioner for Protection of Equality conducted the procedure with the aim to establish the legally relevant facts and circumstances in accordance with Article 35, paragraph 4 and Article 37, paragraph 2 of the Law on the Prohibition of Discrimination. In the course of the procedure a statement was obtained from the company “M. c” d. o. o. from A.
- 1.5. The following is stated in the statement of Director S. K.:
  - That “M. c.” d. o. o. A. adopted the Rulebook on internal work organization and systematization of work and working assignments no. 264-2/11 dated 30 August 2011 on the basis of which the requirement for the work position “controller” is 3<sup>rd</sup> or higher degree of vocational education;
  - That at the moment of delivering the offer for concluding the annex no. 3 of the employment contract the transfer of the employee T. Š. to the work position of controller was necessary due to the requirements of the work process and organization of work. Namely, the employer works in the field of arranging and maintaining public parking lots in the territory of municipality A. and that because of the nature of the job around 80% of the total number of employees has employment contracts for the position of controller performing job duties in the field;
  - That only a few employees perform their tasks in the administration department and that at the given moment the employer had an urgent need to rearrange work positions, that is, to increase the number of controllers working in the field;
  - That the employer respected the procedure prescribed by the Labor Law in relation to the offer for contract annex, which T. Š. signed without presenting any remarks, even though according to Article 172 of the Labor Law she had the right to respond;
  - That, bearing in mind the provision of Article 16, paragraph 1 of the Law on the Prohibition of Discrimination the employer “M. c.” d. o. o. does not recognize itself as a perpetrator of discrimination on any grounds;



- That on 26 September 2012 the employee came to the employer and delivered the medical certificate – a medical certificate on the temporary inability to work on the basis of which the expected duration of the total inability to work was established from 15 to 25 September 2012;
- That the duty of the employee was to come to work on 26 September 2012 as well as to contact the employer on the day of expiry of the total inability to work in order to be informed about the working hours in accordance with the Rules of procedure;
- That the employee did not comply with the obligation of contacting the employer or coming to work as stipulated in the Labor Law and employment contract and that the temporary inability to work did not occur again in terms of Article 103 of the Labor Law.
- That the employee T. Š. is obviously avoiding performing her job duties while the employer has a large degree of understanding and patience towards the employee, who accuses the employer of discrimination;
- That the work position – financial-legal administrator that was previously assigned to T. Š. still exists but that due to reorganization of the work process one employee is now sufficient to adequately and timely perform all assignments.

## **2. FACTS**

- 2.1. Having inspected the employment contract no. 12 dated 17 September 2007 it has been established that the contract was concluded between the employer “P. s.” d. o. o. A. and T. Š., with 6th degree of vocational education for performing assignments at the work position administrative-technical secretary. The contract was concluded for the definite period of time, from 17 September 2007 until 16 December 2007. It has been established that in accordance with Article 7 of this contract, the salary of the employee was 25,000 Dinars and that it was to be paid at least once a month, on the last day of the next month at latest.
- 2.2. From the contract annex no. 12/A dated 17 December 2007 it has been established that it has been concluded for an indefinite period of time starting from 17 December 2007 and that all other provisions of the employment contract were unchanged.
- 2.3. Having inspected contract annex no. 1A dated 12 October 2010 it has been established that Article 1 of the annex was changed due to the fact that the employer changed their business name, which is now “M. c.” d. o. o. A. By this annex the parties defined the working relationship regarding the work position of the employee, duties and assignments in relation to the work position as well as the salary of the employee. Article 1 prescribes that the employer



establishes an employment relationship with employee T. Š., who has a 6th degree of vocational education (economist for marketing and commerce) for performing the assignments at the work position of financial-legal administrator. Article 2 states that the employee accepts reassignment to any other work position during her employment in accordance with the Rulebook on internal work organization and systematization and the Rules of procedure, as well as transfer to another place of employment. The salary of the employee according to Article 5 amounts to 22,000 Dinars net income and is composed of the salary for the job performed and time spent working, salary based on employee's contribution to the business accomplishment of the employer and other income based on employment relationship.

- 2.4. It has been established that the offer for contract annex 3 of the employment contract no. 229-1/12 dated 1 August 2012 states that it was necessary to introduce changes regarding the work position and salary amount to the employment contract dated 17 September 2007 as well as to employment contract annexes 1 and 2 due to the changed management conditions of the employer.
- 2.5. Having inspected employment contract annex 3 no. 243-1/12 dated 10 August 2012 it has been established that the parties defined the rights and duties stemming from the employment relationship in regard to the amount of the salary and the work position of the employee. Thus, Article 1 prescribes that the employer establishes the employment relationship with the employee for performing the assignments of controller, stipulated in the Rulebook on organization and systematization of work positions of the company "M. c." d. o. o from A., including the job description the employee should perform. Article 2 prescribes that the employee has the right to minimal wage before taxes in accordance with the Labor Law, augmented for the amount of the allowance for annual leave as well as for the amount of food to be consumed during working hours in accordance with the Rules of procedures of the employer.
- 2.6. On the basis of the decision no. 02 560-30 of the Municipality of Arandjelovac, Department for Economic and Social Activities, dated 21 January 2011 it has been established that T. Š. was recognized the right to salary compensation during leave due to the special child care from 29 January to 29 July 2011. By the decision no. 02 132-145 dated 1 July 2011 T. Š. was recognized the right to salary compensation during leave due to special child care from 28 July to 28 December 2011, and by the decision no. 01 132-304 dated 4 January 2012 T. Š. was recognized the right to salary compensation during leave due to special child care from 29 December 2011 to 29 June 2012.
- 2.7. Having inspected the decision on annual leave no. 190-2/12 dated 15 June 2012 it has been established that the employee T. Š. obtained approval for annual leave for 2012 for 21 days which she would use from 2 July 2012 to 20 July 2012.

### **3. MOTIVES AND REASONS FOR ISSUING THE OPINION**

- 3.1. While deciding in the present case the Commissioner for Protection of Equality evaluated the allegations from the complaint and the statement, enclosed evidence as well as relevant legal regulations in the field of protection from discrimination.
- 3.2. Bearing in mind the subject of the complaint, the Commissioner for Protection of Equality states that in the concrete case it is contested whether the transfer of T. Š. to a lower work position immediately upon her return from the leave due to the special child care, the employer “M. c.” d. o. o. committed an act of discrimination.

#### Legal background

- 3.3. The Commissioner for Protection of Equality is an autonomous, independent and specialized state authority established on the basis of the Law on Prohibition of Discrimination, with the task to prevent all forms and types of discrimination and to work on the realization of equality in social relations. The competence of the Commissioner for Protection of Equality is broadly defined in accordance with international standards in order to enable the efficient realization of the institution's role. One of the basic competences of the Commissioner for Protection of Equality is to receive and consider complaints of discrimination, to issue opinions and recommendations in concrete discrimination cases and to stipulate measures defined by the Law. In addition, the Commissioner is authorized to initiate the reconciliation procedure as well as court procedures for protection against discrimination and to submit misdemeanor notices against discrimination as defined by antidiscrimination legislation. The Commissioner is also authorized to warn the public about the most common, typical and severe cases of discrimination and to recommend measures for achieving equality to public authorities.
- 3.4. The Constitution of the Republic of Serbia prohibits any form of discrimination, direct or indirect, on any grounds, particularly on race, sex, national origin, social origin, birth, religion, political or other opinion, property status, culture, language, age and mental or physical disability. Also, the provision of Article 66 prescribes that families, mothers, single parents and any child in the Republic of Serbia shall enjoy special protection in the Republic of Serbia in accordance with the law, and that mothers shall be given special support and protection before and after childbirth.
- 3.5. Constitutional prohibition of discrimination is further elaborated in the Law on the Protection of Discrimination, in which Article 4 prescribes that all persons shall be equal and shall enjoy equal status and equal legal protection regardless of personal characteristics and that everyone shall be obligated to respect the principle of equality, that is to say, the prohibition of discrimination. Article 7 of the Law on the Prohibition of Discrimination prescribes that

indirect discrimination occurs if an individual or a group of persons, on the ground of his/her or their personal characteristics, is placed in a less favorable position through an act, action or omission that is apparently based on the principle of equality and prohibition of discrimination, unless it is justified by a lawful objective and the means of achieving that objective are appropriate and necessary. Articles 15-27 of the Law on the Prohibition of Discrimination define special cases of discrimination. In addition to other cases, Article 20 regulates discrimination on the basis of gender which shall be considered to occur in the case of conduct contrary to the principle of the equality of the genders, that is to say, the principle of observing the equal rights and freedoms of women and men in the political, economic, cultural and other aspects of public, professional, private and family life. Paragraph 2 of the same article forbids the denial of rights or the granting of privileges pertaining to gender, regardless of whether it is public or covert.

- 3.6. The Gender Equality Law prescribes that gender-based discrimination is any unjustified differentiation or unequal treatment or failure to treat (exclusion, restriction or prioritizing) aimed at hindering, jeopardizing, preventing or denying the exercise or enjoyment of human rights and freedoms to a person or a group of persons in the area of politics, economy, social, cultural, civil, family life or any other area. The Commissioner for Protection of Equality particularly points out the provision of Article 16, paragraph 3 of the Gender Equality Law that explicitly prescribes that absence from work because of pregnancy and parenthood must not be grounds for assigning a person to an inadequate job position and terminating the employment contract, in accordance with the law regulating labor.
- 3.7. Article 18 of the Labor Law stipulates that both direct and indirect discriminations are prohibited against persons seeking employment and employees in respect to their sex, origin, language, race, color of skin, age, pregnancy, health status or disability, nationality, religion, marital status, familial commitments, sexual orientation, political or other belief, social background, financial status, membership in political organizations, trade unions or any other personal quality. According to Article 19 of this Law, indirect discrimination exists when an apparently neutral provision, criterion or practice puts or would put a person seeking employment or employee in a less favorable situation than other persons, due to a certain quality, status, belief, while the provisions of Article 20 prescribe that discrimination shall be prohibited in relation to, *inter alia*, working conditions and all rights resulting from the labor relationship.

#### Analysis of the evidence submitted with the complaint and the statement

- 3.8. On the basis of the evidence submitted with the complaint it has been established that T. Š. has been employed in the company "M. c." d. o. o. from A. since 17 September 2007, with 6<sup>th</sup> degree of vocational education in the

position of administrative-technical secretary. According to employment contract annex 11 dated 12 October 2010 she was assigned to perform the job of financial-legal administrator with 6<sup>th</sup> grade of vocational education and she was employed in that work position until her return from special child care leave, that is, until the employment contract annex 3 was concluded. On the first day upon her return from special child care leave, that is upon return from annual leave on 31 August 2012, an offer for contract annex 3, due to “the changed management conditions of the employer” was delivered to T. Š., with the changes in the contract in relation to “work position and salary amount”. According to employment contract annex 3 dated 10 August 2012 T. Š. is assigned to performing the duties of controller, and according to Article 2 of the annex it has been established that she had the right to minimum wage in accordance with the Labor Law.

- 3.9. Taking into consideration the established facts, the Commissioner for Protection of Equality states that from the aspect of the Law on the Prohibition of Discrimination it is necessary to determine whether there were objective and justifiable reasons for reassigning T. Š. to a lower work position immediately upon her return from special child care leave. In addition, establishing this contested fact should be considered in accordance with the provision of Article 7 of the Law on the Prohibition of Discrimination, according to which indirect discrimination shall occur if an individual or a group of individuals, on account of his/her or their personal characteristics, is placed in a less favourable position through an act, action or omission that is apparently based on the principle of equality and prohibition of discrimination, unless it is justified by a lawful objective and the means of achieving that objective are appropriate and necessary. In accordance with this, discrimination shall not occur if the objective of the concrete treatment (act, action or omission) is legitimate and the means of achieving that objective are appropriate and necessary. Since the complainant presented the facts and offered the evidence by which she proved the likelihood of an act of discrimination, the burden of providing evidence that no violation of the principle of equality has occurred shall fall on the employer, the company “M. c.” d. o. o. from A., in accordance with Article 45 of the Law on the Prohibition of Discrimination and Article 49 of the Gender Equality Law.
- 3.10. The company “M. c.” d. o. o. from A. was requested to provide a statement on the allegations of the complaint and on, *inter alia*, “changed management conditions of the employer”, which are stated as a reason for changing the employment contract in relation to work position and the salary amount of the employee T. Š. in the offer for contract annex 3, as well as to deliver evidence thereto.

Regarding the allegations of the statement that “M. c.” d. o. o. from A. on 31 August 2011 issued the Rulebook on the internal organization of work and systematization of job positions on the basis of which 3<sup>rd</sup> or higher vocational education degree is required for the work position of controller, as well as that the offer for employment

contract annex was delivered in accordance with Article 171 of the Labor Law, the Commissioner for Protection of Equality shall state that these allegations are irrelevant for the present case. The fact that the employer conducted the procedure of concluding the employment contract annex with T. Š. in accordance with the provisions of the Labor Law does not at the same time mean that the employer did not commit discrimination against T. Š. on the grounds of gender, which is the motive for submitting the complaint. Bearing in mind the provisions of the Law on the Prohibition of Discrimination and the Gender Equality Law, the ground for assigning T. Š. to the lower work position is relevant in the present case. However, in the statement of M. c. d. o. o. from A. it is not stated which specific “changed management conditions of the employer” led to assigning T. Š. to a lower work position immediately upon her return from special child care leave. Although the statement does affirm that at the moment of delivering T. Š. the offer for employment contract annex 3 the employer needed to increase the number of controllers due to the needs of the work process and organization of work, considering that the nature of the company’s job requires that around 80% of the total number of employees has employment contracts for the work position of controller performing their job duties in the field, the Commissioner for Protection of Equality shall state that this is an arbitrary statement which the employer did not substantiate by the facts or evidence, which the employer was obliged to do in terms of Article 45 of the Law on the Prohibition of Discrimination in order to demonstrate the existence of justifiable and objective reasons for such treatment.

- 3.11. By delivering the employment contract annex 3 immediately upon her return from special child care leave, after which T. Š. was assigned to a lower work position, the employer committed an act of indirect discrimination based on gender. The reason of assigning T. Š. to a lower work position is her personal characteristic – gender – considering that there are no objective or justifiable reasons for such treatment by the employer. The effects of such treatment by the employer are doubly harmful – assignment to a lower work position is a professional degradation that hinders and/or impedes career advancement and decreases salary.
- 3.12. The Commissioner for Protection of Equality shall mention that in numerous international documents as well as in national legislation there are rules that state that placing women in less favorable position because of pregnancy, parental leave, breastfeeding, etc., represents direct discrimination on the grounds of gender for which it is not necessary to seek the so-called “comparators” (persons who find themselves in the same position) since such comparison is not possible due to the different reproductive functions of women and men.

On the other hand, international and national regulations contain provisions that prescribe that gender (gender roles) and absence from work due to child care and family care must not be a barrier to promotion at work or the ground for assigning a person to a less favorable position, and if such treatment does exist then indirect discrimination occurs.

Gender equality, *inter alia*, presumes that men and women have equal opportunities in the enjoyment of rights, which is a substantial determinant of

a democratic society and a state based on the rule of law. However, inequalities between men and women still persist in all spheres of social life (e.g. wage difference, unequal representation in public sphere and politics, unbalanced division of labor and responsibilities in the private sphere). These inequalities are a result of social relations built on stereotypical gender roles, which are visible in family, education, culture, media, labor market and in other areas of social life, and they are often used to justify and explain the subordinate position of women in society, thereby reflecting and encouraging existing inequalities. It is a well-known fact that women are very often discriminated against in the sphere of labor relations, especially because of their biological function to bear children. The most common forms of gender based discrimination in relation to pregnancy are: refusal of the employer to employ women because of pregnancy; termination of employment or assignment to another (lower) work position; women are not assured or enabled to go back to the same work place after the use of maternal leave and absence from work due to child care; women are hindered in work advancement or professional training during the pregnancy. This situation in society and the practice of employers excludes women from competing for employment and/or advancement at work and systematically places and keeps women in a less favorable situation, thus violating the principle of equality.

#### **4. OPINION**

By assigning T. Š. to a lower work position on the basis of employment contract annex 3 dated 10 August 2012 immediately upon her return from special child care leave, the employer “M. c.” d. o. o. from A. committed an act of indirect discrimination on the grounds of gender, prohibited by Article 7 of the Law on the Prohibition of Discrimination in connection to Article 20 of the Law on the Prohibition of Discrimination and Article 16, paragraph 3 of the Gender Equality Law.

#### **5. RECOMMENDATION**

The Commissioner for Protection of Equality recommends to “M. c.” d. o. o. from A. to undertake all necessary measures with the aim of redressing the discriminatory treatment committed against employee T. Š.

“M. c.” d. o. o. from A. shall inform the Commissioner for Protection of Equality about the measures planned in order to act in line with this recommendation within 30 days of the day of receiving this Opinion with Recommendation.

In accordance with Article 40 of the Law on the Prohibition of Discrimination, if “M. c.” d. o. o. from A. fails to act upon the Recommendation within 30 days of the day of receiving it, the Commissioner shall issue the measure of caution by passing a decision against which it is not allowed to lodge a complaint; should “M. c.” d. o. o. from A. fail to implement the measure of caution, the Commissioner for Protection of Equality shall inform the public about it through the media and in other appropriate ways.

### **6.3. The complaint of Z. F. against the company G. T. against discrimination on the basis of membership in the trade union organization in the field of labor relations (File no. 188 dated 18 January 2013)**

#### **OPINION NO. 351/2012**

This Opinion has been issued in the procedure upon the complaint submitted by Z. F. from S. P. against the employer – the company “G. T.” d. o. o. from S. P. against discrimination in the workplace on the basis of membership in a trade union organization.

#### **1. COURSE OF THE PROCEDURE**

- 1.1. Z. F. from S. P. contacted the Commissioner for Protection of Equality with a complaint regarding discrimination on the basis of membership in a trade union organization.
- 1.2. In the complaint he stated the following:
  - That he is employed in the company “G. T.” d. o. o. from S. P. and that he, as well as all other employees, had to sign a blank consensual termination of employment contract when he became employed at the company;
  - That 52 workers registered a trade union organization on 30 June 2009 as well as that at the moment of founding the trade union the company had 210 employees;
  - That the representativeness of the trade union could not be established due to formal reasons because the employer refused to deliver the data on the exact number of employees to the Ministry of Labor and Social Policy;
  - That the employer was against organizing the union and that on 24 August 2009 all seven members of the union committee were dismissed from work as the employer activated the blank consensual termination of employment contracts;
  - That according to his knowledge only members of the union committee in this company were dismissed from work;
  - That the Labor Inspectorate acted in this case and that it issued a decision ordering the employer to postpone the implementation of the decision according to which Z. F.’s employment was terminated and for him to return to work until the final court decision is issued, but that the employer did not act in line with this decision even after several warnings and urgings of the competent minister. Likewise, the employer did not act in accordance



with the court decision, which ordered a temporary measure for Z. F. to return to work;

- That he has returned to work only after the initiation of the execution of the judgment of the Municipal Court in Sremska Mitrovica, as well as that he was then reassigned from the work position of toolmaker to a lower position, and the salary was 20,000 Dinars less than the previous one;
  - That after the court procedure ended he did not spend time in his workplace but that the employer was constantly issuing him certificates on the basis of which he was sent home and that after a few weeks spent outside of the workplace he was referred to work for another employer for the period of one year, for which he never gave his consent;
  - That after he was once transferred to another employer he returned to the work position in the company "G. T." d. o. o. from S. P. but that he again started to receive the certificates by which he was constantly sent home, as well as that after two months he was again referred to another employer, again without his consent;
  - That he initiated a litigation in this legal matter before the court of law and that in the meantime he returned to work in the company "G. T." d. o. o. from S. P. but that he was once again prevented from working because he was continuously receiving certificates sending him home and that this situation has been ongoing for several months;
  - That all seven members of the union committee initiated the court proceeding because of the illegal dismissal from work and that one court proceeding is still in process while the other six are completed; that in the completed procedures the court established that the illegal termination of employment occurred; also, after the court procedure only the complainant and B. V. went back to work in the company while other colleagues did not wish to go back to work for that employer;
  - That the same situation in relation to sending the worker home is also happening to his colleague B. V., who was also a member of the union committee;
  - That he considers such treatment by the employer to be the consequence of his participation in a trade union and that he is discriminated against on the ground of personal characteristic – membership in a trade union organization.
- 1.3. With the complaint and the supplement to the complaint the complainant also delivered: the decision on the founding of a trade union organization dated 15 June 2009; the statement on the number of members of the Independent Trade Union of Metal Workers of Serbia for trade union organization "G. T." dated 15 June 2009; the request for the registration of the trade union organization sent to the Ministry of Labor and Social Policy; the decision on registration no. 110-00-935/2009-02 dated 30 June 2009; the information on



elected members of the union committee of the trade union dated 19 August 2009; the request for establishing representativeness of the trade union dated 2 October 2009; the correspondence of the Labor Inspectorate – Department for Labor Inspection in Srem District no. 021-408/2009-04 dated 3 September 2009; the correspondence of the Labor Inspectorate – Department for Labor Inspection in Srem District no. 021-408/2009-04 dated 11 September 2011; the information no. 62/09 on registration of the trade union dated 19 August 2009; the termination of employment contract dated 25 August 2009; the decision on consensual termination of employment dated 26 August 2009; newspapers articles and the recording of a TV program on the situation in the company “G. T.” d. o. o. from S. P.; the request to the Labor Inspectorate for Srem District dated 31 August 2009; the Labor Inspectorate information on performed supervision no. 021-408/2009-04 dated 3 September 2009; the decision of the Labor Inspectorate no. 117-62/2009-04 dated 21 September 2009; the decision of the Ministry of Labor no. 164-03-01288/2009-01 dated 12 November 2009; the decision of the Municipal Court in Stara Pazova no. P1-43/09 dated 23 December 2009; the decision of the Basic Court in Sremska Mitrovica no. I-704/10 dated 11 February 2010; the decision of the company “G. T.” d. o. o. from S. P. on returning to work no. 264 dated 19 February 2010; the confirmation on the submitted registration of insurance no. 1959 dated 25 February 2010; the referral to the medical examination dated 24 February 2010; the acknowledgment on notification receipt dated 28 February 2010; the statement on returning to work after the compulsory implementation of the decision dated 2 November 2010; the vacancy notice for the work position of toolmaker; the employment contract dated 24 February 2010; the certificates on sending Z. F. home from work dated 8 March 2010, 28 March, 4 April, 11 April, 4 May 2011, 21 May, 4 June, 19 June, 6 August, 20 August 2012; the offer of an employment contract annex for referral to work with another employer no. 426 dated 15 March 2010; the reply to the employment contract offer dated 23 March 2010; the decision of the company “L.” d. o. o. from I. on employment dated 25 March 2010; the employment contract dated 25 March 2010; the decision on termination of employment contract dated 25 March 2011; the employment contract dated 25 March 2011; the confirmation on the submitted checkout from the compulsory medical insurance; the judgment of the Court of Appeal in Novi Sad no. Gž1 537/12 dated 12 March 2012; the judgment of the Basic Court in Sremska Mitrovica no. P1 420/10 dated 9 June 2010; the judgment of the Basic Court in Sremska Mitrovica no. P1 421/10 dated 19 April 2010; the judgment of the Basic Court in Sremska Mitrovica no. P1 418/10 dated 30 August 2010; the judgment of the Basic Court in Sremska Mitrovica no. P1 419/10 dated 4 November 2010; the judgment of the Basic Court in Sremska Mitrovica no. P1 424/10 dated 4 November 2010; the report of the Ombudsman no. 11-1571/10 dated 13 October 2010; the report of an international organization on violation of trade union rights in the company “G. T.” d. o. o. from S. P.; and the request for establishing the representativeness of the trade union.

- 1.4. In accordance with Article 38 of the Law on the Prohibition of Discrimination the parties in the procedure were offered a reconciliation procedure but this offer was not accepted.
- 1.5. The Commissioner for Protection of Equality conducted the procedure with the aim to establish the legally relevant facts and circumstances in accordance with Article 35, paragraph 4 and Article 37, paragraph 2 of the Law on the Prohibition of Discrimination. During the procedure the request for a statement was sent on 6 November 2012 to B. A., Director of the company "G. T." d. o. o. from S. P. to provide a statement on allegations of the complaint within 15 days of receiving the request.
- 1.6. Since B. A. did not send the statement within the deadline, and he received the request on 11 November 2012, the Commissioner for Protection of Equality had access to allegations of the complaint as well as the generally known facts.

## **2. FACTS**

- 2.1. In the course of the procedure it has been established on the basis of the allegations from the complaint and the submitted evidence that the trade union of „G. T.“ d. o. o. S. P. was registered in the record of trade unions by the decision of the Ministry of Labor and Social Policy no. 110-00-935/2009-02 dated 30 June 2009. Having inspected the information issued by the Independent Trade Union of the Metal Workers of Serbia, trade union organization „G. T.“ d. o. o. S. P. no. 69/09 dated 19 August 2009 it has been established that Z. V., Z. F., D. K., Z. T., D. Dj., B. V. and Dj. P. were elected as members of the union committee.
- 2.2. Having inspected the judgment of the Basic Court in Sremska Mitrovica, Court Unit in Stara Pazova no. P1-421/10 dated 19 April 2010 it has been established that the court ruled that the illegal termination of employment occurred as a consequence of Z. F.'s activities in a trade union and ordered that Z. F. is returned to work.
- 2.3. Having inspected the decision no. 264 dated 19 February 2010 it has been established that Z. F. returned to work for the company „G. T.“ d. o. o. from S. P., as well as that he was assigned to the position – worker III in maintenance.
- 2.4. On the basis of the certificate dated 8 March 2010 it has been established that B. L., procurator of the company „G. T.“ d. o. o. from S. P. referred Z. F. to use free days from 8 to 15 March 2010.
- 2.5. Having inspected the employment contract annex for the case of referring the employee to the other employer without the consent of employee no. 426 dated 15 March 2010 it has been established that Z. F. was referred to work in the company "L." d. o. o. from I. for a period of one year.

- 2.6. Having inspected the employment contract no. 95060927 dated 26 March 2011 it has been established that Z. F. established a labor relationship in the company „G. T.“ d. o. o. from S. P. for an indeterminate period of time.
- 2.7. Having further inspected the documentation it has been established that during the periods 26 March – 4 April 2011, 4-11 April 2011, 11 April – 4 May 2011, 4-9 May 2011, B. L., procurator of the company „G. T.“ d. o. o. from S. P. was sending the complainant home on the basis of the certificates in which it is stated that during that time he would be paid his income as if he had worked.
- 2.8. Having inspected the employment contract annex for the case of referring the employee to the other employer without the consent of employee no. 1784 dated 9 May 2011 it has been established that Z. F. was temporarily sent to work for the employer – company “L.” d. o. o. from I. for a period of one year. Having inspected the employment contract no. 15/11 dated 20 May 2011 it has been established that Z. F. was employed at the company “L.” d. o. o. for a period of one year.
- 2.9. Having inspected the employment contract no. 9506027 dated 20 May 2012 it has been established that Z. F. established an employment relationship with the company „G. T.“ d. o. o. from S. P. for an indeterminate period of time.
- 2.10. Having further inspected the documentation it has been established that on behalf of the company „G. T.“ d. o. o. from S. P., M. B. was delivering the certificates on release from work to Z. F. during the periods 21 May-4 June 2012, 4-19 June 2012, 19 June-6 August 2012, 6-20 August 2012, 20 August-1 October 2012, and that the certificates determined that during those periods he would have been paid his income and allowances as if he had worked.
- 2.11. On the basis of the judgments of the Basic Court in Sremska Mitrovica no. P1 420/10 dated 9 June 2010, P1 421/10 dated 19 April 2011, P1 418/10 dated 30 August 2010, P1 419/10 dated 4 November 2010, P1 424/10 dated 4 November 2010 it has been established that the employment of V. Z., K. D., T. Z., V. B., and P. Dj. was illegally terminated.

### **3. MOTIVES AND REASONS FOR ISSUING THE OPINION**

- 3.1. While reaching a decision in the present case, the Commissioner for Protection of Equality bore in mind the allegations of the complaint as well as the relevant legal regulations in the area of protection from discrimination.
- 3.2. Bearing in mind the subject of this complaint, the Commissioner for Protection of Equality shall state that it should be established whether the fact that Z. F. was constantly sent home is a consequence of his membership in a trade union, that is, whether the employer „G. T.“ d. o. o. from S. P. committed an act of discrimination.

### Legal framework

- 3.3. The Commissioner for Protection of Equality is an autonomous, independent and specialized state authority established on the basis of the Law on Prohibition of Discrimination, with the task to prevent all forms and types of discrimination and to work on the realization of equality in social relations. The competence of the Commissioner for Protection of Equality is broadly defined in accordance with international standards in order to enable the efficient realization of the institution's role. One of the basic competences of the Commissioner for Protection of Equality is to receive and consider complaints of discrimination, to issue opinions and recommendations in concrete discrimination cases and to stipulate measures defined by the Law. In addition, the Commissioner is authorized to initiate the reconciliation procedure as well as court procedures for protection against discrimination and to submit misdemeanor notices against discrimination, as defined by antidiscrimination legislation. The Commissioner is also authorized to warn the public about the most common, typical and severe cases of discrimination and to recommend measures for achieving equality to public authorities.
- 3.4. The Constitution of the Republic of Serbia prohibits any form of discrimination, direct or indirect, on any grounds, particularly on race, sex, national origin, social origin, birth, religion, political or other opinion, property status, culture, language, age and mental or physical disability. Also, the provision of Article 55, paragraph 1 prescribes that freedom of political, union and any other form of association shall be guaranteed.
- 3.5. Constitutional prohibition of discrimination is further elaborated in the Law on the Protection of Discrimination, where discrimination is defined as any unwarranted discrimination or unequal treatment, that is to say, omission (exclusion, limitation or preferential treatment) in relation to individuals or groups, as well as members of their families or persons close to them, regardless of whether it is overt or covert, on the grounds of race, skin color, ancestors, citizenship, national affiliation or ethnic origin, language, religious or political beliefs, gender, gender identity, sexual orientation, financial position, birth, genetic characteristics, health, disability, marital and family status, previous convictions, age, appearance, membership in political, trade union and other organizations and other real or presumed personal characteristics. Article 6 of the Law on the Prohibition of Discrimination prescribes that direct discrimination shall occur if an individual or a group of persons, on the grounds of his/her or their personal characteristics, in the same or in a similar situation, are placed or have been placed or might be placed in a less favorable position through any act, action or omission. Articles 15-27 of the Law on the Prohibition of Discrimination define special cases of discrimination. In addition to other things, Article 25 prohibits discrimination against an individual or a group of persons on the grounds of his/her or their political beliefs, or membership or non-membership of a political party or a trade union. Bearing in mind the circumstances of the present case, for its consideration the provision of Article

16 is also relevant - it prescribes the prohibition of discrimination in the sphere of labor; that is to say, to violate the principle of equal opportunity for gaining employment or equal conditions for enjoying all the rights pertaining to the sphere of labor, such as the right to employment, free choice of employment, promotion, professional training and professional rehabilitation, equal pay for work of equal value, fair and satisfactory working conditions, paid vacation, joining a trade union and protection from unemployment. In addition, the Law on the Prohibition of Discrimination stipulates severe forms of discrimination, one of which is discrimination that is committed a number of times (repeated discrimination) or is committed over an extended period of time (extended discrimination) against the same individual or a group of persons.

- 3.6. The Labor Law also prohibits discrimination, that is, all forms of discrimination are prohibited against persons seeking employment and employees in respect to their sex, origin, language, race, color of skin, age, pregnancy, health status or disability, nationality, religion, marital status, familial commitments, sexual orientation, political or other beliefs, social background, financial status, membership in political organizations, trade unions or any other personal quality. Provisions of Article 20 prohibit discrimination in relation to, *inter alia*, working conditions and all rights resulting from the labor relationship.
- 3.7. The Decree on the ratification of the ILO Convention no. 87 concerning Freedom of Association and Protection of the Right to Organize Convention prescribes that workers and employers, without any type of distinction, shall have the right to establish and, subject only to the rules of the organization concerned, join organizations of their own choosing without previous authorization.
- 3.8. The Decree on the ratification of the ILO Convention no. 98 concerning the Application of the Principles of the Right to Organize and to Bargain Collectively prescribes that the workers shall enjoy adequate protection against acts of anti-union discrimination in respect to their employment. Furthermore, it stipulates that such protection shall particularly apply in respect to acts that would aim to make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership; to cause the dismissal of or otherwise discriminate against a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.

#### Analysis of the evidence submitted with the complaint

- 3.9. On the basis of the evidence submitted with the complaint it has been established that Z. F. was a member of the trade union committee as well as that he initiated two court proceedings against his employer. It was also established that employment had been terminated to all members of the union committee and that in six cases the court decided that employment was illegally terminated.

- 3.10. The Commissioner for Protection of Equality established that after the judicial proceeding conducted in the merit of the illegal termination of employment and bearing in mind the periods when he was referred to another employer Z. F. was employed in „G. T.“ d. o. o. from S. P. during three periods – from 19 February to 25 March 2010, from 25 March to 9 May 2011 and from 9 May 2012 to date. On the basis of the certificates on sending Z. F. home from work and the periods for which they are issued, the Commissioner for Protection of Equality states that during the three aforementioned periods when Z. F. had the status of employee in „G. T.“ d. o. o. from S. P., he spent all the time outside his workplace because the employer explicitly ordered him to do so. Therefore, it can be concluded that after the illegal termination of Z. F.'s employment that was caused by acquiring the status of the trade union representative, he was denied the possibility to work in his workplace and was constantly sent home from work.
- 3.11. The Commissioner for Protection of Equality took into consideration that Z. F. was paid his income and allowances for the periods when the employer was sending him home, but is of the opinion that in the present case it is irrelevant whether he was receiving the monetary compensation for work, bearing in mind that such repeated actions of the employer lasted for a long period of time while he was prevented from coming to his workplace to fulfill his job duties for which he receives a salary just like other employees, thus being placed in an unequal position compared to the rest of the employees who have the possibility of receiving monetary compensation for the work they perform.
- 3.12. Bearing in mind the allegations from the complaint as well as the documentation submitted with the complaint, it can be concluded that Z. F.'s employment was illegally terminated when he became a member of the union committee; he was twice sent to work for another employer and in the meantime he has been constantly sent home. Thus, it can be stated that the complainant's participation in the trade union led to a series of employer's actions, which placed Z. F. in an unequal position and due to his union membership, hindered him in enjoying equal rights with the rest of the employees.
- 3.13. Since the complainant presented the facts and offered the evidence by which he proved the likelihood of an act of discrimination, the burden of providing evidence that no violation of the principle of equality has occurred shall fall on the employer, the company „G. T.“ d. o. o. from S. P., in accordance with Article 45 of the Law on the Prohibition of Discrimination. The company „G. T.“ d. o. o. from S. P. was requested to give a statement regarding the allegations from the complaint, and, *inter alia*, to state how many persons who were members of the union committee and who were returned to work after the judicial proceeding were continuously given certificates to go home, and to present the evidence in this regard. The Commissioner for Protection of Equality shall state once again that the employer did not send the statement regarding the allegations of the complaint and therefore did not point out the facts or delivered evidence which would confirm that an act of discrimination has not been committed, which the employer was obliged to do in terms of Article 35 of the Law on the Prohibition

of Discrimination in order to show that there is no causal relationship of such treatment and personal characteristic of the complainant.

- 3.14. Bearing in mind the provision of the Law on the Prohibition of Discrimination which prescribes that the Commissioner for Protection of Equality shall not take steps concerning a complaint if proceedings pertaining to the matter in question have been initiated before a court of law or an enforceable decision has been passed in the same matter, the Commissioner for Protection of Equality did not have a possibility to evaluate the circumstance in relation to referring Z. F. to another employer or the causal relationship with participation in union activities, since the proceeding regarding that circumstance is still being conducted before the court of law.

#### **4. OPINION**

As a consequence of Z. F.'s participation in union activities the company „G. T.“ d. o. o. from S. P. was continuously sending him home, which occurred several times and lasted for a longer period of time, thus hindering Z. F. to be present at his workplace and perform his job, by which the company committed a severe act of discrimination on the basis of personal characteristic – membership in a trade union, prohibited by Article 24 of the Law on the Prohibition of Discrimination, in connection to Article 6 and Article 13, paragraph 1, point 6 of the Law on the Prohibition of Discrimination, and Article 18 of the Labor Law.

#### **5. RECOMMENDATION**

The Commissioner for Protection of Equality issues the following Recommendation to the company „G. T.“ d. o. o. from S. P.:

- 5.1. To undertake without delay all necessary measures which will enable Z. F. to perform his job at his workplace under equal conditions like other workers.
- 5.2. To take care in the future not to violate the provisions of the Law on the Prohibition of Discrimination with their actions, that is, to abstain from unjustified discrimination or unequal treatment and omission (exclusion, restriction or prioritizing), which is based on any personal characteristic, in relation to an individual or group of persons.

The company „G. T.“ d. o. o. from S. P. shall inform the Commissioner for Protection of Equality about their acting in line with the recommendation within 30 days from the day of receiving this Opinion with Recommendation.

In accordance with Article 40 of the Law on the Prohibition of Discrimination, if the company „G. T.“ d. o. o. from S. P. fails to act upon the Recommendation within

30 days of the day of receiving it, the Commissioner shall issue the measure of caution by passing a decision against which it is not allowed to lodge a complaint; should the company „G. T.“ d. o. o. from S. P. fail to implement the measure of caution, the Commissioner for Protection of Equality shall inform the public about it through the media and in other appropriate ways.



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