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COMMISSIONER
FOR PROTECTION
OF EQUALITY

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

Belgrade, September 2012

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1. Discrimination Complaints on the Basis of National Identity

1.1. The complaint of E. Dz. against the Municipality of Priboj against discrimination committed through omission to have the language and script of a national minority introduced into official use (File. no. 1291/2011 dated 29.10.2012)

Acting within the jurisdiction stipulated by law to receive and review complaints 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 Discrimination (Official Gazette of the Republic of Serbia, no. 22/2009), concerning the complaint of the Bosniak National Minority Council from Novi Pazar, the Commissioner for Protection of Equality issues the following

OPINION

The Municipality of Priboj has not undertaken the measures within its area of responsibility to introduce the Bosnian language and Latin script into official use, equal with the Serbian language and Cyrillic script, despite over 15% of those living in the territory of the Municipality of Priboj being members of the Bosniak national minority, according to the latest population census, thus committing discrimination on the basis of national identity, prohibited by Article 24 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 Municipality of Priboj the following

RECOMMENDATION

1. The Municipality of Priboj shall, without delay, undertake all necessary measures to introduce the Bosnian language and Latin script into official use alongside the Serbian language and Cyrillic script.
2. The Municipality of Priboj shall inform the Commissioner for Protection of Equality, within a 30-day period of receiving this Opinion with Recommendation, about the measures undertaken in order to act in line with the Recommendation.

R a t i o n a l e

E. Dz. ... of the Executive Board of the Bosniak National Minority Council on 29 July 2011 contacted the Commissioner for Protection of Equality with a complaint. In the complaint, he alleges that the Bosnian language has not been introduced into official use despite the requirements stipulated by law existing and the local self-government unit's obligation, because of which the Municipality of Priboj and the president of the Municipality, L. R., are committing a severe form of discrimination against the Bosniak national minority. In the complaint, it is emphasised that, according to the 2002 census and the statutes of the local self-government units in Novi Pazar, Tutin, Sjenica and Prijepolje, it is stipulated that the Serbian and Bosniak languages and the Cyrillic and Latin scripts have equal official use, but not in the Municipality of Priboj. It is also alleged that the Municipality of Priboj has not fulfilled its legal obligations in terms of allocating budgetary funds to support the activities of the Bosniak National Minority Council, thus preventing its functioning and violating Articles 114 and 115 of the Law on National Minorities Councils. In the complaint, it is also alleged that the Municipality of Priboj was contacted on several occasions by the Bosniak National Minority Council to carry out amendments and additions to the Statute, as well as to foresee funds to support the work of the Bosniak National Minority Council, but the Municipality has not responded to these requests.

The following evidence was submitted with the complaint: the requests sent to the president of the Municipality of Priboj dated 5 January 2005, 10 February 2010 and 4 February 2011, Ombudsman Recommendation no. 16-1566/09

dated 31 March 2010 that establishes the violation of national minorities rights guaranteed by the Constitution in the work of the Municipal Administration of the Municipality of Priboj and the recommendation given aimed at the pursuance of the right of the Bosniak national minority to use their language and script officially in the territory of the Municipality.

The Commissioner for Protection of Equality conducted the procedure to ascertain 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, during the course of the procedure, L.R., the president of the Municipality of Priboj, was asked for a statement, however, the response to the complaint was not delivered within the deadline provided.

The Commissioner for Protection of Equality shall first state that the Constitution of the Republic of Serbia (Official Gazette of RS, no. 98/2006) in Article 21 sets forth that all are equal before the Constitution and the law and that any form of discrimination on any basis is prohibited. Under Article 76 of the Constitution, persons belonging to national minorities are guaranteed equality before the law and equal legal protection and any discrimination on the grounds of affiliation to a national minority is prohibited. In the provisions of Article 79 of the Constitution, it is laid down, inter alia, that national minorities, in line with the law, have the right to use their language and script, that state bodies, organisations with delegated public powers, bodies of autonomous provinces and local self-government units also conduct proceedings in their language in areas where they form a significant majority of population; and to have traditional local names, names of streets, settlements and topographic names also written in their language in areas where they form a significant part of population.

Article 4 of the Framework Convention for the Protection of National Minorities (Law on Ratification of the Framework Convention for the Protection of National Minorities, Official Gazette of the Federal Republic of Yugoslavia - International Treaties, no. 6/98), prescribes that the State shall guarantee members of national minorities equality before the law and equal legal protection and prohibit any discrimination on the grounds of being a member of a national minority, whereas Article 10 stipulates that the State shall acknowledge the right of every member of a national minority to use any minority language in private or public, in oral or written communication, in a free and undisturbed manner.

The Law on Ratification of the European Charter for Regional or Minority Languages (Official Gazette of Serbia and Montenegro - International Treaties, no. 18/2005), legally binds the Republic of Serbia to also protect the Bosnian language, among ten minority languages.

The protection of national minority rights was established by the Law on the Protection of the Rights and Freedoms of National Minorities (Official Gazette of FRY, no. 11/2002). Article 11 paragraph 2 of this law prescribes that local self-government units shall equally introduce the official use of the language and script of a national minority if the percentage of the persons belonging to one national minority, in comparison to the total population in its territory, reaches 15 percent, according to the results of the latest census. A similar provision is stipulated in Article 11 paragraph 2 of the Law on Official Use of Language and Script (Official Gazette of RS, no. 45/91, 53/93, 67/93, 48/94, 101/05 and 30/2010) whereby local self-government units shall equally introduce the official use of the language and script of a national minority in their statutes if the percentage of the persons belonging to one national minority, in comparison to the total population in its territory, reaches 15 percent in accordance with the results of the latest census.

The provision of Article 20 point 33 of the Law on Local Self-Government (Official Gazette of RS, no. 129/2007) stipulates that a municipality, through its bodies and in line with the Constitution and the law, shall establish the languages and scripts of the national minorities that are in official use in the territory of the municipality. Additionally, according to the provision of Article 20 point 32 of the Law on Local Self-Government, a municipality is responsible for the pursuance, protection and advancement of the individual and collective rights of national minorities.

Also relevant is the provision in Article 24 of the Law on the Prohibition of Discrimination that forbids discrimination against national minorities and their members on the grounds of religious affiliation, ethnic origin, religious beliefs and language.

The Commissioner for Protection of Equality, while deciding on the complaint, bore in mind the fact that, according to the results of the 2002 census, over 18% of the population living in the territory of the Municipality of Priboj are members of the Bosniak national minority. Bearing in mind the aforementioned regulations, the Municipality of Priboj, as a local self-government unit

in which over 15% are members of one national minority, according to the latest census results, was obliged to introduce the official use of the language and script of that minority into its Statute.

Having inspected the Statute of the Municipality of Priboj (Official Gazette of the Municipality of Priboj, no. 12/08), it was established that Article 5 of the Statute stipulates that the Serbian language and Cyrillic script is in official use in the territory of the Municipality of Priboj, therefore it is clear that the Municipality of Priboj has not fulfilled its legal obligation to introduce the language and script of the Bosniak national minority into equal official use. Having failed to implement the stipulated measures and acts to introduce the Bosnian language and Latin script into official use in the Municipality of Priboj, the competent authorities of the Municipality of Priboj have prevented members of the Bosniak national minority to exercise their right to use their language and script in official communication. Such conduct, i.e. the competent authorities' omission to act, is contrary to the fundamental principles of a democratic society, social integration of national minorities, advancement of inter-ethnic relationships and development of spirit of a pluralistic, open and non-discriminatory society.

This Recommendation issued to the Municipality of Priboj to undertake the necessary measures within their jurisdiction to introduce the Bosnian language and Latin script into official use is motivated by the fact that its realisation, besides the elimination of the consequences of discrimination, shall contribute to the rule of law, development of a legal state and local democracy, as well as to full equality in the pursuance of human and minority rights.

Evaluating the established facts and legal regulations, the Commissioner for Protection of Equality, in accordance with Article 33 paragraph 1 points 1 and 9 of the Law on the Prohibition of Discrimination, issued this Opinion and Recommendation to the Municipality of Priboj to undertake acts on the basis of which members of the Bosniak national minority will be able to pursue the right to use their language and script.

2. Discrimination Complaints on the Basis of Sex/Gender

2.1. The complaint against the Football Association of Serbia against discrimination of women's football clubs concerning the realisation of the right to compensation on account of the costs invested in the development of women players (File. no. 404/2011 dated 05.04.2011)

Acting within the jurisdiction stipulated by law to receive and review complaints 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 K. Women's Football Club (WFC, orig. ZFK) from K., the Commissioner for Protection of Equality issues the following

OPINION

With the Decision of the Commission for Appeals of the Football Association of Serbia (FAS, orig. FSS), no. 24-109/3 dated 26 August 2010 on declaring null and void the decision of the FAS' Women's Football Arbitration Commission no. 20-85/2 dated 17 June 2010 that established the right of the K. WFC to be compensated for the costs invested in development of the female player A. A, **an act of discrimination was committed** on the grounds of personal characteristics - sex, because female and male players were unjustly differentiated.
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 Football Association of Serbia the following

RECOMMENDATION

1. The Football Association of Serbia shall undertake all necessary measures to redress the consequences of the Decision issued by the Commission for Appeals of the Football Association of Serbia no. 24-109/3 dated 26 August 2010 and shall perform the following:

a) It shall declare this Decision null and void if the conditions are met in accordance with general acts of the FAS, or

b) The Football Association of Serbia shall compensate K. WFC's costs in accordance with the Decision of the FAS' Women's Football Arbitration Commission no. 20-85/2 dated 17 June 2010, or

c) It shall ensure that the consequences of the discriminatory Decision are redressed in some other adequate manner.

2. The Football Association of Serbia shall undertake all necessary measures to ensure that FAS bodies apply the general acts of the FAS to men's and women's football clubs, i.e. to male and female players, in a non-discriminatory manner.
3. The Football Association of Serbia shall ensure that on the occasion of issuing, altering, interpreting and applying the general acts of the general acts it acts in accordance with the principle of equality and promotes and develops non-discriminatory practice in its actions.
4. The Football Association of Serbia shall inform the Commissioner for Protection of Equality about the actions taken within a 30-day period of receiving this Opinion with Recommendation.

R a t i o n a l e

M.M., … of the K. Women's Football Club contacted the Commissioner for Protection of Equality with a complaint against the Decision of the Commission for Appeals of the Football Association of Serbia, no. 24-109/3 dated 26 August 2010, wherein it is alleged that the female players of the K. WFC, as well as the female players of other football clubs have been discriminated against by the actions of the bodies of the Football Association of Serbia because the right to compensation for the costs invested in the development of female players

was not acknowledged, whereas that compensation right was acknowledged in terms of men's football clubs. In support of the allegations stated, he submitted the Decision of the Commission for Appeals, no. 24-1309/3 dated 26 August 2010, on declaring the Decision of the FSA Women's Football Arbitration Commission no. 20-85/2 dated 17 June 2010 null and void. With the first instance Decision of the Arbitration Commission, the appeal of the claimant for the compensation of the costs invested in the development of the female player A. A., who was transferred from the K. WFC to the First Football League WFC - S. from S. during the summer transfer period 2009/2010. In its Decision, the Commission for Appeals revoked the official interpretation of the Commission for Legal Affairs no. 19-1856/1, in which it is stated that the Women's Football First and Second Leagues are national competitions, however the provisions of the current Regulations on the Status of Players and the Regulations on the Compensation for the Costs Invested in Players' Development are exclusively applied to male players of the Premier and First Leagues not to female football players.

The complainant adduced that the interpretation concerning this issue had already been made by the Commission for Legal Affairs at the request of the Arbitration Commission in the first instance procedure in Decision no. 19-104/2 dated 11 March 2010 - *"The FAS Women's Football Second League is a national league and Article 27 of the FAS Regulations on Players' Status and Article 3 of the Regulations on the Manner of Establishing the Compensation for the Costs Invested in Players' Development are applied entirely as for the Serbian Premier and First Leagues."*

However, even besides the aforementioned Decision of the Commission for Legal Affairs (published in the "Football Official Gazette"), the Commission for Appeals contacted the Commission for Legal Affairs concerning this issue and asked for an opinion on whether the provisions of Article 27 of the Regulations on Players' Status and Articles 3 and 8 of the Regulations on Establishing the Compensation for the Costs Invested in Players' Development are applied to female players of women's football clubs of the Women's Football First and Second Leagues. The Commission for Legal Affairs delivered the interpretation to the Commission for Appeals indicating that the Women's Football First and Second Leagues were national competitions, but the Regulations on the Manner of Establishing the Compensation for the Costs Invested in Players'

Development were exclusively applied to male players of the Premier and First Leagues, and not to female players in women's football clubs. After the first instance Decision had been declared null and void, the complainant contacted all the other FAS bodies and only received a reply from the Commission for Legal Affairs, which was that there are no grounds for filing a request for the protection of the Regulations, as legal remedy.

Bearing in mind the aforementioned, the complainant believes that the Football Association of Serbia, i.e. its bodies, put female players of women's football clubs in an unequal position compared to male players of men's football clubs, despite the fact that all the registered clubs, both men's and women's, being members of one Association, are declaratively equal in their rights and duties.

The complaint is accompanied by the decisions of the bodies of the Football Association of Serbia, as well as the requests and appeals filed by the complainant.

The Commissioner for Protection of Equality conducted the procedure to ascertain the legally relevant facts and circumstances. In the course of the procedure, the statement of the Football Association of Serbia no. 05-316/2 dated 24 February 2011 was obtained, wherein it is stated:

- That women's football in all football associations in the countries of the region and the wider region, as well as in our country, has the absolute status of amateur football, i.e. female players of women's football have the status of amateur female players, and consequently there are no possibilities for the realisation of the rights to compensation for the costs invested in the development of players. This is because the quality of women's football, organisation, work in the clubs, as well as their infrastructure is still far from the conditions needed to achieve the minimum level required for professional engagement in football.
- That the Football Association of Serbia financially supports women's football by executing payments of funds to women's football clubs, both in the current and in the previous season. Without the aforementioned financial support, the majority of the women's football clubs would have been closed.
- That new FAS regulations are currently being drafted in the Football Association of Serbia, among others the Regulations on Registration, Status and Transfer of Players that will regulate the issue of compensation

rights regarding the costs invested in players' development. In the public debate procedure, which was completed on 31 January 2011, all stakeholders could have submitted their suggestions and proposals, including women's football clubs.

- That there is no unjustified differentiation made and no inequality between female players in women's football clubs and male players in men's football clubs.

No evidence was submitted with the Football Association of Serbia's statement to the complaint, from which the existence of differentiation between female and male players could be established in regard to their status of amateur or professional athletes. Therefore, the assertion that due to amateur player status "there is no possibility to realise the right to compensation for the costs invested in the development of female players", has remained at the level of a mere statement.

An act of discrimination designates 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, whether overt or covert, on the grounds of any real or presumed personal characteristics[1]. Direct discrimination occurs if an individual or a group of persons, on the grounds of his/her or their personal characteristics, in the same or a similar situation, are placed or have been placed or might be placed in a less favourable position through any act, action or omission[2], whereas 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 political, economic, cultural and other aspects of public, professional, private and family life.[3].

Having conducted the procedure, the Commissioner for Protection of Equality established that the Football Association of Serbia is one, i.e. that both men's and women's football clubs are members of the Football Association of

[1] Law on the Prohibition of Discrimination (Official Gazette of RS, no. 22 /2009) and Article 2 paragraph 1 point 1.

[2] Ibid, Article 6

[3] Ibid, Article 20 paragraph 1

Serbia, therefore the regulations of the Football Association of Serbia cannot be applied selectively by applying specific provisions to players in men's football clubs and not to female players in women's female clubs.

The provision of Article 3 of the Regulations on the Manner of Establishing the Compensation for the Costs Invested in Players' Development stipulates that all the clubs of all competition levels have the right to compensation for the costs invested in players' development when their players are transferred to the clubs of the Premier and First leagues for players under 23 years of age, and for the investment in their development from 12 to 21 years of age. Accordingly, the Commission for Legal Affairs in its Decision no. 19-104/2, considering the factual state in women's football, properly stated that the *Second League for female players of the FAS is the national league and Article 27 of the FAS Regulations on Players' Status and Article 3 of the Regulations on the Manner of Establishing the Compensation for the Costs Invested in Players' Development are entirely applicable just as for the Premiere and First Leagues of Serbia*."

The stances expressed in the later decisions of the Commission for Appeals, i.e. the Commission for Legal Affairs, which refer to the inapplicability of the general act of the Football Association of Serbia to female players, are not acceptable because they are contrary to the aforementioned provisions of the Law on the Prohibition of Discrimination, as well as the Law on Sports[4] and the Regulations on the Manner of Establishing the Compensation for the Costs Invested in Players' Development. Additionally, the non-existence of special regulations for female players does not release the Football Association of Serbia from their obligation to apply the provisions of the current Regulations in the proper manner, which means in the case in question the regulations must also be applied to female football players.

The stance of the Commissioner for Protection of Equality is that the announcement on the adoption of special Regulations that would regulate the status of female football players is not prohibited per se; however, if the new general acts arrange the status of male and female football players in different manner, the Football Association of Serbia must take care that any inequality based on personal characteristics must be justified with a legitimate cause, as well as that

[4] Article 10 of the Law on Sports (Official Gazette of RS, no. 24/2011)

the means for prompting that cause must be adequate and necessary.[5]. Bearing in mind the popularity of football and the significance of the Football Association of Serbia in our society, the Commissioner for Protection of Equality issues the recommendation that the FAS shall take care in future to act in accordance with the principle of equality when passing, altering, interpreting and applying the general acts of the FAS, as well as to promote non-discriminatory practice in its actions.

Evaluating the established facts and legal regulations, the Commissioner for Protection of Equality, pursuant to Article 33 paragraph 1 point 9 of the Law on the Prohibition of Discrimination, issues the Opinion that with the Decision of the Commission for Appeals of the Football Association of Serbia no. 24-109/3 dated 26 August 2010, an act of discrimination was committed on the grounds of personal characteristic - gender, since the bodies of the Football Association of Serbia placed the female football players of women's football clubs in a less favourable position in comparison to the male football players of men's football clubs.

2.2. The complaint of M. P. against the Legislative Committee of the National Assembly of Serbia against discrimination on the basis of gender (File. no. 475/2011 dated 15.04.2011)

Acting within the jurisdiction stipulated by law to receive and review complaints 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. 22/09), the Commissioner for Protection of Equality issues the following

OPINION

The provision of Article 43 of the Unique Methodological Guidelines of the Legislative Committee of the National Assembly of Serbia, which reads as follows: *"terms in the Regulations are used in masculine gender, unless required differently*

[5] Article 7 of the Law on the Prohibition of Discrimination

by the nature of the matter" is contrary to the principle of equality of the genders and the principle of respecting the equal rights of women and men, thus it represents an act of discrimination on the basis of personal characteristic - gender.

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 Legislative Committee of the National Assembly of Serbia the following

RECOMMENDATION

1. The Legislative Committee of the National Assembly of Serbia shall undertake all necessary measures in order to alter the provisions of Article 43 of the Unique Methodological Guidelines for Drafting Regulations[6] and shall alter Article 43 of the Unique Methodological Guidelines for Drafting Regulations so that the feminine gender is contained in this provision.
2. The Legislative Committee of the National Assembly of Serbia shall undertake all measures within its area of responsibility in order to create the conditions for the usage of gender-differentiated language, in accordance with the principle of equality of the genders.
3. The Legislative Committee of the National Assembly of Serbia shall inform the Commissioner for Protection of Equality about their actions in line with this Recommendation within a 30-day period of receiving this Opinion with Recommendation.

R a t i o n a l e

Prof. M.P. PhD. contacted the Commissioner for Protection of Equality with a complaint against the Legislative Committee of the National Assembly of Serbia. In the complaint, she alleges that the Legislative Committee, with the adoption of the Unique Methodological Guidelines for Drafting Regulations, specifically

[6] Unique Methodological Guidelines for Drafting Regulations (Official Gazette of RS, no. 21/2010)

with the provision of Article 43 that reads: *"terms in the Regulations are used in masculine gender, unless required differently by the nature of the matter"*, formulated a rule that establishes the use of the masculine gender in regulations as a rule, and feminine gender exceptionally, only when required by the "nature of the matter". Such a rule is discriminatory and contrary to the international standards related to non-discriminatory use of language.

The complainant invoked the *Plan for Correction of the Current Disbalance between Men and Women in Political Life of the Inter-Parliamentary Union (IPU)* 1211 Geneva 19 that recommends, within the legal bases of equality for women and men, the careful selection of terms used in a constitution and laws. This document proposes that language used in legislation must be formulated in such a manner to position women and men on equal basis in order to avoid any discrimination based on gender. Furthermore, it is pointed out that legislators have a significant role in this process, who may act in the direction of adopting these recommendations, using their right of parliamentary initiative. The importance of the elimination of sexism from language was noted in *the Recommendations of the Ministerial Committee on the Elimination of Sexism from Language* R(90)4 adopted on 21 February 1990. As an example of gender sensitive use of language, the complainant quotes the *Constitution of Austria*, which in its fundamental provisions stipulates that official titles may exclusively be used in the form that expresses the gender of the bearer. As another positive example, she also emphasises the provisions of *the Law on Gender Equality of Montenegro*, which stipulate that the usage of words in masculine as a generic neutral term for both the masculine and feminine gender is considered discrimination. In line with this provision, Legal and Technical Rules for Drafting Regulations were adopted that stipulate that *"regulations must be written in gender sensitive language, either using a gender neutral form and words in masculine and feminine or by the introduction of a clause that all provisions of the regulations are equally refer to men and women"*.

The claimant also pointed out the Guidelines for Standardised Non-Discriminatory Speech and Conduct by the Ombudsman wherein it is particularly noted that gender-differentiated language is a language of gender equality. Contrary to this, the generic usage of masculine gender or the presumption that such usage is automatically *"neutral gender-wise"*, undermines that equality, unless an appropriate explanation follows thereafter.

The Commissioner for Protection of Equality conducted the procedure aimed at establishing the legally relevant facts and circumstances. The complaint was forwarded to the Legislative Committee in order for it to issue its statement on 19 January 2011, and afterwards, the complaint was handed over to the Records Office of the National Assembly of Republic of Serbia on 22 March 2011. The Legislative Committee of the RS National Assembly did not issue a statement concerning the allegations in the complaint.

The provision of Article 15 of the Constitution of the Republic of Serbia[7] sets forth that the State shall guarantee the equality of women and men and develop an equal opportunities policy. The provision of Article 194 of the Constitution sets forth that ratified international treaties and generally accepted rules of international law shall be part of the legal system of the Republic of Serbia, so the laws and other general acts enacted in the Republic of Serbia must not be in non-compliance with the ratified international treaties and generally accepted rules of international law.

The Law on Gender Equality[8] concretises equality of the genders which implies the equal participation of women and men in all areas of the public and private sectors, in accordance with the generally accepted rules of international law, ratified international treaties, the Constitution and laws.

Discrimination shall be considered to occur in the case of conduct contrary to the principle of 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 any other field of public, professional, private and family life.[9]

When reviewing the complaint, the Commissioner for Protection of Equality bore in mind the fact that language has a fundamental role in forming the social identity of an individual and exercises a considerable impact on shaping social attitudes. The use of language, wherein the presence, equal status and roles of women and men in society are equally reflected and treated with equal value and dignity, is the core aspect of gender equality and significant for achieving factual equality of the genders.

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7 The Constitution of the Republic of Serbia (Official Gazette of RS, no. 98/2006)

8 Article 2 of the of the Law on Gender Equality (Official Gazette of RS, no. 104/09)

9 Article 20 paragraph 1 of the Law on the Prohibition of Discrimination (Official Gazette of RS, no. 22/2009)

Evaluating the established facts and legal 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 the Opinion that, with the provision of Article 43 of the Unique Methodological Guidelines, the principle of equality of men and women was violated as the Legislative Committee of the National Assembly of Serbia adopted a discriminatory rule of the usage of masculine gender as a rule and feminine gender as exception in the regulations, which is contrary to international standards related to the non-discriminatory use of language, as well as to the Constitution of the Republic of Serbia, the Law on the Prohibition of Discrimination and the Law on Gender Equality.

The Commissioner issued adequate recommendations alongside the Opinion in order to overcome the generic use of masculine grammatical gender as, allegedly, a "neutral gender-wise" use, because the principle of gender equality is undermined thereof. By implementing the Recommendation, the Legislative Committee would, thanks to their authority, contribute to the use of gender differentiated language, i.e. to the consistent use of feminine grammatical gender for women, thereby one of the measures for achieving equality of women and men and the principle of equal opportunities would be realised.

The Commissioner for Protection of Equality points out that building a modern society is never complete if only based on one segment of social development. Since legislation development, as a duty of the Republic of Serbia in regard to European integration, cannot be complete without social, economic and cultural development, improvement of the position of women must be understood as a necessary condition of progress. In that sense, it is necessary to undertake all measures aimed at overcoming those cultural and customary rules that hinder social development and prevent women from enjoying all human rights equally with men.

2.3. The complaint of M. Dj. against the Faculty of Law against discrimination based on sex (File. no. 202/2012 dated 24.02. 2012)

Acting within the jurisdiction stipulated by law to receive and review 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. Dj., whose plenipotentiary is N. N., the Commissioner for Protection of Equality issued the following

OPINION

The Faculty of Law of the University of Belgrade rejected the request of M. Dj. to "correct" her diploma due to the change of name following her gender reassignment from male to female which took place after she had obtained the diploma and to issue her a new diploma wherein her new name would be stated, whereby it committed indirect discrimination on the grounds of her personal characteristic - her sex, forbidden by Article 7 of the Law on the Prohibition of Discrimination.

RECOMMENDATION

1. The Faculty of Law of the University of Belgrade shall undertake all necessary measures without delay to make it possible that M. Dj. and other persons who have changed their name due to gender reassignment after obtaining their diploma are issued new diplomas and other public documents at their request, the issuance of which is within the jurisdiction of the Faculty, wherein their new name shall be stated in compliance with domestic and international standards in the field of the protection of transgender persons against all forms of discrimination.
2. The Faculty of Law of the University of Belgrade shall inform the Commissioner for Protection of Equality about the measures they will have undertaken with an aim to act according to this Recommendation within a 30-day period from the day of receiving of this Opinion with Recommendation.

Rationale

The Commissioner for Protection of Equality received a complaint, dated 28 November 2011, against the Faculty of Law of the University of Belgrade, which was declared on behalf of M. Dj. from N. by her plenipotentiary N. N., a lawyer from Belgrade.

In the complaint, the following is alleged:

- That on 6 October 2011, the plenipotentiary of the complainant filed to the Faculty of Law a "request for the correction of a diploma certifying attainment of a higher education" issued on 21 March 1997 under no. ... in the name of M. Dj., requesting that her diploma is corrected due to the gender reassignment of this person from male to female and because of her new name, and to issue a new one in the name of M. Dj.;
- That on 8 November 2011, the plenipotentiary of the complainant was delivered the Conclusion on the rejection of this request;
- That on 23 November 2011, the plenipotentiary of the complainant declared an appeal against the Conclusion on the rejection of this request to the Council of the Faculty of Law.
- That the Council of the Faculty of Law rejected this appeal with a Decision dated 28 December 2011;
- That M. Dj. has been a national of Germany since 2007, and that until 2007, she had been a national of the Republic of Serbia, where she completed primary and secondary school and the Faculty of Law in Belgrade;
- That M. Dj. underwent gender reassignment from male to female at the end of 2010, which is stated in the Decision of the Municipal Court in Frankenthal no. ... dated 21 January 2011;
- That the Decision of the German court of law was recognised in the Republic of Serbia by the Decision of the Higher Court in Belgrade ... dated 29 July 2011;
- That, on the basis of the Decision of the Higher Court in Belgrade, the competent body of the Municipality of Savski Venac issued to M. Dj. a new birth certificate containing the new data on her personal identity;
- That the "V.K." Primary School in B. and the F. B. Gymnasium made the requested "correction" and issued "corrected diplomas" that bear the new name of the complainant;

- That the Faculty of Law by "not issuing the diploma in her new name" discriminated against the complainant on the basis of gender identity.

The following evidence was submitted with the complaint: a Power of Attorney, a certified translation of the Decision of the German court of law, the Decision of the Higher Court in Belgrade on the recognition of the foreign court decision, the birth certificate issued by the Municipality of S.V. dated 30 August 2011, the certificate on completed primary education and the diploma certifying attainment of a secondary education which are issued in the new name of the complainant, the request to the Law of Faculty to correct the diploma dated 6 October 2011, the Conclusion of the Faculty of Law in Belgrade dated 2 November 2011, the appeal to the Conclusion dated 23 November 2011, the Decision of the Council of the Faculty of Law dated 28 December 2011 and an excerpt from the School-Contemporary Practice magazine no. 4 from April 2011.

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, therefore the statement of the Faculty of Law in Belgrade was obtained during the course of procedure, wherein, inter alia, the following was alleged:

- That the complainant's request was rejected on the basis of relevant regulations that regulate the issuance of diplomas and other public documentations, specifically the provisions of Article 99 paragraph 1 and Article 101 paragraph 1 of the Law on Higher Education and the provisions of Article 161 paragraphs 1 and 2 of the General Administrative Procedure Law, as well as "on the basis of consultations and practice of the University of Belgrade
- That M. Dj. was issued a "valid public document".
- That any "subsequent change of name or surname is not a basis for correction of a public document", and its authenticity and continuity are proved with appropriate decision on concrete change.
- That approximately 90,000 students study at the University of Belgrade and over 11,000 students at the Faculty of Law, and that statistical data show that members of the female sex form considerably more than 50%

of the student population, while approximately 63% of them are at the Faculty of Law.
- That diplomas are issued on the basis of data from the official records, and when applying for a job, after getting married and changing surname, a diploma of a faculty is submitted issued in the name and surname that was valid during studies, while identity is proved with another public document (marriage certificate), and "not by having a new higher education public document issued".
- That the Faculty of Law did not commit a violation on the basis of gender equality, nor on any other basis.
- That the complaint against discrimination filed on behalf of M. Dj. is ungrounded and should be dismissed.

While taking a stand concerning this case, the Commissioner for Protection of Equality analysed all allegations and evidence, as well as the relevant anti-discrimination regulations and the regulations that govern the issuance of diplomas and other public documents.

During the course of the procedure, it was established that in the Decision of the Municipal Court in F. no. ... dated 21 January 2011, it is stated that M. Dj., born in the year ... in Belgrade, registry number ..., instead of his former name, her name is now M., and it is stated that this person is a member of the female sex. The Decision came into force on 18 February 2011. It was also established that this foreign court decision was recognised by the Decision of the Higher Court in Belgrade... dated 29 July 2011.

Having inspected the birth certificate issued by the Municipality of S.V. dated 30 August 2011, it is established that for the registry area of S.V., under registry number ... for the year..., the birth entry was made for M. Dj., as a member of the female sex.

Having inspected the certificates on completed primary education issued by V.K. Primary School in B., file no. ... dated 10 October 2011, and the diploma certifying attainment of a secondary education in the D. D. S. Educational Organisation in B., file no. ... dated 25 November 2011, it is established that the aforementioned documents (as iteratum) were issued in the name of M. Dj.

On the basis of the content of the "request for the correction of a diploma certifying attainment of a higher education", that was submitted to the Faculty

of Law on 6 October 2011, it is established that the plenipotentiary of M. Dj. requested the "correction of the diploma issued to M. Dj" and the delivery of the "corrected diploma", invoking the fact that the diploma was issued to M. Dj., that this person, after having acquired the diploma, changed her sex and name, and he submitted adequate evidence thereof. This request was rejected with the Decision of the Faculty of Law dated 8 November 2011, so the plenipotentiary of the complainant declared an appeal against the Conclusion on 23 November 2011, which was dismissed as being groundless with the Decision of the Council of the Faculty of Law of the University of Belgrade on 28 December 2011.

In order to approach the analysis of this case from the aspect of anti-discrimination regulations, first it is necessary to consider what the content of the request sent to the Faculty of Law was, i.e. what the plenipotentiary of the claimant requested from the Faculty of Law when contacting the Faculty with "the request for the correction of a diploma certifying attainment of a higher education". Namely, as stated in the Rationale of the Council of the Faculty of Law, a diploma is a public document and, like any other public document, it is not a legal act. Therefore, a diploma is not subject to "corrections", as the term "correction" implies a correction of technical errors in legal acts.

The analysis of the content and essence of the request shows that, by submitting it, the complainant endeavoured to realise her legitimate interest - to get a new diploma in her new name following gender reassignment and change of name which took place after the diploma had been acquired. The plenipotentiary of the claimant attempted to realise this interest by submitting the "request for the correction of diploma", which is not allowed by law.

It is obvious that the modus operandi of the faculty is not specially regulated in cases of a person who has reassigned his/her gender and has changed his/her name after acquiring her/his diploma and who wishes to receive a new diploma that states his/her new name. However, if the content of the request, the motives and reasons for its submission, the interest wished to be realised and especially the fact that there is a lack of regulations on the modus operandi of the faculty in such cases, are born in mind, it is obvious that, despite the wrong formulation, the claimant's request for having a new diploma issued in the name of M. Dj., instead of in the name of M. Dj., being regarded essentially, represents a request for the issuance of a new diploma, as this is exactly what she asked for, therewith also asking that "the corrected diploma is delivered in a cardboard

tube". Therefore, there was no reason to consider the request of the complainant in the light of the fulfilment of requirements for announcing a public document null and void (Article 101 of the Higher Education Law), as it was done. Bearing that in mind, the Commissioner for Protection of Equality takes the stand that when considering this case, it should be reconsidered whether the claimant was discriminated by the non-issuance of the new diploma in the new name of the claimant, bearing in mind the Law on the Prohibition of Discrimination and the regulations that govern the issuance of new diplomas.

In its statement, the Faculty of Law states, invoking Article 99 paragraph 1 of the Law on Higher Education, which regulates the issuance of diplomas and other public documents, and Article 101 paragraph 1 of the Law on Higher Education, which regulates announcing diplomas null and void, as well as Article 161 paragraphs 1 and 2 of the General Administrative Procedure Law that regulates the issuance of certificates and other documents, as well as the consultations and the practice of the University in Belgrade, that M. Dj. was issued a valid diploma, therefore the subsequent change of name or surname is not a basis for the correction of a public document. It obviously arises there from that the Faculty of Law did not consider the possibility of issuing the new diploma according to the "request for the correction of diploma" to the claimant in her new name, although, as it has been already said, that was exactly the essence of her request. Yet, it should be stated that, in the Rationale of the Decision of the Council of the Faculty, Article 102 of the Law on Higher Education is mentioned, which regulates the issuance of new diplomas and other public documents, but is it just stated that the "Faculty did not violate these provisions in any manner". Apart from that, it is stated in the statement that among the students of the Faculty of Law 63% of the student population are female, who are issued diplomas after graduation on the basis of the data from the official records and that after their marriage and change of surnames when they apply for a new job they submit the diploma issued in the name and surname used during the course of their studies and prove their identity with another public document (marriage certificate), and not "by having a new higher education public document issued".

In this concrete case, it is contested whether the Faculty of Law, by dismissing the request of M. Dj, to carry out the "correction" of her diploma due to the change of sex and name, and to issue her a new one that would state her new

name, committed discrimination prohibited by the anti-discrimination regulations of the Republic of Serbia.

The Commissioner for Protection of Equality first states that the Constitution of the Republic of Serbia (Official Gazette of RS, no. 98/2006) in Article 21 stipulates that all are equal before the Constitution and that any form of discrimination on any basis is prohibited, and in Article 18 paragraph 3 it stipulates that the provisions on human and minority rights are interpreted to the benefit of promoting values of a democratic society, pursuant to valid international standards in human and minority rights, as well as the practice of international institutions which supervise their implementation. 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 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 provisions of Articles 5-14 of the Law on the Prohibition of Discrimination define various forms of violation of the principle of equality, i.e. discriminatory conduct, including direct and indirect discrimination.

The Commissioner reviewed whether direct discrimination was committed in this case. As the Article 6 of the Law on the Prohibition of Discrimination defines direct discrimination as placing in a less favourable position an individual or a group of persons, who are in the same or a similar situation, through any act, action or omission on the grounds of their personal characteristics, the Commissioner for Protection of Equality is of opinion that the Faculty of Law did not discriminate the complainant directly since it decided upon her request applying the rules that are equal for all, in line with its common practice, which is, inter alia, also built on the grounds of the "consultations and practice of the University in Belgrade", as it was stated in the statement.

Concerning indirect discrimination, the Commissioner for Protection of Equality is of opinion, observing the facts and circumstances and bearing in mind valid legal regulations, that indirect discrimination was committed in this case, which is, as a specific form of discrimination, defined as a term in Article 7 of the Law on the Prohibition of Discrimination.

Namely, pursuant to the provision of Article 7 of the Law on the Prohibition of Discrimination, indirect discrimination occurs 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. Indirect discrimination occurs not only when persons who are in the same or similar situation, without any objective or reasonable justification, are treated in a different manner on the basis of their personal characteristic, but also **when persons who are in substantially different situations are not treated in a different manner, unless there is objective and reasonable justification**. Thus, this aspect of indirect discrimination is not permitted because persons, i.e. groups that have different personal characteristics are treated in the same manner without justification. This explicit case is also expressed in the decision of the European Court for Human Rights (see, e.g. the Decision of the European Court for Human Rights in the case *Tlimmenos v. Greece*, Application No. 34369/97).

In order to examine whether M. Dj. was indirectly discriminated by the rejection of her request for the "correction" of her diploma and the issuance of a new diploma that would state her new name, first it should be considered if she, as the person who has reassigned her gender, is in a substantially different situation in relation to other persons who are not in that situation. The Commissioner is of opinion that the position of the complainant, as well as all other persons in her position, is substantially different in relation to all other persons. Namely, persons who have reassigned their gender have a justified interest that public documents they use in legal traffic, including diplomas certifying attainment of education, state their new name, in accordance with their new gender identity, as only thereby they ensure that the reassignment of their gender is fully integrated in their personal and professional life. Thereby, one should bear in mind that a name itself designates one's sex, so the incongruence of a name identified in a diploma and with the one in a public document used to prove identity in legal traffic can objectively cause the violation of the right to privacy and discrimination in all those situations where a person submits his/her diploma as a proof of his/her education, such as employment, continuation of education, etc. Therefore, it is unacceptable that the situation where persons who have reassigned their gender is identified with the situation of persons who changed their surname by marrying. Bearing all these facts in mind, it is obvious that

the claimant has been indirectly discriminated against since the Decision issued upon her request is such as the Faculty of Law always issues when their clients ask for a "correction" of their diploma and the issuance of a new one with the new data about their identity, with no regard to the specific situation that she and all other persons who have changed their due to gender reassignment are in.

The Commissioner for Protection of Equality points out the need that the problem of issuing new documents is observed in the context of the overall social position of transgender persons, since the respect of the human rights of this group of people has been ignored and neglected for a long time despite the problems that they face being serious and specific. Transgender persons are exposed to a very high level of discrimination, non-tolerance and open violence. The pursuance of some of their fundamental human rights is denied or made difficult, including the right to live, the right to inviolability of physical and mental integrity and the right to healthcare protection. Although a very small and diverse community is in question, the Commissioner for Protection of Equality believes that all social actors must provide support and undertake all measures, everyone within his/her area of responsibility, to assure that transgender persons enjoy all rights guaranteed to citizens without discrimination. Also, it is important to bear in mind that it is highly important for transgender persons to have the possibility of changing their legal and social status and harmonising it with their gender identity after gender reassignment.

The Commissioner for Protection of Equality states that since 1 January 2012, in line with the provisions of the Law on Healthcare Insurance (Official Gazette of RS, no. 107/2005, 109/2009 – corrected. and 57/2011), gender reassignment surgery for medical reasons has been classified as a healthcare service that is funded from the obligatory healthcare insurance funds. It is estimated that between 150 and 200 persons are waiting to undergo gender reassignment surgery, therefore, the need to enable these persons to have new personal document issued in a fast and efficient manner is additionally imposed.

The need to eliminate every aspect of discrimination of transgender persons is pointed out in numerous binding and non-binding documents of international organisations that the Republic of Serbia is a member of, as follows: Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1979), Universal Periodic Report of the UN Council for Human Rights (2011), Resolution on Human Rights, Sexual Orientation and Gender Identity of the UN

Council for Human Rights (2011), Recommendation of the Ministerial Committee on the Measures against Discrimination on the Basis of Sexual Orientation and Gender Identity 2010(5), Report on Human Rights and Gender Identity of the High Commissioner of the Council of Europe (2009), Resolution on Discrimination on the Basis of Sexual Orientation and Gender Equality of the Parliamentary Assembly of the Council of Europe 1728(2010)1, and Recommendation on the Situation of Transgender persons of the Parliamentary Assembly of the Council of Europe 1117 (1989). Furthermore, the European Court for Human Rights has brought many decisions wherein the need for better understanding of the problem encountered by transgender persons is emphasised, so that there would be less such problems and they would be eliminated over time, e.g. see decisions of the European Court for Human Rights in the cases B. *v. France Application no. 13343/87, X, Y, Z v. the UK Application no. 21830/93, X, Y, Z v. the UK Application no. 36528/97, X, Y, Z v. the UK Application no. 28957/95 and 25680/94, Van Kuck v. Germany Application no. 35968/97, X, Y, Z v. the UK Application no. 32570/03, L. v. Lithuania Application no. 27527/03, Schlumpf v. Switzerland Application no. 29002/06 i P.V. v. Spain Application no. 35159/09.*

The Commissioner for Protection of Equality highlights the documents that are adopted at EU level: the Directive 2004/113/EC (2004) on the implementation of the principle of equal treatment of men and women in the access to goods and services, as well as the Directive 2006/54/EC (2006) on the implementation of the principle of equal opportunities for men and women in matters of employment and occupation.

Bearing in mind this concrete case, the key question that is brought up in this case is whether the equal treatment of a person who is in an essentially different position in comparison to people who have changed their name for other reasons, and not because of gender reassignment, is allowed. Namely, according to Article 7 of the Law on the Prohibition of Discrimination, this form of discrimination would not exist if there is equal treatment 1) justified by a legitimate cause and 2) if the means to achieve this cause are proper and necessary.

In the statement of the Faculty of Law in Belgrade, it is not explicitly stated what legitimate cause was endeavoured to be achieved with the rejection of the request of the claimant. Yet, it can be concluded that the cause for such action was the observance of legitimate rules that do not stipulate any possibility for the "correction" of a diploma and issuance of a new one that states the

new name that the person acquired after the issuance of the diploma. Therefore, it can be concluded that the cause was legitimate and non-discriminatory.

In regard to the propriety and necessity of the means used to achieve the cause, the Commissioner states that the law does not prohibit the issuance of a new diploma. Namely, the issuance of a new diploma is regulated by Article 102 of the Law on Higher Education that stipulates that a higher education institution issues a new public document after the original public document has been declared invalid in the Official Gazette of the Republic of Serbia, on the basis of the date from the records it keeps. According to paragraph 2 of this article, a new public document shall have the significance of the original public document, and as provided in paragraph 3 of this article, it shall bear a remark that this is a new public document issued after the original public document has been declared invalid.

In connection to this, the question brought up is whether the new diploma can be issued in a new name after the diploma has been declared invalid, or must it be issued in the name that the person had at the moment of the issuance of the diploma. The Law does not provide an explicit answer to this question. In paragraph 1 of Article 102, it is stipulated that a new diploma is issued "on the basis of the data from the records that the higher education institution keeps". Pursuant to Article 9 of the Regulations on the Content and Manner of Keeping Records Kept by a Higher Education Institution, (Official Gazette of RS, no. 21/06), the records on issued diplomas and supplements to diplomas, inter alia, contain the surname, middle name and name of a student. The Commissioner is of opinion that these provisions do not exclude the possibility of a person who has changed his/her name after the issuance of the diploma because of gender reassignment being issued a diploma that states her/his new name. Namely, the objective of these regulations is to exclude every possibility of issuing a diploma to a person who has not graduated, in order to prevent possible fraudulent activity. This possibility is, however, fully excluded if the person, in the procedure of issuing a new diploma, submits a proper public document that proves the change of her/his name and confirms that this is the same person to whom, according to the data from the records on issued diplomas, the diploma was issued. The Commissioner additionally points out that Article 154 of the General Administrative Procedure Law stipulates that a document issued by a state body in the stipulated

form and within the limits of its jurisdiction, i.e. by a company or other organisation within the framework of the legally vested public authority (public document), proves what is confirmed or established therein. Article 156 of the same law stipulates that if the body in charge has already established some facts or circumstances or they are proved in the public document (ID card, birth certificate etc.), the body that conducts the procedure shall consider these facts and circumstances as established.

Considering all the circumstances of this concrete case, the Commissioner for Protection of Equality is of the stand that the equal treatment of persons who have changed their names because of gender reassignment and persons who changed their names for other reasons is not allowed, because although the Faculty of Law had a justified and legitimate cause, the means to achieve that cause were neither adequate nor necessary, i.e. there was no proportionality between the actions undertaken and the consequences, therefore, in this concrete case, the Faculty of Law committed an act of indirect discrimination against M. Dj.

Evaluating 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, has issued the Opinion and recommended that the Faculty of Law of the University of Belgrade undertake appropriate actions in order to eliminate the consequences of its discriminatory conduct.

3. Discrimination Complaints on the Basis of Sexual Orientation

3.1. The complaint of the O.f.l.h.r. (orig. O.z.l.lj.p.) against Professor M. B. for discrimination on the basis of sexual orientation (File. no. 168/2012 dated 18.1.2012)

Acting within the jurisdiction stipulated by law to receive and review 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 1of the Law on the Prohibition of Discrimination, (Official Gazette of Republic of Serbia, no. 22/2009), concerning the complaint of the O.f.l.h.r. "L." from B., the Commissioner for Protection of Equality issues the following

OPINION

During the Theory of Public Opinion lecture, which was held on 12 October 2011 to the students at the F.f.k.m. (orig. F.z.k.m.) of the M.U., in B., M. B, Ph.D., a professor of this Faculty spoke about homosexuality mentioning in that context "disease", "treatment", and "gender reassignment" and questioned the validity of the decision on the basis of which it was removed from the list of diseases, thereby he contributed to the creation of a humiliating and offensive environment for LGBT persons. Thereby, he committed discrimination against LGBT persons on the basis of their personal characteristic - sexual orientation, prohibited by Article 12 of the Law on the Prohibition of Discrimination.

RECOMMENDATION

Prof. M. B., Ph.D., shall take care in future that whatever he says about homosexuality to students is absolutely clear and unambiguous, without any possibility to misunderstand his words, whereby, he shall bear in mind that certain incorrect statements can contribute to the creation and maintenance of stereotypes, prejudices and non-tolerance of LGBT persons, hurt their dignity and create a humiliating and offensive environment for them.

Rationale

The Commissioner for Protection of Equality was contacted on 19 October 2011 by the O.f.l.h.r. "L.", which in the name of K.p.d. filed the complaint against M. B., Ph.D., professor of the F.f.k.m. of the M.U in B. In the complaint, it was alleged that Prof., M. B., Ph.D., during the lecture held on 5 October 2011 in the Theory of Public Opinion subject, at the F.f.k.m. of the M.U in B., declared: "*homosexuality is a disease and should be classified just as a stomach ulcer is, and homosexuality is treated by gender reassignment*." It is highlighted that Prof. M. B., Ph.D., stated, during the lecture, that he studied psychiatry during his studies and that then "*homosexuality was a disease, so I (he) was bewildered that it was not the case any longer*". The stand of the complainant is that in these statements, Prof. M. B., Ph.D. committed an act of discrimination on the basis of sexual orientation.

At the request of the Commissioner for Protection of Equality dated 4 November 2011, on 14 November 2011, the complainant complemented the complaint by submitting data on the person who was stated in the complaint as having been present at the lecture given by Prof. M. B., Ph.D., on 5 October 2011.

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 Prof. M. B., Ph.D., to give a statement on the allegations and the grounds of the complaint within a period of 15 days.

Prof. M. B., Ph.D., sent a written statement wherein he stated that it was true that during his lecture, that had been held, as he claimed, on 12 October

2011, he stated that *"in the Psychiatry course book that he used to prepare his examination in 1976, it was stated that homosexuality was a disease"*, and that it was true that he stated that "*in the contemporary Psychiatry course book it says this is not the case any longer*". He pointed out that it is not true that he said "*homosexuality should be the same as a stomach ulcer*" and that "*it can be treated by gender reassignment*".

Stating that in the complaint the meaning of his words was "inadmissibly reduced" and "distorted", Prof. M. B., Ph.D., pointed out in his statement that this topic was introduced to the agenda as an example "*that in public illustrates the pressure of public opinion, making a public rational debate impossible*", to which, allegedly, "*the filed complaint bears witness*". Furthermore, he alleged that stomach ulcer was mentioned during the lecture in connection to the way the American Psychiatric Association *"declassified homosexuality from the list of diseases by democratic vote"*, then asking the students to imagine *"when doctors, for example surgeons, would democratically decide that ulcer is not a disease any longer"*. In his statement, he also alleges that when a female student who attended the lecture asked him *"what do you (does he) mean that homosexuality is a disease"*, he mentioned the issues of gender that are *"solved by surgery to change gender"*, and he stated that he did so in order to *"illustrate diseases and problems that both the profession and the state recognise, therefore the state subsidises surgery of that type, which solve the real and serious problem of personality and sexual self-experience."* He explained that he *"did not identify two cases, but mentioned the possible closeness of the problems of gender and homosexuality, which is surely greater than the closeness of it to a stomach ulcer."*

Giving his statement on the grounds of the complaint, Prof. B. stated in his statement that this specific case is not about discrimination but about an *"exchange of stands and opinions"*. According to his assertion, if an *"exchange of stands and opinions,"* which is a *"natural matter"* at university, were to be declared discrimination, then an *"Inquisition"* would have been *"introduced"*. Furthermore, he stated that expressing the opinion, by itself, that *"homosexuality"* is a disease does not represent discrimination, nor it is connected to tolerance, concluding: *"if I said or did not say that (whether) homosexuality is a disease, it still says nothing about my stand about people of LGBT orientation"*. He pointed out that during his lectures he always told students: *"However and whatever we privately think we are obliged to tolerate people regardless of their orientation and*

whether they are sick or not (with AIDS or any other disease), as long as that does not undermine our health", and that he, during his lectures and in public, explicitly declared many times that *"violence against LGBT population is inadmissible, as well as towards any other person, because he/she is different from us. You are tolerant exactly because you show you can bear the difference, although you will not or cannot agree with it"*. Finally, he stated that he has several friends, colleagues of *"homosexual orientation",* and that, as he highlighted*, "did not prevent him from seeing in them what they were: diligent people and persons to be respected."*

During the procedure, a written statement was requested from N. L., who was stated in the complaint as having attended the lecture of Prof. M. B., Ph.D.

In her written statement dated 28 December 2011, N. L. stated that she had attended the Theory of Public Opinion lecture by Prof. B, held on 5 October 2011. She pointed out that during the lecture, Prof. B. said that during the time of his studies he had learned from the Psychiatry course book that homosexuality was a disease and that this was true. She also alleged that, *"Prof. B. said that homosexuality was not classified as a disease any longer, as it had been voted by a group of democrats, the majority of who were of homosexual orientation"*, and that when asked by a female colleague whether *"there is a cure for that disease and how it is treated"*, he answered that the cure *"certainly exists like for any other disease, for example a stomach ulcer, and that is gender reassignment"*.

While taking the stand on this case, the Commissioner for Protection of Equality analysed all the allegations contained in the complaint, the statement and the written statement of the witness, as well as the relevant legal regulations in the field of the protection from discrimination.

Although, it is difficult to establish in this case what exactly Prof. B. said during the lecture held on 12 October 2011 in the Theory of Public Opinion subject, on the basis of the allegations from the complaint and the statement by Prof. B., as well as the written statement of N. L., who attended his lecture, it can be concluded that on that occasion he spoke about homosexuality to the students linking it with "disease", "treatment" and "gender reassignment" and expressed his negative attitude towards the way the American Psychiatric Association declassified homosexuality from the list of diseases by a vote.

The Commissioner for Protection of Equality first states that Article 21 of the Constitution of the Republic of Serbia (Official Gazette of RS, no. 98/2006) stipulates that all are equal before the Constitution and that any form

of discrimination is prohibited on any basis, and Article 18 paragraph 3 stipulates that the provisions on human and minority rights are interpreted to the benefit of promoting values of a democratic society, pursuant to valid international standards in human and minority rights, as well as the practice of international institutions which supervise their implementation.

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 obligated to respect the principle of equality, that is to say, the prohibition of discrimination. Under the provisions of Articles 5-14 of the Law on the Prohibition of Discrimination, various forms of violations of the principle of equality, i.e. of discriminatory behaviour, are defined. In regard to the facts and circumstances of this specific case, the provisions of Article 12 of the Law on the Prohibition of Discrimination are relevant, which forbid 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*.

While considering this case, the Commissioner for Protection of Equality first reviewed the acceptability of the stand of Prof. B., to whom merely expressing the opinion that homosexuality is a disease does not mean discrimination as it does not demonstrate the stand towards LGBT persons of the one who expresses such an opinion. The Commissioner for Protection of Equality is of the stand that such an attitude is unacceptable. Namely, a lecture of a university professor is not merely an "expression of opinion". A lecture is a communication between two "unequal parties", a professor, who transfers knowledge and who shapes the understanding of his/her listeners with his/her lecture, and the students who attend lectures to learn something from a person who is an expert in matters and an intellectual authority within the area he/she teaches. Therefore, the university professor expressing to the students at his lecture the opinion that homosexuality is a disease, is *per se* an act of discrimination as it represents an unacceptable labelling and offends the dignity of such persons, creating a humiliating and offensive environment for them. Prof. B. was, as a university professor, obliged to take into account that not only students of

heterosexual orientation, but also of homosexual, could have been present at his lecture, who would be disturbed, humiliated, anxious and angered by the expression of the opinion that they are sick.

Based on the view that every spoken word is not just an expression of an opinion, but represents a message to the one it is directed to, the Commissioner believes that linking homosexuality with a disease is humiliating and offensive, that it contributes to the creation and maintenance of stereotypes and prejudices, as well as the stigmatisation and non-tolerance of all LGBT persons. Particularly when bearing in mind the extremely negative social perception of LGBT persons and the high level of homophobia, which is not inborn or a necessary human characteristic, but is a value, i.e. an ideological position that is adopted through socialisation, and reproduced through discursive practices founded on ignorance, and the fogging and concealment of facts. University professors, as well as all others who influence the formation of attitudes of young people with their work and professional authority, providing knowledge and a role model, who are aware of the responsibility for every publicly spoken word, must take special care about it. Therefore, their obligation not to support and incite stereotypes of and prejudices against LGBT persons with their statements is even more emphasised. In regard to that, the Commissioner implies professors' obligation to say what they want to tell their students in an absolute clear and unambiguous manner, not leaving any possibility for any misunderstanding of what they have said, i.e. to be understood wrongly.

The Commissioner bore in mind while examining whether this concrete conduct of a specific person, which consists of speaking certain words, undertaking some factual actions etc., is an act of discrimination, from the aspect of anti-discrimination regulations, that it is not significant whether this person intended to discriminate, whether he/she is guilty of discrimination etc. The subject of evaluation is only the conduct manifested, in relation to which it is examined whether, in regard to all circumstances, it is allowed or not, i.e. whether it is contrary to imperative regulations on the prohibition of discrimination, which are binding for all legal subjects. This is asserted with the fact that the legislator in Article 12 of the Law on the Prohibition of Discrimination forbids harassment and humiliating treatment not only when aimed at violating the dignity of an individual or a group of persons on the basis of his/her or their personal characteristics, but also when such conduct objectively represents a

violation of the dignity of an individual or a group of persons. Consequently, in this specific case, it is legally irrelevant whether Prof. B. aimed to violate the dignity of LGBT persons on the basis of their sexual orientation or whether this was not his aim at all.

In regard to the allegation in the statement that, during the lecture, *an "exchange of stands and opinions"* was carried out, which cannot be "proclaimed" discrimination, the Commissioner states that this is not about an "*exchange of stands and opinions"*, but about the lecture given by Prof. B. to the students. A scholarly discourse related to some sensitive, current and acute issues of social reality, in regard to which there is a discord in the scholarly and wider communities, is to be conducted in scientific magazines, at scholarly and professional gatherings, and not with students at lectures. One can initiate an exchange of stands and opinions pertaining to these issues only with "one's peers" who are capable of discussing such a topic on an equal footing. In comparison to their professors, the students are surely not their peers.

While taking the stand that it is not about an *"exchange of stands and opinions"*, the Commissioner, in particular, bore in mind that Prof. B. brought up the topic of homosexuality not providing the students with precise, objective and complete facts based on the contemporary scientific explanations of legitimate non-heteronormative varieties of sexuality and gender and sex identities, including also information that the World Health Organisation in 1990 conducted the Revision of the International Classification of Diseases and Related Health Issues (MKB-10) and declassified homosexuality from the list of diseases, that only persons who are in the internationally recognised acronym "LGBT" designated by the letter "T" have the need to have gender reassignment through medical surgery, whereas the parts of the LGBT population designated by the letters "L", "G" and "B" realise their emotional and sexual liaisons with persons of the same sex, etc.

The Commissioner points out that Article 46 of the Constitution guarantees freedom of thought and expression, as well as the freedom to seek, receive and impart information and ideas through speech, writing, art or in some other manner; and that paragraph 2 of this article stipulates that freedom of expression may be restricted by law if necessary *to protect the rights and reputation of others*, to uphold the authority and objectivity of the court and to protect public health, the morals of a democratic society and the national security of the Republic of Serbia. In line with the Constitution, exactly *for the sake of the protection of the rights and*

dignity of others, under the provisions of Article 12 of the Law on the Prohibition of Discrimination, harassment and humiliating treatment aiming at or constituting violation of the dignity of an individual or a group of persons on the basis of his/her or their personal characteristics is forbidden as one of specific forms of discrimination. The very actions performed to harass or humiliate an individual or a group of persons on the basis of their personal characteristic may be diverse, also including the public announcement of specific ideas, attitudes and thoughts.

In regard to the stand of Prof. B. that an *"exchange of stands and opinions"*, which is a *"natural matter"* at the university, cannot be declared discrimination as therefore an *"Inquisition would have been introduced"*, the Commissioner highlights that Article 4 of the Law on Higher Education (Official Gazette of RS, no. 76/2005, 100/2007 - authentic interpretation, 97/2008 and 44/2010) stipulates the principles of higher education, and among them are academic freedoms, respect of the humanistic and democratic values of the European and national tradition and respect of human rights and civic freedoms, including the ban on all forms of discrimination.

The Commissioner also took into consideration the assertions of Prof. B. on the messages, as he claims in his statement, that he delivered to students at his previous lectures, inviting them to be tolerant and pointing out to them that *"violence towards the LGBT population is inadmissible, as well as towards any other person, because he/she is different from us"*, as well as the assertions that for decades he has been friends with several colleagues of a *"homosexual orientation"*, and that, as he emphasises, did not *"prevent him from seeing in them what they are: diligent people and persons to be respected"*. Not entering into the veracity of these assertions, the Commissioner deems that they are legally irrelevant for legal qualification. Namely, it is not the degree of tolerance of Prof. B. towards LGBT persons that is being established, nor his system of values, but what Prof. B. said in front of students at the lecture and whether, regarding the content of the spoken words and the entire context, that represents an act of discrimination prohibited by law.

Considering all the aforementioned facts and circumstances and bearing in mind the legal regulations, the Commissioner for Protection of Equality, in accordance with Article 33 paragraph 1 point 1 of the Law on the Prohibition of Discrimination, issued the Opinion, as well as the appropriate Recommendation, in accordance with the general objective of recommendations.

4. Discrimination Complaints on the Basis of Disability

4.1 The complaint of S. G. against the S. Home for Children and Youth with Learning Difficulties against discrimination of an employee based on disability (File. no. 423/2011 dated 11.04.2011)

Acting within the jurisdiction stipulated by law to receive and review complaints 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), the Commissioner for Protection of Equality issues the following

OPINION

With the Decision of the acting director of the S. Home for Children and Youth with Learning Difficulties, no. 6289 dated 17 December 2010, on the basis of which the Employment Contract of Dr. S.G. was cancelled, an act of discrimination on the grounds of personal characteristic - disability was not committed.

Acting within the jurisdiction stipulated by law to recommend measures to realise equality to public authorities and other persons (Article 33 paragraph 9 of the Law on the Prohibition of Discrimination), the Commissioner for Protection of Equality issues the following

RECOMMENDATION

The S. Home for Children and Youth with Learning Difficulties shall undertake all necessary actions and measures without delay to ensure the fulfilment of the

obligation stipulated in Article 24 of the Law on Employment and Professional Rehabilitation of Persons with Disabilities[10], which provides for the employment of a specific number of persons with disabilities, depending on the number of employees.

Rationale

With the complaint dated 29 December 2010 against the Decision of the acting director of the S. Home for Children and With Learning Difficulties no. 6289 dated 17 December 2010, the Commissioner for Protection of Equality was contacted by Dr. S. G. through her plenipotentiary, the lawyer N. D. C. In the complaint, it was alleged that an act of discrimination was committed against her on the basis of her personal characteristic - disability, since the only reason for taking the Decision on the Cancellation of the Employment Contract was the disability of the complainant. S. G. was employed for a definite period of time with the S. Home for Children and With Learning Difficulties on 31 March 2010 and, by December 2010, she had been engaged with interruptions on the basis of contracts for a definite period of time of 30 day each. Evidence that S. G. is a person with a disability, as well as the employment contracts that she concluded in the aforementioned period and the Decision on the Cancellation of the employment contracts were submitted alongside the complaint.

The Commissioner for Protection of Equality conducted the procedure in order to establish the legally relevant facts and circumstances. During the course of the procedure, the statement of the acting director of the Home, M. M. M., dated 28 January 2011 was obtained, as well as a supplement to the statement dated 13 March 2011. In the statement and the supplement to the statement, the following was stated:

- That Dr. S. G. was employed with the S. Home for Children and With Learning Difficulties in the post of a general practitioner in the period from 31 March 2010 to 25 December 2010, according to the employment contracts each for a definite period of time of up to 30 days duration, for a seven-month period in total, with the remark that the 12-month time

[10] Official Gazette of RS, no. 36/2009

limit stipulated by Article 37 paragraph 1 of the Labour Law was not overstepped.

- That she did not submit to the employer confirmation that she was a person with a disability when she entered into employment, and that she did not provide any notification/request that it was necessary to initiate the procedure to evaluate her working capability in line with the provisions of the Law on Employment and Professional Rehabilitation of Persons with Disabilities. The fact that S. G. has a visible physical disability is irrelevant in relation to the accountability of the employer, as no relevant evidence was submitted to the employer.
- The Regulations on the Systematisation of Jobs Positions were submitted, as well as the Agreement on Providing and Financing Healthcare Protection from the obligatory healthcare insurance for 2010, no. 2419 dated 7 May, and the Agreement on Amendments and Additions to the Agreement on Providing and Financing Healthcare Protection in 2007 no. 335 dated 25 May 2007; from which it can be seen that the financing of the fees for the salaries of two general practitioners was agreed upon.
- That the Decision of the National Employment Service, the City of Belgrade Branch Office, no. 0100-1002-642/2010 dated 4. November 2010, which establishes that S. G. has first degree of difficulties and obstacles at work, was submitted to the S. Home for Children and With Learning Difficulties only on 28 December 2010, i.e. after the termination of employment for a definite period of time.
- That two general practitioners are employed at the Home - Dr. I. Dj. for indefinite period of time, and Dr. L. S. for a definite period of time.
- That the Ministry of Labour and Social Policy fulfils the obligation to employ a specific number of persons with disabilities instead of the Home, in accordance with Article 29 of the Law on Employment and Professional Rehabilitation of Persons with Disabilities.
- That there is no evidence that the complainant was discriminated against in any way.

Having inspected the documentation submitted, the Commissioner for Protection of Equality established that Dr S. G. was employed with the S. Home for Children and With Learning Difficulties in the post of general practitioner

in the period from 31 March 2010 to 25 December 2010, according to each 30-day definite period employment contract, for a seven-month period in total. The Law on the Prohibition of Discrimination[11] stipulates that discrimination of persons with disabilities occurs if acting contrary to the principle of equal rights and freedoms of persons with disabilities in political, economic, cultural and other aspect of public, professional, private and family life, as well as that the manner of realisation and protection of persons with disabilities is regulated with a special law. Article 21 of the Law on the Prevention of Discrimination against Persons with Disabilities[12] stipulates that it is forbidden to discriminate against persons with disabilities in employment and the pursuance of employment rights, both towards a person seeking employment and towards an employee with a disability. In employment, the following is considered discrimination on the basis of disability:

- Not employing a person with disabilities or the escort of a person with a disability because of disability, i.e. because of the characteristic of the escort of a person with disability.
- Setting special healthcare conditions for employing a person with a disability, unless special healthcare conditions for carrying out specific jobs are determined in accordance with law,
- Previous test of mental and physical capabilities which are not directly connected to the tasks for which a person is being employed[13] [...] .

The very fact that the complainant was employed for a definite period of time implies that the employer did not discriminate when establishing the employment relation for definite period of time. Although the Commissioner for Protection of Equality established that there were irregularities pertaining to the successive establishment of employment for a definite period of time by inspecting the submitted documentation and on the basis of the collected facts, it was not established that the cause was the disability of the complainant, therefore, the Commissioner for Protection of Equality directs S. G. to seek the protection of her rights before a competent court of law, as any eventual irregularities in

[11] Article 26 paragraphs 1 and 2

[12] Official Gazette of RS, no. 33/2006

[13] Ibid, Article 22

relation to the conclusion of the definite period employment contracts of employment and the cancellation of the employment contracts do not fall within the jurisdiction of this state body. During this procedure, it was not established that the exclusive reason for the termination of employment, i.e. the non- renewal of the definite period employment contract, was based on the personal characteristic of the complainant - her disability.

Evaluating the established facts and legal regulations, the Commissioner for Protection of Equality, pursuant to Article 33 paragraph 1 point 9 of the Law on the Prohibition of Discrimination, issues the Opinion that with the Decision on the Cancellation of the Employment Contract no. 6289 dated 17 December 2010, an act of discrimination on the basis of disability was not committed against the complainant.

Considering the facts collected in order to make a decision on the complaint, the Commissioner for Protection of Equality, in accordance with her legal authority to recommend to public authority bodies and other persons[14] measures for the realisation of equality, issues a Recommendation to the S. Home for Children and With Learning Difficulties that it undertake all necessary actions and measures without delay, wherein it will ensure the realisation of the obligation stipulated in Article 4 of the Law on Employment and Professional Rehabilitation of Persons with Disabilities, which provides for the employment of a specific number of persons with disabilities, depending on the number of employees employed by the employer. That, inter alia, implies the planning and implementation of measures to increase the employment rate of persons with disabilities with all employers, and thereby with state bodies that should set an example and enable the greatest possible accessibility to and the equal availability of various jobs to persons with disabilities.

While making this Recommendation, the Commissioner bore in mind that Article 29 paragraph 1 of the Law on Employment and Professional Rehabilitation of Persons with Disabilities stipulates that an employer who does not employ persons with disabilities pays penalties which are three times higher than the minimum salary determined in accordance with the regulations on labour for each person with a disability it has not employed, and also the Regulations on the Manner of Monitoring and Enacting the Obligation to Employ Persons

[14] Article 33 paragraph 9 of the Law on the Prohibition of Discrimination

with Disabilities and the manner of proving the enactment of that obligation[15], which, in Article 8 paragraph 1, stipulates that the Republic of Serbia as an employer for direct and indirect beneficiaries of budget funds enacts the obligation of employing persons with disabilities by allocating funds for the current year for the purpose of refunding the wages of persons with disabilities employed in companies for the professional rehabilitation and employment persons with disabilities, improving working conditions, advancing production programmes and for other purposes in line with the law.

The Recommendation is based on the constitutional provision that stipulates that all jobs are available to all, under the same conditions, and that special protection at work and special working conditions are provided for persons with disabilities in accordance with the law[16]. Also, the Recommendation is based on the Law on the Prevention of Discrimination against Persons with Disabilities[17], the Law on Employment and Professional Rehabilitation of Persons with Disabilities, as well as on the Strategy for the Improvement of the Status of Persons with Disabilities in the Republic of Serbia (2006) and the Convention on the Rights of Persons with Disabilities[18].

While issuing the Recommendation, the Commissioner for Protection of Equality bore in mind that the fundamental idea of these documents and laws is the improvement of the status of persons with disabilities in our society, which leads towards full social inclusion, and that it is in the best interest of persons with disabilities that all employers undertake measures that will enable employment and equal availability of jobs to them.

[15] Official Gazette of RS, no. 33/2010 and 48/2010-correction.

[16] Article 60 paragraphs 3 and 5 of the Constitution of the Republic of Serbia (Official Gazette of RS, no. 98/2006

[17] Official Gazette of RS, no. 33/2006

[18] Official Gazette of RS - International Treaties, no. 42/2009

4.2 Complaint of J. C. against the National Employment Service, the City of Belgrade Branch Office, against discrimination in establishing the status of a person with disability 685/2011 dated 15.06.2011)

Acting within the jurisdiction stipulated by law to receive and review complaints filed pertaining to violations of the 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 RS, no. 22/2009), concerning the complaint of J. C. from B., the Commissioner for Protection of Equality issues the following

OPINION

With the Decision of the National Employment Service, the City of Belgrade Branch Office, no. 0100-1002-1081/2010 dated 25. January 2011, which established third degree of difficulties and obstacles at work for J.C. from B., and the status of a person with disabilities who cannot be employed and maintain employment either under general or special conditions, an act of discrimination was committed in the area of work on the basis of disability, stipulated by Article 16 of the Law on the Prohibition of Discrimination in conjunction with Article 26 paragraph 1 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 National Employment Service, the City of Belgrade Branch Office, the following

RECOMMENDATION

1. The National Employment Service, the City of Belgrade Branch Office, shall take all the necessary measures within its jurisdiction to eliminate the consequences of Decision no. 0100-1002-1081/2010 dated 25 January 2011 on the basis of which J. C. was denied the right to work.

2. The National Employment Service, the City of Belgrade Branch Office, shall ensure, in cooperation with the relevant commission of the expert bodies of the Republic PIO Fund (Pension and Disability Insurance Fund of the Republic of Serbia) through a joint meeting or in any other appropriate way, that, in future, the work capability assessment is done in such manner that it facilitates the realisation of the right to work for people with disabilities at the highest possible level, done in their best interests, with respect to their needs, wishes and opinions, and in accordance with the general principle of full social inclusion of persons with disabilities.

3 The National Employment Service, the City of Belgrade Branch Office, shall take care when making decisions within its jurisdiction to promote and develop non-discriminatory practice.

4 The National Employment Service, the City of Belgrade Branch Office, shall inform the Commissioner for Protection of Equality about the actions undertaken within a 30-day period from the day of receiving of this Opinion with Recommendation.

Rationale

The Commissioner for Protection of Equality was contacted with the complaint on 21 March 2011 by J. C. from B., through her plenipotentiary N. C., a lawyer from Belgrade. In the complaint, it was alleged that J. C. was discriminated on the grounds of personal characteristic - disability, as she was denied the right to work with Decision of the National Employment Service, the City of Belgrade Branch Office for the City, no. 0100-1002-1081/2010 dated 25. January 2011 which establishes for her the status of a person with disabilities, and that she cannot be employed and maintain employment either under general or special conditions.

In the complaint and the evidence submitted with the complaint (Decision of the National Employment Service, the City of Belgrade Branch Office, no. 0100-1002-1081/2010 dated 25. January 2011, and the complaint dated 9 March 2011 declared against this Decision), the following is stated:

- That with Decision of the National Employment Service, the City of Belgrade Branch Office, no. 0100-1002-1081/2010 dated 25. January 2011,

J. C. was determined to have third degree of difficulties and obstacles at work, i.e. inability to be employed either under general or special conditions.

- That J. C. was diagnosed with *diabetes mellitus type 1*, because of which she is on insulin therapy and in 2004 total vision loss and diabetic polyneuropathy occurred as a consequence of the disease.
- That her health status has been sustainable and stable in the last ten years and that she was employed twice - in the post of a nurse with the City Hospital Belgrade, the Nephrology Ward, and in the post of a sales specialist with a private company, as well as that she stopped working because of her obligations at the College for Nurses in Belgrade, where she is a senior undergraduate.
- That she completed a course for massage at the Bozidar Adzija Peoples' University; that in 2007 she enrolled in the Diada school for personal development and communication skills; and that during 2009 and 2010, she attended computer and English language courses.
- That during the assessment of her healthcare capability by a PIO fund expert, the test that she did with the psychologist had not adapted for persons with impaired vision.

The Commissioner for Protection of Equality conducted the procedure for 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, the statement of the National Employment Service, the City of Belgrade Branch Office, was obtained, wherein it is alleged:

- That the assessment of working capability and possibility of employment and maintaining employment is performed by the commission of the expert bodies of the Republic PIO Fund formed for this purpose and composed of physicians - experts in an appropriate or related specialty in connection to primary disease or disability of the person whose capabilities are being appraised and experts for other appropriate diseases (social worker, special educator - defectologist, psychologist, and specialist of occupational medicine).
- That during the procedure the client submits appropriate medical and other documentation, as well as the findings of a psychologist from an

adequate healthcare institution, so that the aforementioned commission does not impact the manner of testing which is applied in the healthcare institution where the testing is performed.

- That in Belgrade tests adapted for persons with impaired vision cannot be preformed in any healthcare institution and that the aforementioned commission evaluates working capabilities on the basis of the findings of a psychologist, which is done by using standard tests and based on the examination of the person during the expert assessment.
- That the Decision to establish the status of a person with disabilities is established for J.C. and that the difficulties and obstacles are total and multiple, i.e. that the person cannot be employed either under general or specific conditions, even though she had working experience, i.e. she had already been employed, was made on the basis of consideration of her overall status and the state of the labour market.
- That the Decision was made jointly by all the members of the commission, and that the Decision was in the interest of the person whose rights were being decided upon.

The Constitution of the Republic of Serbia (Official Gazette of RS, no. 98/2006) forbids any form of discrimination, on any basis, particularly on race, sex, national origin, social origin, birth, religion, political or other opinion, property status, culture, language, age, mental or physical disability [19]. Furthermore, the Constitution guarantees the right to work, the right to choose one's occupation freely and it stipulates that all work places are available to everyone under equal conditions[20]. Also, the categories of people who are provided with special protection at work and special work conditions are stipulated, and people with disabilities are among them.[21].

Article 16 paragraph 1 of the Law on the Prohibition of Discrimination forbids discrimination in the sphere of labour; that is to say, violation of the principle of equal opportunity for establishing employment or equal conditions for enjoying all the rights pertaining to the sphere of labour, such as the

[19] Article 21 of the Constitution of RS

[20] Article 60 Constitution of RS

[21] Ibid.

right to work, free choice of employment, promotion, professional training and professional rehabilitation, equal pay for work of equal value, fair and satisfactory working conditions, paid vacation, membership of a trade union and protection from unemployment. Article 26 of the same law stipulates that discrimination occurs in the case of conduct contrary to the principle of observing the equal rights and freedoms of persons with disabilities in political, economic, cultural and other aspects of public, professional, private and family life

The Republic of Serbia ratified the UN Convention on the Rights of Persons with Disabilities on 29 May 2009[22], which aims to advance, protect and ensure the full and complete enjoyment of all human rights and fundamental freedoms to all persons with disabilities and to promote respect of their inborn dignity[23]. Among the rights that are explicitly guaranteed by the Convention is the right to work and employment of persons with disabilities. Ratifying this Convention, the Republic of Serbia committed to "*adopt appropriate legislative, administrative and other measures for the implementation of the rights recognised by the Convention; to undertake all measures for purpose of changing or eliminating the current laws, regulations, traditions and practices that represent discrimination against persons with disabilities; to abstain from any procedures or practices that are not in accordance with the Convention, as well as to ensure that the state bodies and institutions act in accordance with the Convention; to incite training of professional human resources and staff who work with persons with disabilities on the rights set forth in the Convention in order to ensure better aid and services guaranteed on the basis of these rights* [24] ."

Article 14 of the Law on the Prohibition of Discrimination stipulates that measures introduced for the purpose of achieving full equality, protection and progress of an individual or a group of persons in an unequal position are not considered discrimination.

The existence of a special law that regulates the issue of employment and professional rehabilitation of persons with disabilities[25] is an indicator that our

[22] The Law on the Ratification of the Convention on the Rights of Persons with Disabilities (Official Gazette of RS - International Treaties, no. 42/2009

[23] Article 1 paragraph 1 of the Convention on the Rights of Persons with Disabilities

[24] Article 4 Convention on the Rights of Persons with Disabilities

[25] Law on Employment and Professional Rehabilitation of Persons with Disabilities (Official Gazette of RS, no. 36/09

country intends to deal with the problems that persons with disabilities encounter in this important sphere of life in a serious and affirmative manner. The basic goal of the Law on Employment and Professional Rehabilitation of Persons with Disabilities, as well as of the passed by-laws, is to enable and facilitate social inclusion of persons with disabilities, and not to prevent and make their status more difficult. According to this Law, if a person with disability wishes to work, it is the duty of the state and its bodies/institutions to enable him/her to pursue this right. That is exactly why professional expert support is envisaged in the form of a special procedure and special commission for the assessment of working capabilities, which should use knowledge and professional competencies to find the best way for persons with disabilities to realise their right to employment and work. The Commissioner for Protection of Equality believes that participation in the decision-making of the person whose working capability is being evaluated is essential, and that no one (including the PIO fund commission and the National Employment Service) can evaluate what is in the best interest of a person, if the person in question does not agree or is not consulted.

The content of the Recommendation is motivated by the need to eliminate in the best manner the consequences of the discriminatory act and to prevent further discriminatory behaviour, bearing in mind the general goal of the Recommendations defined by law.

Evaluating 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, gave her Opinion and issued the Recommendation to the National Employment Service, the City of Belgrade Branch Office, to undertake appropriate actions with a goal of eliminating the consequences of the discriminatory conduct.

4.3 The complaint of M. S. against the Secretariat for Traffic of the City of Belgrade against an unequal treatment of persons with disabilities (File. no. 998/2011 dated 07.9.2011)

Within the jurisdiction stipulated by law to receive and review complaints 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), acting upon the complaint of M. S. from Z., the Commissioner for Protection of Equality issues the following

OPINION

The Secretariat for Traffic of the City of Belgrade has not undertaken any measures within its jurisdiction in order to carry out the work on sloping the curb of the pavements at the corner of Prizrenska and Karlovacka streets in Zemun and adapting the pavement in Prizrenska street, whereby it discriminated against persons who use wheelchairs to move around on the basis of their personal characteristic - disability, stipulated by Article 16 paragraph 1 of the Law on the Prevention of Discrimination against Persons with Disabilities (Official Gazette of RS, no. 33/2006), in conjunction with Article 26 paragraph 1 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 Secretariat for Traffic of the City of Belgrade the following

RECOMMENDATION

1. The Secretariat for Traffic of the City of Belgrade shall undertake all necessary actions with an aim to implement the work on sloping the curb of the pavements at the corner of Prizrenska and Karlovacka streets in Zemun and

adapting the pavement in Prizrenska street, thus enabling unhindered movement and use of public services to M. S. and other persons with disabilities who use wheelchairs to move around.

2. The Secretariat for Traffic of the City of Belgrade shall undertake appropriate measures and activities within its jurisdiction to eliminate barriers that hinder and hamper movement in squares, streets, at pedestrian crossings and other public roads.
3. The Secretariat for Traffic of the City of Belgrade shall inform the Commissioner for Protection of Equality, within a 30-day period from the day of receiving this Opinion with Recommendation, about the measures undertaken in order to act in line with the Recommendation.

Rationale

The Commissioner for Protection of Equality received the complaint on 4 August and the supplement to the complaint on 11 August 2011 filed by M. S. from Z., wherein he alleges that, through the omission of the Secretariat for Traffic of the City of Belgrade, he has been discriminated against on the grounds of his personal characteristic - disability. In the complaint, he alleged that, as a person with disability and a user of wheelchair, he had contacted the Secretariat on several occasions with an appeal to be able to use public surfaces in an unhindered manner, i.e., with a request to slope the curb of the pavements at the corner of Prizrenska and Karlovacka streets in Zemun and to adapt the pavement in Prizrenska street in order to ensure unhindered movement for persons with disabilities who use wheelchairs, but the Secretariat for Traffic of the City of Belgrade had not acted according to the appeals by the day of the complaint was filed.

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, therefore, during the procedure, a written statement was requested from the Secretariat for Traffic, the City Administration of the City of Belgrade. The statement was delivered on 17 August 2011, wherein it is alleged that on 1 August 2011 in regard to

the submission filed by M. S. to the Commission for Reviewing Submissions and Complaints of the Citizens, an expert team of the Secretariat for Traffic inspected the state of the crossroad in question and found that sloping of the curb of the pavements had been made without consent of the Secretariat for Traffic. The photos of the actual state and several documents related to the correspondence of the Secretariat for Traffic and the Directorate for Roads in regard to the request of the complainant are enclosed. It is alleged that an interview was conducted with M. S. and it was agreed that the monitoring department would inspect the location and determine whether the request was justified on 3 August 2011.

Also submitted was correspondence of the Department for Dynamic Traffic of the Sector for Technical Regulation of Traffic of the Secretariat for Traffic of the City of Belgrade IV - 06 no. 344.16 – 397/2011 dated 10 March 2011, which was sent to the Department for Roads of the Sector for Inspection Surveillance of the Secretariat for Inspection Affairs, wherein it is stated:

- That the Secretariat for Traffic made huge efforts and invested significant funds aimed at facilitating the life and work of persons with disabilities, the elderly and the weak in the territory of the City of Belgrade over the last couple of years,
- That the funds approved by the Secretariat for Traffic for 2011 are insufficient for all planned interventions set as priorities,
- That the request of M. S. will be included in the list of planned interventions to be reviewed and classified subsequently, if they have available funds after the implementation of other priorities within their jurisdiction.

The correspondence of the Secretariat for Traffic of the City of Belgrade sent to the Directorate for Roads no. IV-06 no. 344.16-302/2011 dated 15 March 2011 was delivered, wherein it is stated:

- That M. S. contacted the Secretariat for Traffic with a request to mend the damaged surface of the pavement for the movement of persons who use wheelchairs and to build a pedestrian ramp to facilitate crossing of the road. The case was, because of the subject matter of the request, forwarded with written document IV-03 no. 344.15-1531/2007 dated 17 August 2007, to the Directorate for Roads;

- That the client also sent a new letter to the Directorate for Roads formally on 25 February 2011, which was registered as a case of the Directorate for Roads under number IV-05 2206-1245 dated 30 November 2007, which was delivered to the Secretariat for Traffic for its further jurisdiction,
- That the Secretariat for Traffic established that the case is within the jurisdiction of the Sector for Technical Regulation of Traffic and that it would be resolved in accordance with available funds, which were "highly restrictively allocated for these needs" in the budget for 2011.

The provision of Article 21 of the Constitution of the Republic of Serbia[26] forbids any form of discrimination, direct or indirect, on any basis, particularly on race, sex, national origin, social origin, birth, religion, political or other opinion, property status, culture, language, age, mental or physical disability. On 29 May 2009, the Republic of Serbia ratified the UN Convention on the Rights of Persons with Disabilities[27] committing itself to undertake appropriate measures to provide accessibility to the physical environment to persons with disabilities as equally as to others, with an aim to facilitate independent life and full participation of persons with disabilities in all spheres of life. These measures, inter alia, include identification and elimination of barriers that impede or hinder access to buildings, roads, means of transportation and other facilities, indoors and outdoors.

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 impede or make it difficult for 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 people.

[26] Official Gazette of RS, no. 98/2006

[27] The Law on the Ratification of the Convention on the Rights of Persons with Disabilities, Official Gazette of RS - International Treaties, no. 42/2009

Article 26 paragraph 1 stipulates that discrimination occurs if one acts contrary to the principle of equal rights and freedoms of persons with disabilities in political, economic, cultural and other aspect of public, professional, private and family life, whereas Article 2 provides that the manner of pursuance and protection of the rights of persons with disabilities is regulated by a special law.

The Law on the Prohibition of Discrimination of persons with disabilities,[28] apart from regulating the general regime of discrimination on the grounds of disability, also stipulates the special case of discrimination related to the provision of services and using buildings and surfaces. Namely, under Article 13 paragraph 1 of this Article, discrimination on the basis of disability is explicitly prohibited in regard to 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.

According to the Decision of the City Administration of the City of Belgrade[29], the Secretariat for Traffic performs the work related to reconstruction, maintenance, protection, use and management of municipal roads and streets in the settlement and monitors the work of public utility companies and entities that have been entrusted with the business activity of maintaining municipal roads, streets in the settlement, and state roads (except the motorway), in the territory of the City of Belgrade. The Assembly of the City of Belgrade founded the Beograd Put (Belgrade Road) Public Utility Company and entrusted it with the maintenance of streets, local and unclassified roads, road structures and traffic signalisation.

[28] Official Gazette of RS, no. 33/2006

[29] Official Gazette of the City of Belgrade, no. 51/2008, 61/2009, 6/2010, 23/2010 and 32/2010)

The Commissioner bore in mind that the Secretariat for Traffic of the City of Belgrade invested certain funds in the previous years in order to facilitate the movement of persons with disabilities in the territory of the City of Belgrade (building ramps to access buildings, sloping the curb on pedestrian paths etc.), as well as the fact that the available funds allocated by the City Budget were restricted. However, on the basis of the documentation submitted by the Secretariat for Traffic, it is obvious that M. S. contacted the Secretariat for the first time back in 2007 and that the request was forwarded from the Secretariat for Traffic to the Directorate for Roads on 17 August 2007. Afterwards, M. S. himself sent a letter to the Directorate for Roads formally on 30 November 2007. It clearly arises from this fact that the Secretariat for Traffic of the City of Belgrade, of which the Directorate for Roads is a part, undertook no measures to assign the request of M. S. into the interventions planning programme or nor provided funds to act according to the request in the period from 2007 to 2011.

While inspecting the circumstances of this case, the Commissioner took into consideration that the legislator itself, with the final provision of Article 53 of the Law on the Prevention of Discrimination against Persons with Disabilities postponed the application of the provisions of Article 33 that stipulate the undertaking of measures on the basis of which, inter alia, public surfaces are made accessible to persons with disabilities. The reason why the legislator postponed the application of this provision is to provide the local self-government units with certain period of time, it assessed to be sufficient, to plan and provide the funds for the implementation of these measures from the day the provisions of Article 33 entered into force to the day of their application. In line with this, in Article 16 with an imperative norm, the legislator established the duty of the public companies responsible for the maintenance of public surfaces to ensure access to the public surfaces to all persons with disabilities, regardless of the type or the degree of their disabilities, not stipulating at all the possibility of justifying the failings with any objective reason. Therefore, it can be concluded that the omission of the Secretariat for Traffic of the City of Belgrade, as the public authority body in charge of public surfaces maintenance, to perform its legal obligation, led to the discrimination of M. S. , as well as all other persons who use wheelchairs, in terms of accessibility of public surfaces, which is explicitly forbidden under Article 13 of the Law on the Prevention of Discrimination against Persons with Disabilities as one of the special

discrimination cases. The consequences of this omission are reflected in the restriction of the possibilities of persons who use wheelchairs to enjoy their civil, political, social, economic, cultural and other human rights and freedoms under the same conditions.

Bearing in mind the aforementioned regulations, the Commissioner for Protection of Equality is of opinion that the circumstance that the funds for the reconstruction of streets and pavements are limited by a restrictive budget, which was invoked by the Secretariat in its statement, is not sufficient by itself to conclude that discrimination was not committed in this case, as it is alleged in the statement of the Secretariat. Namely, one cannot overlook the fact that the Secretariat has not fulfilled its legal obligation stipulated in Article 16 paragraph 1 of the Law on the Prevention of Discrimination against Persons with Disabilities, which dates back to 1 January 2007 and since then four years and eight months have passed. While taking a stand, the Commissioner also bore in mind the fact that four years had passed since M.S. submitted the request, and that, in its statement dated 10 March 2011, the Secretariat alleges that the request of M. S will be included in the list of the planned interventions to be reviewed and classified subsequently, if they have "available funds after the implementation of other priorities within its jurisdiction".

Evaluating the established facts and legal regulations, the Commissioner for Protection of Equality, in accordance with Article 33 paragraph 1 points 1 and 9 of the Law on the Prohibition of Discrimination, issued the Opinion and the Recommendation to the Secretariat for Traffic of the City of Belgrade in order to undertake the measures aimed to eliminate the consequences of discrimination and to fulfil the legal obligations stipulated by the Law on the Prevention of Discrimination against Persons with Disabilities.

The Recommendation issued to the Secretariat for Traffic of the City of Belgrade to undertake the necessary measures within its jurisdiction in order to perform the work related to sloping the curbs of the pavements at the corner of Prizrenska and Karlovacka streets in Zemun and adapting the pavement in Prizrenska street is motivated with the fact that with their implementation not only would the request of M. S. sent to the Secretariat for Traffic and the Directorate for Roads of the City of Belgrade be met, but movement and unhindered use of the concrete public surface would be enabled both to him and to all persons who use wheelchairs to move around.

The Recommendation refers to the undertaking of appropriate measures and activities within the jurisdiction of the Secretariat for Traffic of the City of Belgrade in order to remove the barriers that impede movement and make it difficult for persons with disabilities in squares, streets, at pedestrian crossings and other public roads is based on the knowledge that there are more public surfaces in the territory of Belgrade where those barriers have not been removed.

5. Discrimination Complaints on the Basis of Age

5.1 The complaint of E. P. against A. bank against discrimination in the provision of bank services on the basis of age (File no. 947/2011 dated 1.8. 2011)

Acting within the jurisdiction stipulated by law to receive and review complaints pertaining to violations of the 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 RS, no.22/2009), concerning the complaint of E. P. from B., the Commissioner for Protection of Equality issues the following

OPINION

The general act of A. bank - Product Description: Current Account Loan dated 18 January 2011, in Article 3 paragraph 1, stipulates the acceptable client category, as follows*: "physical persons not younger than 18 at the moment of filing the request and not older than 67 at the moment of the complete repayment - duration of the permitted overdraft",* denies the right to persons older than 67 to use the current account loan bank service, thereby directly discriminating these persons on the basis of personal characteristic - age.

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 A. bank the following

RECOMMENDATIONS

1. A. bank shall eliminate from the general act *Product Description: Current Account Loan* dated 18 January 2011, the criterion on the basis of which persons older than 67 are directly discriminated in regard to using the current account loan bank service on the grounds of age as personal characteristic.
2. In future, A. bank shall take care not to violate the provisions of the Law on the Prohibition of Discrimination with its general acts and decisions, that is to say, to abstain from unjustified discrimination or unequal acting and omission (exclusion, restriction or prioritising) in relation to persons or groups of persons, based on any personal characteristic.
3 A. bank shall inform the Commissioner for Protection of Equality within a 30-day period from the day of receiving this Opinion with Recommendation, about the measures undertaken in order to act in line with the Recommendation.

Rationale

The Commissioner for Protection of Equality was contacted with a complaint dated 15 April 2011 by E. P. from B., who alleged that in A. bank, at the Branch Office in V., she had been discriminated on the basis of personal characteristic - age. In the complaint, she alleged that, on 18 March 2011, she had intended to renew the agreement on the permitted overdraft approved by the bank, but the bank officer refused to extend the agreement explaining that there was a bank regulation on the basis of which it was not permitted to make permitted overdraft agreements with persons over 68 of age.

The Commissioner for Protection of Equality conducted the procedure aimed at ascertaining 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, therefore, the statement of A. bank dated 13 May 2011 was obtained, wherein it is alleged:

- That A. bank is a business bank, which performs its business activities in accordance with the conditions stipulated by the Law on Banks and the by-laws of the National Bank of Serbia;

- That the bank service in question is of an obligational and legal character in the field of agreements on credits, meaning that making agreement on a credit and legal deal presupposes freedom, within the boundaries of compulsory regulations, and of public order and good business traditions and that those deals are performed according to free mutual will;
- That a bank operates predominantly with someone else's funds and that, basically, it performs the function of a mediator between financial surplus and financial deficit transactions, as well as that the character of its operations is risky;
- That a credit deal according to its legal and financial elements contains basic risks of bank operations, that the bank is obliged to evaluate credit risk on the basis of special regulations. The evaluation must be based on the quantitative and qualitative criteria being taken into consideration and the characteristics of the specific debtor and investment;
- That the basic principles of the credit policy applied by the bank are equal for all its clients in regard to credits issued to general population defined by the "*Policy for Issuing Credits to Physical Persons for Consumer, Cash, and Car Credits and Credit Cards*",
- That the conditions for determining the acceptable category of clients, one of which is age (physical persons not younger than 18 at the moment of filing the request and not older than 67 at the moment of the complete repayment), cannot be implicated as discriminatory conduct, as this differentiation is not unjustified.

A. bank submitted the following evidence with the statement: *The Product Description: Current Account Loan* dated 18 January 2011, Annex 12. *The basic principles of the credit policy* from the general act of the bank: "Policy for Issuing Credits to Physical Persons for Consumer, Cash, and Car Credits and Credit Cards" and the Decision of the Management Board no. 1-4T/2010 dated 27 October 2010, with a remark that the data is confidential.

The general act - Product Description: Current Account Loan in Article 3 paragraph 2, stipulates the acceptable client category*: "physical persons not younger than 18 at the moment of filing the request and not older than 67 at the moment of the complete repayment - duration of the permitted overdraft"*. The same regulation is stipulated by the general act of the bank: "Policy for Issuing

Credits to Physical Persons for Consumer, Cash, and Car Credits and Credit Cards" adopted on 27 October 2010.

The Commissioner for Protection of Equality shall first state that the Constitution of the Republic of Serbia (Official Gazette of RS, no. 98/2006), in Article 21, forbids any form of discrimination, direct or indirect, on any basis, particularly on race, sex, national origin, social origin, birth, religion, political or other opinion, property status, culture, language, age, mental or physical disability. With the constitutional prohibition of discrimination, as a phenomenon contrary to the principles of a democratic society, the realisation of the principle of equality is ensured and preconditions created so that legal entities realise their rights under the same conditions.

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. Under the provisions of Articles 5-14 of the Law on the Prohibition of Discrimination, various forms of violations of the principle of equality, i.e. of discriminatory behaviour, are defined.

In regard to the facts and circumstances of this specific case, the provisions of Article 6 of the Law on the Prohibition of Discrimination, which defines direct discrimination by stipulating that it is committed if an individual or a group of persons, on the grounds of his/her or their personal characteristics, in the same or a similar situation, are placed or have been placed or might be placed in a less favourable position through any act, action or omission are relevant for the consideration of the case. The provisions of Article 23 of the Law on the Prohibition of Discrimination are also relevant, which forbid discrimination on the grounds of age and explicitly establish that the old have the right to equal access to all public services.

Analysing the allegations from the complaint and the statement, the Commissioner for Protection of Equality states that the *Product Description: Current Account Loan* dated 18 January 2011 is a general act of the bank, on the basis of which the bank regulates the relations with its clients and which stipulates the conditions under which it is possible to use the services of the bank. Indisputably, A. bank, as well as all other banks, is authorised to pass general acts

on the basis of which it regulates its operations, however, all bank acts must be harmonised with the Constitution and legal regulations, both those in the area of business operations of banks and other regulations of the Republic of Serbia, including the regulations that forbid discrimination.

The Commissioner for Protection of Equality evaluated the allegations in the statement of A. bank *that the bank service in question has an obligational and legal character in the field of agreements on credits, meaning that making agreement upon a legal deal presupposes freedom, within the boundaries of compulsory regulations, of public order and good business traditions and that those deals are performed according to free mutual will*. Regarding this, the Commissioner states that this specific case pertains to a banking service offered to an infinite number of potential clients and it is designed to satisfy a certain interest that is typical for a wide circle of subjects. Thereafter, from the aspect of the Law on the Prohibition of Discrimination, a current account loan does not have the character of an obligational and legal matter, implying the freedom of the contracting parties, but this is a bank service, which, as such, must be available to all persons under the same conditions, without any discrimination on the grounds of age or any other personal characteristic.

Indisputably, A. bank with its general act - *Product Description: Current Account Loan* dated 18 January 2011 stipulated "the acceptable category of clients", as follows: physical persons not younger than 18 at the moment of filing the request and not older than 67 at the moment of the complete repayment. Obviously, the result of the application of this criterion is that persons older than 67 cannot enter into an agreement on current account loan with the bank under any conditions.

The key issue which needs to be answered in this case is whether discrimination was committed by stipulating the upper age limit for using the current account loan service.

Reviewing this case, the Commissioner considered the fact that the bank predominantly operates with someone else's funds and that the character of its business operations is risky, as declared in the statement; thus, it is obliged to perform the credit risk evaluation. Therefore, the bank's authorisation to perform the client's credit competency evaluation is indisputable as it has a legitimate and legally based interest to ensure adequate profit through the investment of funds, implying adequate credit risk evaluation when granting a loan. In line

with this, the bank is sovereign to decide whether a loan will be approved and what its size will be in every request for a current account loan to be approved. Thus, the realisation of the legitimate and legally based interest of the bank implies its authorisation to evaluate the financial capacities of each client to repay the credit account loan in an efficient and timely manner. However, it is obvious that the client's age has nothing to do with this evaluation, per se; it does not have any impact as it is not "financially measurable" and whether the client will repay the loan in an efficient and timely manner cannot depend on the client's age itself, either. Being a person over 67 cannot imply, in any way, that he/she does not have financial capacities to repay a loan in an efficient and timely manner, or that his/her financial capacities are lower than the capacities of a person (adult) younger than 67, since the regular monthly incomes of people are very different and do not depend on age.

In its statement, A. bank states that the criteria for establishing an acceptable category of clients, one of which is age, cannot imply discriminatory conduct, as "this differentiation is not unjustified". The Commissioner is of opinion that this stand is unjustified and unacceptable. Namely, the legal principle of equality (of equal treatment) requires that all persons who apply for the current account loan are treated in the same way, on the basis of comparable and objective criteria. It is evident that age, which was foreseen by the bank as a criterion for the use of current account loan service, deprives a person who does not meet this criterion of the possibility of having his/her credit capacity evaluated, on the basis of comparable and objective criteria, and to have the current account loan approved for an adequate amount if he/she has the credit capacity. In this context, the age criterion stipulated by the bank results in the unequal treatment of persons older than 67 in relation to all other persons (adult) younger than 67, thereby persons older than 67 are directly discriminated. Because the law explicitly prohibits age as a basis for any differentiation or unequal treatment, it cannot be accepted that there is any objective or reasonable justification for introducing the age criterion, on the basis of which A. bank differentiates clients - potential users of the current account loan. The Commissioner emphasises that the evaluation performed by A. bank on the basis of "quantitative and qualitative criteria", which, as alleged in the statement, "take also into account characteristics of a specific debtor and the placement", and must not cause, in any way, clients to be treated unequally on the basis of any personal

characteristic of theirs, including age. Only this approach and manner of treatment ensures that all persons can use bank services under the same conditions.

In its statement, A. business bank invokes that it performs its business activity in line with the conditions stipulated by the Law on Banks and by-laws of the National Bank of Serbia. In connection to this, the Commissioner states that the business activities of this, as well as of other banks, are regulated with special legal regulations, but these special by-laws on bank operations, as well as their application, must not be contrary to the constitutional and legal norms on the prohibition of discrimination. In the procedure according to the complaint that was conducted, the by-laws of the National Bank of Serbia were not analysed as they are not of direct importance for the evaluation of the permissibility of the age criterion for the approval of a current account loan. However, the Commissioner states that even if the possibility of introducing the age criteria for using bank services were explicitly allowed, it would not set straight the illegality of the age criteria which were stipulated by A. bank for the approval of a current account loan. Such a stand arises from the fact that even the National Bank of Serbia itself is obliged to observe legal regulations, both those pertaining to bank operations and to all other legal regulations, including the regulations on equality and prohibition of discrimination. Accordingly, the by-laws of the National bank of Serbia must not be contrary to the Constitution and the by-laws of the Republic of Serbia.

Evaluating the established facts and legal regulations, the Commissioner for Protection of Equality, in accordance with Article 33 paragraph 1 points 1 and 9 of the Law on the Prohibition of Discrimination, issued the Opinion and the Recommendation to A. bank in order that it undertake actions to eliminate direct discrimination of persons older than 67.

5.2 The complaint of Lj. B. S. against the K.c.s. – Clinic ... against employment discrimination on the grounds of age (File. no. 1110/2011 dated 12. 9. 2011)

Acting within the jurisdiction stipulated by law to receive and review complaints 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 Lj. B. S. from B., the Commissioner for Protection of Equality issues the following

OPINION

The C.C.S. (org. K. c. s.) – Clinic ... on 7 June 2011, through the National Employment Service – Belgrade Branch Office, published an advertisement looking to employ a nurse for a definite period of time, wherein a condition was stipulated that *"nurses are not to be older than 35"*. By setting this condition, equal possibilities for gaining employment in relation to persons older than 35 were violated, whereby direct discrimination on the grounds of age in the area of labour was committed, prohibited under Article 6, 16 and 23 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 C.C.S. the following

RECOMMENDATIONS

1. The C.C.S. - Clinic for ... shall establish, by means of a general act on systematisation, the positions in regard to which the age of an employee, as a personal characteristic, represents a special condition for performing the job, if there is a justified need for that, thereby respecting the imperative legal regulations according to which age, as any other personal characteristic, must represent

a real and decisive condition for performing the job within the framework of the position, with regard to the character and characteristics of the job and the conditions it is performed in.
2. The C.C.S. shall, when advertising jobs and sending requests to the National Service to offer a selection of persons for to employ (Article 34 of the Law on Employment and Unemployment Insurance), set only those conditions for performing the job that are determined by the general act on systematisation.
3. The C.C.S. shall undertake all necessary measures to prevent violation of equal opportunities for establishing employment when advertising jobs and selecting applicants, i.e. unjustified differentiation or unequal treatment and omission (exclusion, restriction or prioritising) based on any personal characteristic of the applicant, including age.
4. The C.C.S. shall inform the Commissioner for Protection of Equality within a 30-day period from the day of receiving this Opinion with Recommendation, about the measures undertaken in order to act in line with the Recommendation.

Rationale

The Commissioner for Protection of Equality was contacted with a complaint on 28 June 2011 by Lj. B. S. from B., wherein she alleged that she was discriminated in the employment procedure by the employer C.C.S. - Clinic for ..., on the basis of age. According to the allegations in the complaint, the National Employment Service informed the complainant orally that the Clinic for... sought several replacement nurses, aged under 35. According to the allegations in the complaint, upon the complainant's insistence, J. B. B., employed with the National Employment Service, talked with the employer and entered the complainant into the list of applicants. In the complaint, it is also alleged that on 14 June 2011, the complainant had an interview for a job at the Clinic for..., which was attended by the head nurse of the Clinic and the head nurse of the ward, and that she was adduced that the condition for establishing employment was that the applicants are younger than 35. The complainant further alleges that, at the insistence of the complainant, the interview was conducted, that the complainant left a good impression considering her employment history and the job that she performed, and that she was then that age was not important.

In the supplement to the complaint dated 3 August 2011, the complainant alleged that Lj. N., head nurse of the Clinic for..., had been rather kind during the interview, that she had conducted the interview properly and had shown interest in her employment history. According to the complainant's allegations, the under 35 age condition was stipulated at the level of the C.C.S., which comprises 24 clinics. She clarified that she could have been highly ranked according to the other conditions advertised for the job as her average grade was 4.81 and she had passed her professional examination and had a 10-year long employment history. However, she did not get the job.

Alongside the complaint and during the procedure, the following evidence was submitted: a photocopy of the advertisement of the C.C.S. - Clinic for ... delivered to the National Employment Service on 7 June 2011, the complaint of Lj. B. S. to the National Employment Service dated 15 July 2011, the reply of the National Employment Service to the complaint, no. 0110-71-2/2011 dated 21 July 2011, and the Ombudsman's memo no. 13-1697/11 dated 14 July 2011 directing the complainant to contact the Inspectorate for Labour of the Ministry of Labour and Social Policy.

The Commissioner for Protection of Equality conducted the procedure aimed at ascertaining 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, therefore, during the procedure, a written statement was requested from the director of the C.C.S. and the director of the Clinic for...

The C.C.S. delivered the statement on the complaint's allegations, whereas the Clinic for... did not deliver a statement on the complaint's allegations. In the statement of the director of the C.C.S. dated 23 August 2011, the following is alleged:

- That in the C.C.S., there is a permanent problem of a deficit of secondary education level medical staff and other profiles, and that the problems occurring are related to burden of the work, size of the income, and the examples of providing immeasurable self-abnegation, sacrifice and other moral and ethical values, and these criteria are becoming ever more dominant in the selection of an occupation;
- That age has never been nor will it be an eliminatory condition, a decisive one in the selection of an applicant in the employment process in any of the working units in the C.C.S. In that sense, the requirements formulated as a remark to the applicants in relation to age do not have an eliminatory

element, but they are a reflection of the long experience of the head nurses of the clinics and wards who observed that younger persons perform the assignments with ease, in a more rational and enthusiastic manner, especially when carrying out more demanding assignments. On the basis of the aforementioned reasons, all executive nurses tend to take into consideration age limit as a competent and primary fact when selecting an applicant;

- That in this specific case, Lj. B. S. is turning 42, and that the request of the Clinic for... was directed at the replenishment of job vacancies in the most demanding ward, where the work is performed in shifts, where the patients have difficult treatments under continuous monitoring, which demands exceptional engagement of secondary and higher education level medical staff. The C.C.S. expresses its readiness to invite Lj. B. S. to an interview as soon as there is an opportunity for establishing employment for jobs and assignments within the framework of her profession;
- That the prescribed age was not an eliminatory factor when selecting applicants, but, simply, the applicant, who had left a very positive impression during the interview with the members of the commission, was not selected due to the fact that she was over 35 - which was a condition of the job advertisement;
- That the experience of the employees provides the bases and elements for setting criteria that certainly cannot be anti-constitutional and anti-legal, but can be elementary when selecting an appropriate applicant, depending on the clinic and the types of jobs advertised;
- That, in this specific case, there is no intention to discriminate or to jeopardise the fundamental rights of the complainant, and certainly not of an offensive nature, as well as that the C.C.S. expresses its readiness to invite the applicant in cooperation with the National Employment Service when the next job is advertised.

The National Employment Service – Belgrade Branch Office, in its reply to the complaint of Lj. B. S., dated 21 July 2011, alleges that it has excellent cooperation with the Clinic for..., the C.C.S.. This cooperation is reflected in the Clinic for… frequently contacting it with a request to employing nurses. In the reply, it is stated that the employer set the under-35 age limit because the work

is hard and performed in night shifts. The practice of the National Employment Service is, unless programmes in question are not intended for employment of persons of certain age, that the advisor informs unemployed persons that for that specific type of job, younger persons have priority, but he/she also informs those older than the age stated thereof.

The Commissioner for Protection of Equality shall first state that the Constitution of the Republic of Serbia (Official Gazette of RS, no. 98/2006), in Article 21, forbids any form of discrimination, direct or indirect, on any basis, particularly on race, sex, national origin, social origin, birth, religion, political or other opinion, property status, culture, language, **age**, mental or physical disability. With the constitutional prohibition of discrimination, as a phenomenon contrary to the principles of a democratic society, the realisation of the principle of equality is ensured and preconditions created so that legal entities realise their rights under the same conditions.

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 16 paragraph 1 of the Law on the Prohibition of Discrimination forbids discrimination in the sphere of labour, i.e. violation of equal opportunities for establishing employment relation or enjoying the equal conditions of all the rights in the sphere of labour. A jobseeker also enjoys protection against discrimination according to paragraph 2 of the aforementioned Article.

In regard to the facts and circumstances of this specific case, the provision of Article 6 of the Law on the Prohibition of Discrimination, which defines direct discrimination by stipulating that it is committed if an **individual** or a group of persons, on the grounds of his/her or their **personal characteristics, in the same or a similar situation, are placed or have been placed or might be placed in a less favourable position through any act, action or omission**, is relevant, as is the provision of Article 23 paragraph 1 of the Law on the Prohibition of Discrimination, which prescribes that discrimination on the grounds of **age** is forbidden.

From the aspect of the Law on the Prohibition, the possibility of establishing employment must not be violated, so that all jobseekers have equal conditions

without any discrimination on the grounds of age or any other personal characteristic. Also, according to the Law on Employment and Unemployment Insurance (Official Gazette of RS, no. 36/2009), an employer is obliged to ensure the equal treatment of persons who contact him/her for a job interview. The Law on Labour (Official Gazette of RS, no. 24/2005, 61/2005 and 54/2009) contains a set of provisions referring to the prohibition of discrimination - Article 18 prohibits both direct and indirect discrimination against **persons seeking employment** and employees in terms of their sex, origin, language, race, colour 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 organisations, trade unions or any other personal quality; whereas, Article 20 paragraph 1 point 1 prescribes that discrimination is prohibited in relation to employment conditions and the selection of candidates for a job.

Indisputably, the C.C.S. - Clinic for..., as the employer, stipulated the condition that nurses are not to be older than 35. Namely, in the C.C.S. 's job advertisement, which was delivered to the National Employment Service on 7 June 2011, it is stated that: *"for the needs of the Clinic for... - C.C.S., a number of nurses (6) should be sent for a job interview to replace nurses absent due to maternity leave.* **They should not be older than 35***, the average grade should be 3.5 and they should have passed the professional examination.*"

Setting the upper age limit for applying for the position of a nurse evidently results in the early elimination of nurses older than 35 who are potentially interested in this job, just because of their personal characteristic, i.e. they are denied the opportunity to have their professional skills and competencies evaluated under equal conditions during the selection procedure. Consequently, the allegations in the statement of the C.C.S. that *"age has never been nor will be an eliminatory condition, the decisive one in the selection of an applicant in the employment process in any of the working units in the C.C.S. In that sense, the requirements formulated as a remark to the applicants in relation to age do not have an eliminatory element*" are unacceptable. Namely, the text of the advertisement itself confirms exactly the opposite. That it is about a condition of an eliminatory character is also confirmed by the fact provided in the statement of the C.C.S. that the complainant had left a good impression during the interview with the members of the commission, but she was not selected because of the fact that she was over 35.

In order to determine whether, by stipulating the upper age limit for establishing employment as a nurse for definite period of time with the C.C.S. - Clinic for..., the equal opportunities for establishing employment were violated, i.e. whether discrimination was committed on the grounds of age, it is necessary to examine whether this aspect of excluding nurses older than 35, potentially interested in the position, can be considered permissible and justified. Namely, under Article 16 paragraph 3 of the Law on the Prohibition of Discrimination, it is stipulated **that different treatment, exclusion or giving priority on account of the specific character of a job, for which an individual's personal characteristic constitutes the real and decisive condition for performing the said job, if the objective to be achieved is justified, is not considered discrimination**. A similar provision is contained in Article 22 paragraph 1 of the Labour Law and it **stipulates that differentiation or prioritisation for a certain job is not considered discriminating when the character of the work is such or the work is done under such circumstances that the characteristics related to some of the grounds referred to in Article 18 of the Labour Law represent the real and decisive requirement for performance of such job, and that the aim wished to be achieved is justified**.

In this regard, the Commissioner first states that the Constitution of RS and the relevant legal regulations prohibit differentiation or unequal conduct when stipulating conditions for employment and carrying out the selection of applicants for performing a specific job on the basis of age, therefore, the exceptions of this rule must be very restrictively interpreted and only accepted as justified in situations when age is the real and decisive factor for the possibility, or for the impossibility of performing a specific job, bearing in mind its character and characteristics.

In accordance with the provisions of Article 16 paragraph 3 of the Law on the Prohibition of Discrimination and Article 22 paragraph 1 of the Labour Law, in order to determine whether by excluding the possibility of establishing employment in the position of a nurse, discrimination was committed in regard to persons older than 35, the following should be examined: 1) whether in the specific case, the age of 35 represents the real and decisive condition for performing the job of a nurse, bearing in mind its character and characteristics, and 2) whether the purpose wished to be achieved thereof is justified.

The C.C.S., like all other employers, sets the conditions for every position with an appropriate act on systematisation, which implies establishing the objective conditions to be met by employees in specific positions. However, in its statement, the C.C.S. does not invoke the conditions established in a systematisation act, but, instead of that, it is stated in the statement that "*the position in question is in the most demanding ward, where the work is performed in shifts, where the patients have difficult treatments under continuous monitoring, which demands exceptional engagement of secondary and higher education level medical staff.*" Also, the statement invokes the general assessment of the head nurses of the clinics and wards, who allegedly "*based on their long experience, observed that younger persons perform the assignments with ease, in a more rational and enthusiastic manner, especially when performing more demanding assignments*."

Indisputably, the C.C.S. may stipulate the conditions to be met by the applicants to perform the work in specific positions, as well as to be guided by the need for a better and more efficient organisation of the work and by the professional standards of medical staff work thereof. However, it cannot be accepted that age is the real and decisive condition for performing the job of a nurse, as there is no one exact piece of evidence that the job of a nurse can only be performed by persons under 35, even when performing the work in "*the most demanding ward*", in shifts, which includes work with patients who *"have difficult treatments under continuous monitoring*". There is no basis for the supposition that, in any ward of the Clinic for..., a nurse who is, for example 30, will perform the assignments better than a nurse who is, for example, 40 because individual skills, professional competencies, capabilities and characteristics of nurses, as well as persons from other medical and all other professions, are very different, which is a well-known fact. In that sense, the supposition that "*younger persons perform the assignments with ease, in a more rational and enthusiastic manner*" is absolutely arbitrary and based on a common stereotype and prejudice. The Commissioner points out that if age is set as a condition for performing the work of a nurse in a certain ward, that would mean that every nurse in that ward, when he or she turns certain age, must be re-assigned to another position as he/she ceases to meet the age-related condition for performing the assignments.

Bearing in mind these facts, the Commissioner takes the stand that age is not the real or the decisive condition for performing the job of a nurse, considering both the character and characteristics of the job performed and the conditions

under which the job is performed. Consequently, there are no objective reasons for the introduction of an age restriction for performing the job of a nurse.

Although, the C.C.S. does not explicitly state the purpose of the introduction of an upper age limit as the eliminatory criterion for the job of a nurse, on the basis of the statement, it can be concluded that the purpose of the restriction is the endeavour to ensure adequate human resources for performing the work. However, the Commissioner states that the realisation of a legitimate cause must not lead to discrimination. Concretely, with the introduction of the upper age limit, as an eliminatory condition, direct discrimination was committed against all nurses older than 35 in relation to persons under 35, since the stipulation of this condition was justified neither from the aspect of purpose, nor from the aspect of the consequences it has caused.

One should bear in mind that in this specific case, the subject of consideration is not the treatment of the complainant by the C.C.S. The essence of this case is to examine, on the basis of all the relevant facts and circumstances, and in line with the imperative regulations on the prohibition of discrimination, whether the C.C.S. violated equal opportunities for establishing employment by setting an age limit as the condition for performing the job of a nurse at the Clinic for..., which is contained in the request directed to the National Employment Service to offer a selection of persons for establishing employment. Therefore, the statements of the C.C.S. on the professional capabilities and qualities of the complainant herself, on the non-existence of the intention to discriminate her, as well as the expressed readiness of the C.C.S. to invite her again in cooperation with the National Employment Service when the next job advertisement is published etc., are entirely irrelevant.

The Commissioner states that the C.C.S. is fully free to decide independently, in line with the current regulations and on the basis of objective criteria, about the selection of persons who will be employed or engaged, evaluating their professional skills, competencies and capabilities. What the C.C.S. must not do is set conditions for establishing employment concerning personal characteristics of applicants, and which are not the real and decisive condition for performing the job, with regard to the character and characteristics of the job and the conditions it is performed in. Such conduct is unlawful and represents a violation of the imperative regulations on the prohibition of discrimination, which are binding for all legal entities.

The Commissioner took into consideration the statement of the National Employment Service, wherein it is stated that if the programmes intended for the employment of persons of a certain age is in question, the advisor of the National Employment Service informs unemployed persons that younger persons are prioritised for the specific type of work, but he/she also informs unemployed persons older than the age set forth. Not entering into the veracity of these allegations, the Commissioner states that they are not relevant for taking a stand in this case, since in the memo of the C.C.S. directed to the National Employment Service, the age was explicitly determined as the eliminatory condition. On the other hand, although in this specific case, upon insistence of the complainant herself, she was directed to the interview with the employer, this circumstance is not relevant as well, as by the setting age as the eliminatory condition for performing the job of a nurse, all potentially interested nurses who are seeking work, and who do not meet this condition, are directly discriminated. Thereby, it is necessary to bear in mind that no one can be expected to apply to an advertisement for a job knowing a priori that, due to the eliminatory condition set, he/she does not stand a chance of being employed.

Evaluating the established facts and legal regulations, the Commissioner for Protection of Equality, in accordance with Article 33 paragraph 1 points 1 and 9 of the Law on the Prohibition of Discrimination issued the Opinion and the Recommendation to the C.C.S. in order to that it undertake actions to prevent violation of equal employment opportunities and any form of discrimination of jobseekers, on the basis of any personal characteristic of theirs, including age.

6. Discrimination Complaints on Any Other Bases

6.1. The complaint of A. C. against the Hungarian National Minority Council against discrimination concerning the scholarship conditions for students who completed their education in the Hungarian language (File. no. 836/2011 dated 27.07.2011)

Acting within the jurisdiction stipulated by law to receive and review complaints pertaining to violations of the 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 DZVM from B., the Commissioner for Protection of Equality issues the following

OPINION

With the Decision on the Manner of Publishing a Public Call, the Implementation of the Procedure and the Applications Crediting System for the Scholarship Programme of Students of the HNMC (orig. NSMNM) dated 05 April 2011, which stipulates the operational conditions of the higher education scholarship programme, the principle of equality was violated, whereby the direct discrimination of certain categories of students who completed their schooling in Hungarian, was committed on the basis of their personal characteristics and personal characteristics of their parents, as follows:

a) Those who enrolled in a higher education institution the founder of which is not the Republic of Serbia compared to those who study in a higher education institution the founder of which is the Republic of Serbia;

b) Those whose parents have a higher level of education compared to those whose parents have a lower level of education , i.e. lower professional education;
c) Those who are not entered into the special voters' register of the Hungarian national minority compared to those who are;
d) Those who have not declared their intention to be entered into the special voters' register compared to those who have;
e) Those who completed secondary school in Hungarian in their place of domicile study compared to those who completed secondary school in Hungarian out of their place of domicile.

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 HNMC the following

RECOMMENDATION

1. The HNMC shall eliminate from the Decision on the Manner of Publishing a Call, the Implementation of the Procedure and the Applications Crediting System for the Scholarship Programme of Students of the HNMC, dated 05 April 2011, the conditions and criteria that violate the principle of equality to certain categories of students who completed their schooling in Hungarian, and 0n the basis of their personal characteristics and the personal characteristics of their parents.
2. The HNMC shall take care, in future, not to violate the provision of the Law on the Prohibition of Discrimination with its decisions, that is to say, to abstain from unjustified differentiation or unequal conduct and omission (exclusion, restriction or prioritising), in relation to an individual or a group of persons, which is based on any personal characteristic.
3. The HNMC shall inform the Commissioner for Protection of Equality within a 30-day period from the day of receiving this Opinion and Recommendation about the measures undertaken in order to act in line with the Recommendation.

Rationale

The Commissioner for Protection of Equality was contacted on 05 May 2011 with a complaint by A. C. (C. A.), the president of the DCVH (orig. DZVM), alleging that with the *Decision on the Manner of Publishing a Public Call, the Implementation of the Procedure, and the Applications Crediting System for the Scholarship Programme of Students of the HNMC* dated 05 April 2011 (hereinafter: The Decision), discrimination was committed on several bases: nationality, language, origins and age.

The following was alleged in the complaint:

- That the HNMC brought the *Decision on the Manner of Publishing a Public Call, the Implementation of the Procedure, and the Applications Crediting System for the Scholarship Programme of Students of the HNMC* dated 05 April 2011, in accordance with the HNMC Strategy for Development of Education aimed to increase the number of Hungarian nationality students in the period 2010 – 2016,
- That in Article 2 paragraph 1 of the aforementioned Decision, it is stipulated that those applicants of Hungarian nationality who have acquired the condition to enrol in the first year of studies in state higher education institutions as students financed from the state budget and who completed their education (elementary and secondary) taught in the Hungarian language can apply to the Call for Scholarship Applications, whereby "discrimination on the basis of national origin of the applicants who are not determined by national origin" was committed; also, discrimination on the grounds of differentiation between the "state" and "private" higher education institutions, as well as differentiation between students who have already studied (2nd or 3rd year of studies) and those who have just acquired the right to enrol in the first year of studies;
- That in Article 9 of the aforementioned Decision, the criteria and the manner of crediting the submitted applications are stipulated, and the applicants are differentiated by the credit system in terms of the professional education of their parents;
- That in Article 9 paragraph 1 point 5, it is stipulated that being entered into the special voters' register of the Hungarian national minority, or

declaring an intention to be entered into the special voters' register by juvenile applicants, is specially credited;
- That the fact that the order of applicants in the final list, i.e. the outcome of the Call procedure, is independently decided by the president of the administrative office of the National Council (who is also the president of the Council), as well as that the decision is final and that applicants have no right to appeal, is an issue of concern.

The DZVM submitted the text of this Decision in Hungarian and in Serbian alongside the complaint.

The Commissioner for Protection of Equality conducted the procedure for 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, the statement of the HNMC was obtained, wherein the following is alleged:
- That the Law on National Minorities Councils[30] sets forth the right of the National Minorities Councils to establish scholarships from their own funds and to stipulate the criteria and decision-making procedures on granting scholarships with its acts and to implement the granting procedure thereof;
- That the acts and decisions of the HNMC in the sphere of education are passed in accordance with the Strategy for Development of Education for the period 2010-2016 that was adopted by the National Council and that defines a *significant increase of the number of members of Hungarian community with a higher education*, as one of the goals;
- That national origin was not set as a condition for receiving a scholarship, but the language of education in primary or secondary school is a condition for taking part in the future call;
- That the right to scholarship is conditioned by the enrolment of a student into a domestic "state faculty or college", financed from the budget of RS, i.e., that the differentiation was made in relation to who finances the studies - self-financed or financed from the budget of RS, and not on the basis who is the founder of the higher education institution. Self-financing

[30] Official Gazette of RS, no. 72/2009

students are excluded from the scholarship because the intention is to give opportunities to the most diligent students and to those who are not able to finance their studies due to their economic situation;

- That the scholarship is granted only to first year students because the financial means are limited and the primary goal is to influence the number of future students;
- That deficit professions were determined on the basis of an analysis of official data on the number and national composition of students at certain faculties and study programmes, therefore, all those professions where the number of Hungarian students in the total number of students is significantly less the share of the Hungarian population in the total population, are determined as deficit professions;
- That lower professional education of parents is additionally credited because there is a justified assumption that, in those families, parents are less motivated to send their children to school, and, as a rule, their economic position is poorer;
- That crediting due to being entered into the Hungarian national minority voters' register is not a condition to receive the scholarship, but it is only one of the bases for crediting, and it has been introduced because this is a scholarship of the Hungarian National Minority Council; that such a criterion is justified and necessary since the National Council is elected by the persons entered in the special voters' register, as well as that the enrolment is possible at any time following a very simple procedure;
- That there is the possibility that some students when submitting their application are still underage and therefore they do not have the right to be entered into the special voters' register, and for this reason they can declare their intention to be entered into the special voters' register of the Hungarian national minority, thereby, they will not be placed in an adverse situation compared to scholarship applicants of age;
- That by determining credits on the basis of the language of secondary education, the goal of the scholarship and the interest of educating members of the Hungarian community in their mother tongue were prioritised;
- That completed secondary education in Hungarian is credited differently depending on whether a student completed school in his/her place of

domicile or not, was motivated by social measures and the intention to support those applicants who accepted certain costs and additional burden in order to be educated in their mother tongue, since going to school in another place or municipality implies larger effort and higher costs both for the student and his/her family;

- That Article 12 paragraph 3 does not allow the right to appeal, but in the published Call For Scholarship Applications, the right to appeal will be set forth, in the event of a mistake being made when giving credits or determining the total number of credits; that the scholarship rules do not allow the Council to be arbitrary since the order is established on the basis of objective crediting;
- That the scholarships of the Council are not about the right to scholarship determined by law but about an incentive, and that establishing a special appeal procedure and two-instance decision-making is neither the constitutional nor legal obligation of the Council.

The Constitution of the Republic of Serbia (Official Gazette of RS, no. 98/2006), in Article 21, forbids any discrimination, direct or indirect, on any grounds.

The Law on the Prohibition of Discrimination, in Article 4, stipulates the general prohibition of discrimination by stipulating that all persons are equal and enjoy equal status and equal legal protection regardless of personal characteristics, and that everyone is obligated to respect the principle of equality.

Under the provision of Article 8 of the Law on the Prohibition of Discrimination it is stipulated that a violation of the principle of equality occurs if an individual or a group of persons, on account of his/her or their personal characteristics, is denied rights and freedoms or has obligations imposed, in an unwarranted manner, that are not denied to or imposed upon another person or group of persons in the same or a similar situation, if the objective or the consequence of the measures undertaken is unjustified, and if the measures undertaken are not commensurate with the objective achieved thereby.

The Decision on the Manner of Publishing a Public Call, the Implementation of the Procedure and the Applications Crediting System for the Scholarship Programme of Students of the HNMC dated 05 April 2011, which stipulates the operational conditions of the higher education scholarship programme, differentiates certain categories of students who completed their schools in Hungarian,

as follows: those enrolled in a higher education institution not founded by the Republic of Serbia compared to those who study at a higher education institution founded by the Republic of Serbia; those whose parents have higher level education compared to those whose parents have a lower education level, i.e. lower professional education; those who are not entered into the special voters' register of the Hungarian national minority compared to those who are; those who have not declared their intention to be entered into the special voters' register compared to those who have; and those who completed their secondary school in Hungarian out of their place of domicile compared to those who completed secondary school in Hungarian in their place of domicile.

In order to examine whether, with the Decision, the principle of equality had been violated in relation to the aforementioned categories of students, whether they had received unequal treatment during the application and ranking process, it was necessary to review the Decision in its entirety and each individual condition for applying and criterion for ranking, set forth in the disputed Decision. Consequently, the following was reviewed:

- Whether the goal to be achieved is allowed and justified,
- Whether the goal can be achieved with the stipulated measure, i.e. whether there is commensuration between the measures and goals undertaken that are being achieved with that measure, as well as
- Whether there is an objective and reasonable justification to deny the rights set forth in this measure to certain categories of students who completed schooling in Hungarian.

Analysing the permissibility and justification of the Decision, bearing in mind the legal norms on the jurisdiction of the national minority councils and the explanation delivered by the HNMC, it is obvious that the goal in question is allowed and justified. Namely, pursuant to Article 2 of the Law on National Minority Councils, the National Councils represent national minorities in the areas of official use of language, education, information in the languages of national minorities and culture; participate in the decision making process, make decisions on issues concerning these areas and found institutions related to these areas. The HNMC, like all other national minority councils, has the right to establish scholarships from its own funds and stipulate the criteria and the procedure on granting scholarships, and conduct the procedure for their granting with its

acts. Consequently, the HNMC was authorised to issue the Decision and this authorisation is not compromised in any way. On the contrary, the readiness of the National Council to allocate a portion of its available funds to scholarships for students represents a positive example of the realisation of the right of national minorities to self-govern in education, since this is a measure aimed at increasing the number of highly-educated members of the Hungarian national minority and, as such, is highly commendable.

In regard to the conditions for applying for the scholarship, in Article 2 of the Decision, it is established that the right to scholarship is acquired by a student:

a) who enrols in the first year of studies for the first time,
b) who is enrolled in a higher education state institution in the Republic of Serbia,
c) whose schooling is charged to the state (so-called budget students),
d) who completed primary or secondary school in Hungarian.

The first set condition is justified both from the aspect of the goal and the aspect of the consequence. As stated in the statement of the National Council, this condition was set as the financial means were restricted and the primary goal was to influence an increase in the number of future students, i.e. the number of citizens with a higher education.

The second and third conditions, related to the enrolment of students to a state higher education institution in the Republic of Serbia, i.e. to the studies charged to the budget of RS, do not have an objective and reasonable justification, bearing in mind the goal of the Decision.

Considering these conditions, the Commissioner first states that Article 19 paragraph 3 of the Law on the Prohibition of Discrimination explicitly forbids discrimination against educational institutions that operate in accordance with the law and other regulations, and against persons who use or have used the services of these institutions. In order to establish whether the different treatment of students in regard to whether they have enrolled in a state or a private higher education institution in the Republic of Serbia, i.e. whether their studies are charged to the budget of RS or they finance their education themselves, represents discrimination, it was necessary to consider whether the goal determined with the Decision was realised by setting this condition, whether the principle

of commensuration (proportionality) was respected, and whether there is an objective and reasonable justification to actually deny the right to apply for scholarship to students who have completed their schooling in Hungarian, enrolled the first year of studies and finance their education themselves.

In the statement of the National Council, it is alleged that the right to scholarship is conditioned by the enrolment of a student in a domestic "state faculty or college" charged to the budget of RS, i.e. in relation to whether they are self-financed students or students financed by the budget of RS, and not on the basis who is the founder of the higher education institution. Further, it is alleged that self-financing students are excluded from the scholarship because the intention is to give study opportunities to the most diligent students, and those who are not able to finance their studies due to their economic situation.

The Commissioner is of opinion that these arguments cannot be accepted as they are based on ungrounded assumptions that students who enrol in studies financed from the budget are more diligent (better achieving) and that their financial situation is poorer in comparison to self-financing students.

Namely, if the goal was indeed to give priority for scholarship grants to more successful applicants, which is quite legitimate, then the sufficient criterion was the achievement in secondary school, since the scholarship is granted to students enrolling in the first year of studies, and what their achievements in the studies will be cannot be known in advance. By introducing the budget student status as a special condition for applying, self-financing students are a priori eliminated as applicants and their right to apply for scholarship with the other applicants is denied. Bearing in mind the consequences it produces, this condition is unacceptable as there is no commensuration (proportionality) between the goal wished to be achieved and the consequences caused by the introduction of this condition. Thereby, one should bear in mind that the principle of commensuration orders that whenever an individual right is derogated, there is a balance between the requirement of an equal treatment and the goal, the achievement of which is aspired to. Consequently, the realisation of the goal must not lead to a discriminatory result.

On the other hand, although the goal to grant scholarships to students in a poorer financial situation is fully legitimate, the assumption that budget students have a poorer financial situation in relation to self-financing students is unsustainable and ungrounded, since the enrolment of students in a higher

education institution with a self-financing student status is determined by various objective and subjective reasons. Thus, e.g., in some individual cases, it is possible that a scholarship for a private faculty situated in the place of domicile of a student is lower than the costs of living that the student would have if his/her studies were charged to the state, but at a faculty out of his/her place of domicile. Under such circumstances, a student in a poorer financial situation would opt to enrol in a higher education institution as a self-financing student.

The last condition for applying for a scholarship, that the student completed primary or secondary school in Hungarian, is justified from the aspect of the goal and the aspect of the consequence, bearing in mind the role and authorities vested that the HNMC has in the sphere of education.

The Commissioner also considered, besides the conditions under which students may apply for studies, the criteria for assessing applicants. Article 9 paragraph 1 of the Decision stipulates the following criteria:

- a deficit profession at the faculty level education (10 credits),
- higher education in Hungarian (3 points),
- average grade achieved in secondary school at the end of the school year multiplied by 3,
- parents' education 2 credits in total, whereby 2 credits are granted for parents who completed primary school or lower education, 1.5 credits for parents who completed secondary school, and 1 credit for parents who have a higher education,
- entry in the voters' register of the Hungarian national community; declaration of intention of an underage person to enter the voters' register (25 points),
- secondary school graduation in the year of publishing of the Call (14 points),
- completed three-year secondary school in the year of publishing of the Call (10 points),
- enrolment in a faculty in the year of publishing of the Call, financed by the state (25 points),
- enrolment in a college in the year of publishing of the Call, financed by the state (10 points),
- secondary education completed in Hungarian in the territory of the local self-government different to the place of domicile of a student (10 points),

- secondary education completed in Hungarian in the territory of the local self-government in the place of domicile of a student (5 points).

In regard to criteria 1-3, 6 and 7, the Commissioner is of opinion that their introduction is objectively justified, both from the aspect of the goal and the aspect of the consequence.

In regard to the criterion 4, the Commissioner is of opinion that this one does not have any objective and reasonable justification, bearing in mind the goal of the Decision. Although it is fully legitimate to prioritise the applicants coming from families in a poorer financial situation when granting a scholarship, crediting parents' educational level does not support the realisation of this goal. The arguments alleged in the statement of the National Council are unacceptable: "that lower professional education of parents is additionally credited because there is a justified assumption that, in those families, parents are less motivated to send their children to school, and, as a rule, their economic position is poorer". As experience shows, the financial situation of an individual is not directly conditioned by the level of his/her education, but depends on a series of objective and subjective circumstances. On the other hand, the assumption that parents with a lower professional education are less motivated to educate their children is ungrounded. Moreover, one could assert just the opposite from numerous examples.

As for the 5th criterion for credits, the Decision sets forth entry into the Hungarian national minority voters' register, or a minor's declaration of intention to enter the Hungarian national minority voters' register.

The statement of the National Council provides that this criterion was introduced because it is a scholarship of the HNMC, and that this criterion was justified and necessary since the National Council is elected by persons entered in the special voters' register, and that entry is possible at any moment according to a very simple procedure. Analysing this criterion from the aspect of the goal of the Decision, the Commissioner for Protection of Equality is of opinion that the arguments expressed cannot be accepted and that there is no objective and reasonable justification for its introduction. The stance of the Commissioner for Protection of Equality is that it is legitimate to incite members of the Hungarian national minority to enter into the special voters' register so they can realise their right to participate an election of the national council of their national minority and thus influence the realisation of the minority self-government

of their national community. However, in this specific case, that could not be done in the manner stipulated by the disputed Decision.

Bearing in mind that 25 credits can be obtained on the basis of the criterion of being entered in the Hungarian national minority voters' register, it is obvious that the applicants entered in the voters' register are favoured in that manner in comparison to the ones who have are not, even to that extent, that entry into the voters' register is practically decisive for receiving the scholarship. On the other hand, by introducing this criterion, the principle of voluntarism is jeopardised in regard to being entered into a special voters' register, stipulated in Article 47 paragraph 2 of the Law on National Minorities Councils (Official Gazette of RS, no. 72/2009). Therefore, it is evident that between the goal of the Decision and the consequences caused by the application of this special criterion, there is no commensuration.

The criterion of expressing an intention of an underage person to be entered into the special voters' register is particularly unacceptable. Besides the reasons stated when evaluating the justification of the criterion of the being entered into the voters' register for adults, here one should particularly bear in mind that children are in question, who enjoy special social protection due to the sensitivity of the position they are in. Thereby, one should bear in mind that the right be entered into a special voters' register of a national minority belongs to citizens who have an active electoral right (Article 45 of the of the Law on National Minorities Councils), which, pursuant to Article 32 of the Law on National Minorities Councils, members of national minority have if they fulfil the general conditions for acquiring the active electoral right stipulated by the Constitution and the law. The Constitution of RS stipulates that the active electoral right belongs to citizens of age of Serbia (Article 52 of the Constitution). In light of these explicit regulations, it is unacceptable to incite underage persons to express their intention to be entered into the Hungarian national minority voters' register, which is done by determining 25 credits on the basis of the expressed intention to be entered into the special voters' register by the disputed Decision. The explanation of the National Council that this criterion was introduced with an aim to equalise the possibilities of adult and underage students to obtain a specific number of credits according to this criterion is unacceptable since, as was explained earlier, the criterion of being entered into the voters' register is in itself ungrounded.

The analysis of criteria 1o and 11, on the basis of which an applicant who completed his/her education in Hungarian in the territory of the local self-government different to the place of his/her domicile acquires 10 credits, and the one who completed his/her education in his/her place of domicile acquires 5 credits, has shown that there is no objective and reasonable justification for such unequal treatment of applicants.

In the explanation of the National Council, it is alleged that the additional crediting of completed secondary education in Hungarian out of the applicant's place of domicile was motivated by social measures and the intention to support those applicants who had accepted certain costs and additional burden in order to be educated in their mother tongue, since going to school in another place or municipality meant larger efforts and higher costs both for the student and his/her family. The Commissioner believes that these arguments are unacceptable and that stipulating these criteria based on the fact of the place of domicile is not justified. The fact that some applicants live in places in Serbia with secondary schools in Hungarian should not have impact on the ranking of applicants. On the other hand, there is no objective basis for the assumption that enrolment into secondary schools in some other place is motivated exclusively by the student's wish to be educated in Hungarian, since the motive can be of quite another nature in some individual cases (e.g. the desired secondary school does not exist in the place of domicile of the applicant). Thereupon, this criterion would have eventually been objectively justified if the Decision had stipulated, as an additional condition, that the credits based on this criterion would be acquired if there was no Hungarian-language secondary school in the place of domicile of the applicant. Also, it cannot be justifiably assumed that schooling in another place is inevitably linked to certain costs and additional charges, as alleged in the statement of the National Council, since the living circumstances of every individual applicant and his/her family are completely different.

Evaluating the established facts and legal regulations, the Commissioner for Protection of Equality, in accordance with Article 33 paragraph 1 points 1 and 9 of the Law on the Prohibition of Discrimination, issued the Opinion and the Recommendation to the HNMC in order that it undertake actions to eliminate the violation of the principle of equality of certain categories of students who completed schooling in the Hungarian language.

In regard to the remaining irregularities pointed out in the complaint, the Commissioner for Protection of Equality states that she is not competent to evaluate whether it is in accordance with the law that the president of the administrative office of the National Council, who is simultaneously the president of the Council, decides independently on the order of applicants, i.e. on the outcome of the procedure of the Call; and whether the Decision violates the constitutionally guaranteed right to appeal or any other legal remedy against the decision on the basis of which the right, obligation or interest based on law is decided.

6.2. The complaint of M. K. against the Fund for Young Talents of the Republic of Serbia concerning the conditions of the Call for Scholarships (File no. 1438/2011 dated 19.11.2011)

Acting within the jurisdiction stipulated by law to receive and review complaints 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), acting upon the complaint of M. K. from B., the Commissioner for Protection of Equality issues the following

OPINION

In the procedure conducted according to the complaint of M. K. from B. against the Fund for Young Talents of the Republic of Serbia, concerning the conditions of the Call for Scholarships for the best students of 2nd (Master's) and 3rd degree (PhD) studies at universities of the member countries of the European Union and the European Free Trade Association (EFTA) and at leading world universities for the academic year 2010/2011, it was established that the Fund for Young Talents of the Republic of Serbia had not committed an act of discrimination on the basis of any personal characteristic of the complainant.

Rationale

The Commissioner for Protection of Equality received the complaint of M. K. from B. against the Fund for Young Talents of the Republic of Serbia, concerning the conditions of the Call for Scholarships for the best students of 2nd (Master's) and 3rd (PhD) degree studies at universities of the member countries of the European Union and the European Free Trade Association (EFTA) and at leading world universities for the school year 2010/11. The complainant alleges that she believes that the Fund for Young Talents of the Republic of Serbia discriminated against her on the basis of her financial situation, i.e. on the basis of the fact that she was a student of a private faculty.

The following is alleged in the complaint:

- That on 28 June 2011, the Call of the Fund for Young Talents was published on the website of the Ministry of Youth and Sports;
- That one of the conditions stipulated by the Call was also that the student has completed a minimum one year of undergraduate at a higher education institution founded by the Republic of Serbia;
- That by stipulating such a condition, the Fund for Young Talents of the Republic of Serbia committed discrimination against the students of private faculties, i.e. against those students who decided to go to a private faculty at the beginning of their studies;
- That the discrimination in question is against students and not faculties since the accredited faculties are equal.

The text of the Call for Scholarships for the best students of 2nd and 3rd degree studies at universities of the member countries of the European Union and the European Free Trade Association (EFTA) and at leading world universities for the academic year 2010/11 was submitted along 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, therefore the statement of the Fund for Young Talents was obtained during the course of the procedure; wherein, the following is alleged:

- That the Fund for Young Talents of the Republic of Serbia grants scholarships to students in line with the Decision on Education of the Fund for Young Talents of the Republic of Serbia (Official Gazette of RS, no. 71/08, 44/09 and 37/11), exclusively through a publicly published call;
- That the aforementioned Call was published on 28 June 2011 in a number of daily newspapers and on the website of the Ministry of Youth and Sports and on the Imagine Life (orig. Zamisli zivot) youth portal, for the purpose of informing students about the application possibilities in the best possible manner;
- That the conditions of the aforementioned Call are entirely in line with the Decision on Education of the Fund for Young Talents of the Republic of Serbia;
- That the financial means for the student scholarship of are provided from the budget of the Republic of Serbia and these funds are restricted by the financial potential of the state;
- That the Fund for Young Talents, as an indirect beneficiary of budget funds, grants scholarships to students of higher education institutions founded by the Republic of Serbia, which is the commitment of the state concerning both the allocation of scholarships and credits to students, which are awarded by the Ministry of Education and Science, and the allocation of vacancies in students halls of residence;
- That, at sessions, on several occasions, the members of the Fund for Young Talents considered the criteria for establishing the ranking lists of applicants, the level of representation of applications from different universities and from different teaching and scientific fields, the results of the accreditation of faculties process and the study programmes with an aim to issue adequate proposals and decisions;
- That only after the strategic documents (such as the Strategy on Education and the Strategy on the Higher Education Development) have been passed, the long-term prognosis from the labour market on the needs for specific profiles obtained and the accreditation process of the faculties in the Republic of Serbia has been completed, will it be possible to propose to the Government that it carry out specific core changes to the Decision, if this proves to be justified;

- A memo, i.e. the request that M. K. sent to Snezana Samardzic Markovic, Minister of Youth and Sports, on 5 August 2011, was submitted alongside the statement of the Fund for Young Talents. In this memo, M. K. asked Minister Snezana Samardzic Markovic, as a member of the Commission of the Fund for Young Talents, to pardon her for the fact that she had not met one of the conditions of the Call, i.e. to take her application in consideration. At the same time, M. K. asked the minister to support her, in line with the possibilities provided by her position, to pass the formal and procedural obstacles in order for her application to be considered.

The Commissioner for Protection of Equality analysed the facts contained in the complaint from the aspect of the Law on the Prohibition of Discrimination, as well as the regulations relevant for receiving scholarships from the Fund for Young Talents, in order to examine whether the Fund for Young Talents had treated the complainant differently on the grounds of her personal characteristic in comparison to other students interested in receiving the scholarship.

Point 2 paragraph 2 of the Decision on Education of the Fund for Young Talents of the Republic of Serbia, stipulates the tasks of the Fund are, inter alia, to grant scholarships to the 500 best students in the final year of undergraduate degree studies as well as in second and third degree studies, at universities of the member countries of the European Union and the European Free Trade Association (EFTA) and the leading world universities, in the amount of RSD 1,250,000.00 per student during one school year; while point 3 paragraph 3, stipulates that this financial aid can be realised by students under the condition that they have completed a minimum of one year of undergraduate studies at a higher education institution founded by the Republic of Serbia.

In the Call published by the Fund for Young Talents, as one of the conditions, it is stipulated that "students have completed a minimum of one year of undergraduate studies at a higher education institution founded by the Republic of Serbia", which is in accordance with the Decision on the Foundation of the Fund, and it is also a condition applied to all students in the territory of the Republic of Serbia. Bearing in mind that the Fund for Young Talents, against which the complaint was filed, acted in accordance with the regulations, the Commissioner for Protection of Equality is of the stand that the fact that M. K. was required to meet the conditions of the Call as everyone else interested in

the scholarship, does not represent an act of discrimination, since the conditions stipulated by the Decision on Education of the Fund for Young Talents, which the Fund is obliged to comply with. Evaluating the established facts and legal regulations, the Commissioner for Protection of Equality, in accordance with Article 33 paragraph 1 of the Law on the Prohibition of Discrimination, issued the Opinion that the Fund for Young Talents of the Republic of Serbia did not commit an act of discrimination on the basis of any personal characteristic of the complainant.

However, the Commissioner for Protection of Equality begun an analysis of the conditions stipulated by the Decision on Education of the Fund for Young Talents pertaining to student scholarship grants, financing study visits and awarding prizes. If this analysis proves that the stipulated conditions are discriminatory, she will initiate the initiative to alter the Decision.

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