



**COUNCIL FOR THE PREVENTION AND ELIMINATION OF DISCRIMINATION
AND ENSURING EQUALITY**

СОВЕТ ПО ПРЕДУПРЕЖДЕНИЮ И ЛИКВИДАЦИИ ДИСКРИМИНАЦИИ И ОБЕСПЕЧЕНИЮ РАВЕНСТВА
COUNCIL ON THE PREVENTION AND ELIMINATION OF DISCRIMINATION AND ENSURING EQUALITY

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DECISION
of 28 September 2015
on the case No 286/15 (Group of women vs. “ProFamilia” NGO)
regarding gender-based discrimination against women

The Council on Prevention and Elimination of Discrimination and Ensuring Equality, at the deliberation meetings of 11 August 2015, 19 August 2015 and 28 September 2015

examined the case No: 286/15 and analysed the written and oral testimonies of
the petitioners: Victoria Apostol, Nadejda Hriptievschi, Stella Utica, Sorina Macrinici, Galina Precup, Valentina Bodrug-Lungu, Rodica Comedant,
the defendant: “ProFamilia” NGO, represented by Irina Batin,
regarding the maternity harassment of women
deliberated over the following:

I. Performed Proceedings

- 1.1. On 1 July 2015, the Council received and registered under the No 637 the notification of a group of women (case file pages 2-9), on the basis of which the review of the case No 286/15 started.
- 1.2. On 7 July 2015, the petitioners were sent the letter No 03/573 communicating the procedure of complaint examination and were summoned to appear at the hearing, scheduled for 6 August 2015 (case file page 12).
- 1.3. On 7 July 2015, the defendant was sent the letter No 03/576 by which it was informed about the content of the complaint, its examination procedure, and was asked to carry its burden of proof. At the same time, the defendant was summoned to appear at the hearings (case file page 13).
- 1.4. On 27 July 2015, the Council registered defendant's reference under the No 744 (case file pages 16-17).
- 1.5. On 6 August 2015, the defendant reinforced its position by submitting 2 references and additional proofs during the hearings (case file pages 22-61).
- 1.6. On 6 August 2015, the petitioners reinforced their position by submitting 2 additional pieces of information during the hearing (case file pages 62-65).

II. Admissibility of the Object of the Complaint

- 2.1. The object of the complaint meets the requirements of Article 13 of the Law No 121 on Equality, does not correspond to any of the inadmissibility exceptions provided for in Article 14 of the same Law.
- 2.2. The defendant raised an exception of inadmissibility, arguing that the provisions of the Law No 121 on Equality do not extend over them and they can not be interpreted as affecting religious cults and their components in respect of religious convictions.
- 2.3. The Council rejects this exception, explaining that petitioners' claims were filed against “ProFamilia”'s actions which is a non-governmental organization according to its legal status. Respectively, they are in the scope of the Law No 121/2012.

III. Object of the Complaint

- 3.1. The petitioners argue that the intention of “ProFamilia” NGO to install a memorial to unborn children in a public place would put psychological pressure on women who had abortions by various methods. The petitioners believe that this pressure would represent a continuous harassment of women who underwent or intend to undergo abortion, their dignity being, thus, injured on grounds of maternity.

IV. Reasons in Fact and in Law

A. Allegations expressed in the notification

- 4.1 The petitioners communicate: “(...) On 4 June 2015, “ProFamilia” NGO announced, during a press conference, that wants to place the monument “Memorial to Unborn Children” in a public area, namely on the territory of the Institute of Mother and Child. Vasile Filat, the President of the NGO said that despite the fact that the Ministry of Health refused to give permission for the placement of this monument, “ProFamilia” NGO will continue to take the necessary steps to exhibit it in a public place on 15 October 2015. The “Memorial to Unborn Children” is a copy of a sculpture created by the Slovakian sculptor Martin Hudáček, which illustrates a woman kneeling in front of a child who is standing and is trying to comfort her with his right hand. The woman is crying with her hands covering her face. The aim that “ProFamilia” NGO wants to achieve by building this monument is a lower rate of abortions in Moldova by suggesting that abortion is a crime and women committing it need penitence. This message was sent by the President of “ProFamilia” NGO, who mentioned that he is also a pastor and affirmed the following: “the monument would have healed people with soul and mental injuries that resulted from what they did. This monument will heal their soul, it is a hope for forgiveness”. Further, he added: “we believe that the monument would make them change their mind.” We deem that the monument “Memorial to Unborn Children” has the aim to put a symbolic and mental pressure on women from the Republic of Moldova, so as for them not to terminate pregnancy regardless of causes and consequences. This pressure is discriminatory towards women and represents a type of maternity harassment and is at variance with Article 4 (c) of the Law on Equality No 121 of 25 May 2012. In the case of maternity, according to European standards, the establishment of a comparator is not necessary. The Law on Equality No 121 of 25 May 2012 defines the harassment in the following way – “any unwanted behavior that leads to an intimidating, hostile, degrading, humiliating or offensive environment, with the purpose or effect to violate the dignity of a person based on the criteria stipulated in this Law;”, despite that, it particularly is the President of the “ProFamilia” NGO who shows such an unwanted behavior by the intention to place the “Memorial to Unborn Children” monument in a public place, which in its turn, according to affirmations made above, has the aim to make women to change their mind about abortion. We believe that such intimidating environment injures the dignity of women who terminated their pregnancy or intend to do it. What is more, such a monument in a public place represents a phenomenon of manipulation and distortion of real facts about abortion. By putting that monument up, “ProFamilia” NGO means to socially stigmatize and marginalise women who had abortions. To gain the support of the community, “ProFamilia” NGO tells myths and unfounded figures about abortions. Women terminate pregnancy for different reasons, such as: rape, health condition, it threatens their life, poverty etc. However, that monument does not make difference between these reasons and its purpose is to make women feel guilty. The Law No 138 of 15 June 2012 on Reproductive Health, Article 3 (d) provides that women have the right to safely have an abortion as a reproductive health care service. Women shouldn’t, thus, be stigmatized and subject to symbolic and psychological pressure because they observed these legal provisions, which “ProFamilia” NGO is after as it means to put up the “Memorial to Unborn Children” monument in a public place, particularly on the territory of the Institute of Mother and Child, where births are delivered and pregnancies – terminated. Putting this monument up in a public place also violates Article 31 of the Constitution of the Republic of Moldova, which enshrines the freedom of conscience. Therefore, public space should provide the possibility to accommodate the rights of all citizens, regardless of their religious views, while this monument implies a certain religious perspective which is intended to be imposed upon the community. The “ProFamilia” NGO is not an organization that would represent women from the Republic of Moldova, especially

those who had abortions, therefore, the voice and opinion of the respective women towards this initiative is not considered (...)"(case file page 2-3)

- 4.2 During the hearing, the petitioners filled in the complaint and provided additional arguments to support their positions, in brief, the following: *"(...) we underline the fact that becoming pregnant, terminating pregnancy and giving birth are experiences that women exclusively go through. We mentioned in the complaint that the "Memorial to Unborn Children" aims at putting symbolic and psychological pressure on women from the Republic of Moldova so that they don't terminate pregnancy regardless of causes and consequences. We reiterate that this monument is discriminative to any woman, not only to those who terminated or intend to terminate pregnancy. The defendant argues that the monument would only be discriminative to women who terminated or intend to terminate pregnancy and thus, the petitioners should provide documents that would prove that they either had or plan to have an abortion. The hint that we must prove that we terminated or that we intend to terminate pregnancy so as to be regarded as stakeholders is inappropriate and against logic and the spirit of the law. A monument is not only intended for persons who terminated or may terminate pregnancy. The monument is designed to last, affecting, thus, women permanently. Accordingly, as only women go and can go through termination of pregnancy for various reasons, every woman is automatically a stakeholder in a process that concerns women's reproductive health, regardless of the reproductive condition. For this reason, we reiterate that the petitioners are stakeholders and have the right to file the complaint. What is more, besides the maternity criterion, we ask for gender-based discrimination to also be acknowledged (...)"(case file page 62).*
- 4.3 With regards to the exception of admissibility invoked by the defendant, the petitioners contend that: *"(...) we do not challenge the right of the defendant to publicly express its religious beliefs, including disapprobation of abortion. He can condemn abortion in his public speeches and in his church. The petitioners are against defendant's intention to demand and insist on erecting an anti-abortion monument in a public place. Article 2 (1) of the Law No 121 does not relieve religious cults of the obligation to observe the right to equality and non-discrimination. What is more, the Law No 121 explains the exception in Article 2 (1), narrowing it down to the following two clear fields: Article 7 (6), which is about the occupational field and provides that: "in relation with the occupational activities of religious cults and their component parts, religion or belief-based differentiated treatment does not count as discrimination when the religion or beliefs are an essential, legitimate and just requirement"; Article 9 (4), which is about education and which provides: "The provisions of this Article do not restrict the right of an educational institution – training people to work in a particular religious cult – to refuse enrolment of a person whose religious status does not correspond to the requirements that need to be met in order for one to be admitted to the institution in question." Promoting an anti-abortion monument has nothing to do with the occupational activity of religious cults, nor with the training of people working in a particular cult. The exception invoked by the defendant is, thus, not applicable (...)"(case file page 63).*
- 4.4 *"(...) The Law No 121 on Equality applies to the defendant, as the actions that he intends to take are beyond the component parts of the religious cult he represents. The territory of public health facilities, including the Institute of Mother and Child, are not component parts of religious cults, and it is precisely in such a public place that "ProFamilia" NGO insists to place the "Memorial to Unborn Children" in, and the Law No 121 on Equality applies here as well. What is more, even if promoting the anti-abortion monument is related to the display of defendant's religious beliefs, the religious beliefs are not an absolute right, i.e. freedom of conscience, thought and religion are limited. Article 4 (2) of the Law No 11 May 2007 on Freedom of Conscience, Thought and Religion provides that: Enjoyment of the right to freedom of manifestation of religious beliefs or faith may be restricted under the law only if the restriction pursues a legitimate aim and represents, in a democratic society, measures necessary for public safety, public order, protection of health or public morals or for protection of rights and freedoms of individuals. As we already mentioned, the "Memorial to Unborn Children" aims at putting symbolic and psychological pressure on women from the Republic of Moldova so that they don't terminate pregnancy regardless of causes and consequences. If this monument were to appear in a public place, it would create an intimidating environment for women. Women terminate pregnancy for different reasons, such as: rape, health*

condition, it threatens their life, poverty etc. However, that monument does not make difference between these reasons and its purpose is to make women feel guilty. In this case we have to deal with two rights – the freedom of a religious cult to manifest its beliefs by placing an anti-abortion monument in a public space and the right of women to safely terminate pregnancy as a reproductive health care service (provided for in Article 3 (d) of the Law No 138 of 15 June 2012 on Reproductive Health). The defendant can continue to promote his beliefs, only not through methods that affect other rights. Women's right to health by safely terminating pregnancy as a health care service and women's right to dignity are directly affected by placing such a monument in a public place. Putting such a monument in a public place would mean that abortion and, thus, those women who had abortions are publicly condemned by the entire society. Thus, stating that the "Memorial to Unborn Children", as well as any other anti-abortions monument is discriminative to women does not violate defendant's freedom of religion, but protects women's rights (...)" (case file page 64).

- 4.5 To support the statements made in the initial complaint, the petitioners stress out the fact that "(...) the birth rate among Moldovan adolescents is high compared to other European countries ("Social Journal No 2 of December 2013, produced by "IDIS VIITORUL"). The survey carried out in this field suggests that adolescent mothers have less chances to pursue education and more chances to struggle with poverty. What is more, the children of adolescents are often underweight and struggle with health and development issues. Thus, given the situation of the Republic of Moldova, it is not abortions among the young that need to be discouraged, but sex education should be provided to the young. This is an important topic and has to do with state's public health policies. Religious cults can contribute to the appropriate sex education of the young. Putting that monument on the territory of a public hospital would actually be a sign of public deterrence of abortion, affecting women in a disproportionate manner, including the ones that had to terminate pregnancy, without actually answering to the real needs and issues of the society. The defendant did not explain the potential impact of the promoted monument (case file page 66).

B. Statements made by the defendant – "ProFamilia" NGO

- 4.6 In its reply as regards the deeds constituting the object of the complaint, "ProFamilia" mentions the following: "(...) The deeds and speeches made by the undersigned, and intention to put up the monument, to which reference is made in the Collective Complaint as of 01 July 2015 (hereinafter "complaint") do not constitute and cannot be considered as harassment or discriminatory acts. Our activities related to the putting up of the monument comply with the law in force of the Republic of Moldova and international treaties in the human rights field, while the incriminations presented in the complaint are unfounded and ungrounded from the legal point of view. In this letter we will not try to refer to the national and international laws, which completely support our position, but we request the Council on Prevention and Elimination of Discrimination and Ensuring Equality to reject the examination of the complaint for the following reasons: 1. Article 13 (l) of the Law on Equality No 121 of 25 May 2012 provides: "The Council initiates the examination of whether there was or wasn't an act of discrimination ... at the request of the stakeholders, including trade unions and Non-Government Organizations operating in the human rights promotion and protection field." Article 4 of the Regulation of the Council on Prevention and Elimination of Discrimination and Ensuring Quality (Law No 298 of 21 December 2012) stipulates: "the stakeholder is a person who considers himself/herself discriminated, a trade union or Non-Government Organization operating in the human rights promotion and protection field, another person who has a legal interest in combating discrimination and represent a person, a group of persons or a community that were discriminated against". As it is alleged in the complaint, the monument would be discriminative to the women who terminated or intend to terminate pregnancy. The body of the complaint was not annexed any document that would prove that the undersigned persons would fall within one of these categories and/or that they would have a mandate empowering them "to present women who terminated or intend to terminate pregnancy". At the same time, the complaint was not submitted by a trade union or Non Government Organization operating in the field of promotion and protection of women who terminated or intend to terminate pregnancy. As a result, the persons who undersigned the complaint do

not meet the legal requirements to initiate a complaint under the Law No 121 of 25 May 2012 and Law No 298 of 21 December 2012. Article 2 (1) (c) of the Law No 121 of 25 May 2012 provides: the provisions of this Law shall not cover and cannot be interpreted as to affect... religious cults and their component parts as far as religious beliefs are concerned.” It is a publicly known fact that the undersigned is a pastor of the “Buna Vestire” church (religious community “Buna Vestire a Mântuitorului” – Evangelical Baptist Christian Church) from Chisinau, registered in the Register on religious cults and their component parts, which operates in obedience to the legislation of the Republic of Moldova. This fact is also known by the undersigned of the complaint, who make the appropriate note in the 2nd paragraph of the front page of the complaint. It is obvious that the intention to put up the monument is based exclusively on our religious beliefs. The speeches and statements made by the undersigned and my colleagues during several public appearances, as well as the materials shared on the site www.moldovacrestina.md supporting the installation of the monument, clearly prove this. Another example may be the page No 3 of the complaint, which includes the image of the afore-mentioned site, and contains the following quote: “Today, I make a firm decision before God, family and the whole society to cherish human life starting with conception. I will not terminate pregnancy, I will not consent to it, I will not encourage, give advice or force someone to ever take the life of a child by terminating pregnancy. So help me God!” During the press conference I made several statements that clearly prove that the intention to put up the monument is based on our religious beliefs. The following quotes made during the press conference serve as an example (See the materials annexed to the complaint): “I am a pastor, and I often talk to people coming to confess their sins...” “... namely the monument would have been a heal for the ones with mental injuries, as a result of what they committed, will heal their souls, it is a hope for forgiveness.” These statements clearly prove that the intention to put up the monument and our goals are based on our religious beliefs, which we can make public, as national and international legislation provides. As a result, considering the cited provisions of the Article 2 (1) (c) of the Law No 121 of 25 May 2012, the provisions of Law cannot be invoked as regards our religious beliefs. Finally we reiterate our request to reject the examination of the complaint because of the reasons presented above. At the same time, we reserve the right to present additional proofs and evidence, that prove the legality of our deeds and speeches. We also reserve the right to appeal to all the legal norms to defend our rights against unfair and unlawful activities perpetrated by individuals, public authorities or Non-Government Organisations (...)” (case file pages 14-15).

- 4.7 During the hearing, the defendant – “ProFamilia” NGO reinforced its position by submitting 2 explanatory notes. In its first explanatory note the defendant affirms that their actions regarding the installation of the respective monument are protected by freedom of expression, enshrined in Article 10 of the European Convention on Human Rights. To support this statement, the defendant provides the following arguments: “(...) the European Court of Human Rights repeatedly stated that freedom of expression represents the essential foundation of a democratic society, one of the basic conditions of progress and of every person’s self-accomplishment. The court, also, mentioned time and again that the freedom of expression must be protected in order to protect the tolerance, liberalism and pluralism. Therefore, censorship and limitation of expression through vaguely developed accusations of discriminatory represent a serious violation of the commitment that the Republic of Moldova made to ensure the rights and freedoms enshrined in the European Convention on Human Rights. The monument in question is a protected form of expression. Therefore, according to European provisions, the Council cannot conduct its own lawsuit, appreciate the facts regarding the intention to put up the monument or determine whether it represents an appropriate form of expression or not. The State has the duty to be impartial and neutral, because the conservation of pluralism and good functioning of the democracy are at stake now, even in cases when the State or the Court of Law can find some of these opinions annoying. When the State is empowered to dictate what is and what is not an offensive speech or which it believes to be offensive, then one de facto opinion-based discrimination case is identified and a social engineering process is initiated. State actors, as the Council is, are prohibited to make differences between people sharing one or another opinion. Any such differences will be contrary to democratic principles, which have been defended so valiantly

throughout the recent history of Europe. This type of freedom of expression protects not only the information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb; such are the demands of that pluralism, tolerance and broad-mindedness without which there is no democratic society. ECHR declared that as long the freedom of expression is subject to some exceptions, these exceptions must, however, be built strictly and the need for any restrictions must be established persuasively. The accusations made by the defendants do not fall under this extremely restrictive task. The putting up of a public monument that does not defame, slander or label specific individuals in any way, cannot be regarded as discrimination. Such a wide interpretation of the Law would lead to a chilling effect of the freedom of expression. Moreover, there is no legal protection against offences. Freedom of expression would mean nothing if only universally favourable forms of expression would be considered as protected speech. The protection of freedom of expression apply to all views, opinions and any mass-media product or publications, including monuments. The protection provided in Europe to freedom of expression was very liberally interpreted in a number of cases. For instance, Article 10 was applied by extension to defend a film-maker from Great Britain, who produced a pornographic film showing saints of the Catholic Church engaged in sexual acts. In addition, the Court protected some paintings of a clear sexual nature. Ideas were also strongly protected. The Court asserts that the spread of ideas, even of those that are suspected to be false, are protected by Article 10. The responsibility to distinguish the truth from the lie was placed upon the person concerned, namely upon the listener. Thus, the Court recognized that the remedy for bad speech is to carry more intelligent dialogues and communication. Unlike the afore-mentioned cases, the facts of immediate application do not meet the standards of limited speech. The petitioners should not be allowed to use this court with the aim to harass or intimidate the defendant, as this represents an interference in his fundamental right to freedom of expression. Moreover, to ensure that the Law No 298 of 21 December 2012 is applied under European standards, its effects must be understandable and predictable. Thus, it cannot be vague, "the quality" of the law must clearly and precisely define the conditions and forms of any limitation based on the basic guarantees of the Convention and must be free of any arbitrary enforcement. The main requirement related to predictability is an increasing stumbling block for European case-law, since the States approve an increasing number of weakly formulated laws, that make the listener, in his/her subjective understanding, decide whether the respective speech is illegal or not. The provisions are so broad that they do not provide any guidance or predictability for the people about how they should act. At the same time, drafting laws allows for unlimited freedom of expression for local authorities to determine what is and what is not acceptable expression. The Court of Metropolitan Church of Bessarabia specified that to meet the criteria of clarity, the internal law must provide a certain extent of legal protection against the selective interventions of local authorities as regards the rights enshrined in the Convention: "in matters affecting the fundamental rights would be against the law – one of the fundamental principles of a democratic society under the Convention – for a legal freedom of actions safeguarded to the Executive shall be expressed in the context of an unlimited power; thus, as a consequence, the law must clearly specify the goal of such freedom of actions and the way it should be enforced in". To be more precise, for the broad audience, the effects of a law limiting the freedom of expression must be understandable and predictable. The Law No 298 of 21 December 2012 is drawn up in such a way that any offended member of society can initiate a discrimination case based on its subjective feelings of being insulted, even when the offence was not addressed to him/her and this formulation of the respective Law sets a dangerous precedent for Moldova, a precedent that will be appealed for sure in an aggressive way in the European legal framework. Thus, the complaint in question should not be accepted (...)" (case file page 22-24)

- 4.8 "Based on the merits of the case, the defendant argues that the intention to put up the monument cannot be regarded as a harassment or discriminatory act, explaining the following: (...) Our activities regarding the putting up of the monument comply with the law in force of the Republic of Moldova and international treaties in the human rights field, while the incriminations presented in the complaint are unfounded and ungrounded from legal point of view. Our activities fall under the right to public expression. The form of expression chosen

by us – putting up a monument in the public space – falls under the forms allowed by Constitution (expression through “image or another available mean”). Moreover, Articles (3) and (2) of the Law on Freedom of Expression protect the right to public expression, even if we admit that the authors of the compliant consider themselves disturbed or offended by the meaning and form of the monument. The ECHR case-law is very well-defined as regards the right to freedom of expression and its protection. Freedom of expression is one of the core bedrocks of a democratic society, one of the priority condition for its progress. It is so important that it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb: such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society¹. It basically prohibits a government to stop someone from receiving information that others wish or may be willing to share¹². The symbols, speeches and “shocking and offending terms” are protected by the freedom of expression, except for the case when they are likely to favor [directly] violence³ and if they incite rejection of democratic principles⁴. Exaggeration is protected by the Convention⁵. The Convention protects not only the substance of the expressed ideas or information, but also the way they are manifested in⁶, and this is applicable even if the respective way is excessive⁷. The European Court on Human Rights found that if the expression of opinions or beliefs as regards termination of pregnancy turns into a militant speech, it enjoys an increased level of protection⁸. Likewise, if the speech is presented by a Non-Government Organization: “when an NGO attracts public attention upon some matters of public interest, it plays the role of a watchdog, similar in importance to that of the mass-media⁹. As the last guarantor of pluralism, the State and its authorities have not only the negative obligation not to limit without reason the enjoyment of the right to free expression, but also have the positive obligation to ensure the effective enjoyment of the rights and freedoms enshrined in the Convention of those persons sharing unpopular or minority opinions, because they are most often subject to victimisation^{10,11}. Thus, the enjoyment of the rights guaranteed by the Convention by a minority or religious group or out of reasons related to one’s conscience, as in our case, cannot be conditioned by the acceptance of other groups¹¹. In a democratic society the ideas and speeches of minority groups must be tolerated¹². Thus, as the speech to the detriment of abortion is a speech of a minority group and sometimes is considered unpopular, it must be tolerated and basically it must receive more protection than the speech favouring abortion. In the case of *Women on Waves and others v. Portugal*, as regards the appeal against the legislation prohibiting abortion in the country, the European Court on Human Rights sanctioned State authorities for obstructing the enjoyment of the right to free expression of a pro-abortion organization. The Court concluded, in this case, the almost absolute right of an NGO to chose the expression means, which it considers to be the most effective. The stakeholders must be able to choose, without unreasonable interference of State authorities, the expression means that it considers the most effective to persuade a maximum number of persons¹³. In addition, the Court stated that when referring to a symbolic challenge of the existent legislation, the method of dissemination can be so important that its limitation cannot be justified from the point of view of the Convention. In this respect, the Court mentions “It is true that (...) NGO members managed to organize meetings to express their opposition to abortion. However, the Court finds that, in certain situations,

1 Handyside v. the United Kingdom, No 5493/72, Judgment of 7 December 1976, § 49

2 Handyside v. Suedia, No 9248/81, Judgment of 26 March 1987, § 74

3 Faber v. Hungary, No 40721/08, Judgment of 24 July 2012, § 56

4 Alexeiev v. Russia, No 4916/07, 25924/08 and 14599/09, Judgment of 11 April 2011, § 80

5 Handyside v. the United Kingdom, No 5493/72, Judgment of 7 December 1976, § 49

6 Oberschlick v. Austria (No 2), No 20834/92, Judgment of 1 July 1997; Radio France et autre v. France, No 53984/00, Judgment of 30 March 2004

7 Oberschlick v. Austria (No 2), No 20834/92, Judgment of 1 July 1997, § 38; De Haes si Gijssels v. Belgium, No 19983/92, Judgment of 24 February 1997

8 Mutatis mutandis Renaud v. France, No 13290/07, Judgment of 25 February 2010, § 33

9 Vides AizsardzTbas Klubs v. Letonia, No 57829/00, Judgment of 27 May 2004, § 42; Animal Defenders International v. the United Kingdom, No 48876/08, [GC], Judgment of 22 April 2013, § 103

10 B^czkowski and others v. Poland, No 1543/06, Judgment of 3 May 2007, § 64

11 Akdas v. Turkey, No 41056/04, Judgment 16 February 2010, § 81; Chassagnou and others v. France, [GC], No 25088/94, 2833/95 and 2844/95, Judgment of 29 April 1999, § 112

~i2 Chassagnou and others v. France, [GC], No 25088/94, 2833/95 and 2844/95, Judgment of 29 April 1999, § 112

13 Women on Waves et autres v. Portugal, No 31276/05, Judgment of 3 February 2009, § 38

the method used to disseminate information and ideas is so important that the restrictions (...) could essentially affect the substance of ideas and information in question.”¹⁴ The Court also found that when it comes to ideas that shock, offend and disturb the existing public order, the more that way off expression can affect the substance of the expressed ideas and information, the more it is protected, and this happens even if there were other ways of expression and in spite of the fact that stakeholders used them: “the more precious the freedom of expression is, the more used it is for sharing ideas that offend, shock or disturb existent order”¹⁵. The Court found in the same case the duty of the State not to hinder expressions regarding abortion” in an open public space through its own nature”¹⁵. The ECHR affirmed in several cases that the expression or the speech regarding abortion is a matter of “public interest”¹⁷ which is why it is greatly protected by the Convention¹⁸. This protection is equivalent to that of public speech, which enjoys the highest level of protection under the Convention¹⁹. This aspect influences the State possibilities to limit the enjoyment of the right to free expression²⁰. Thus, the more protected the speech is, the lower the margin of appreciation of states is when intending to limit the enjoyment of the right to freedom of expression. In a free and democratic society, everyone has the right to express its opinion towards the practice of abortion. The limitation of freedom of expression can be applied only in cases foreseen by law. It is typical of democracy to allow both parties involved in a certain debate on a particular issue – in our case it is abortion – to have the possibility to express the opinion their opinion, in order to inform and persuade the broad audience of their ideas. We have a minority and unpopular opinion; we also challenge the existing legislation, which does not protect the right to life from the moment of conception, through a symbolic activity, which, according to ECHR’case-law, enjoys a higher level of protection as regards freedom of expression, according to the aforementioned. Our public statements and intention to put up the monument did not cross the limits of freedom of expression and those provided by law. By our intentions, we did not advise anyone to start a war, incite anyone to hatred and discrimination, trench upon anyone’s rights and dignity and also we did not admit other statements or actions that violate the freedom of expression. As a result, the installation of the monument in a public space is how we express our opinion about abortion, which is protected by national and international law – and is equivalent to the right of the authors of the complaint to have and express own opinions publicly with regards to termination of pregnancy (...)” (case file pages 25-29)

- 4.9 The defendant regards a ungrounded and untruthful the statements made by the petitioners, according to which the installation of the monument would be an act of harassment and explains that:” (...) Based on the definition of harassment presented above – harassment is an individual act addressed to a person or a certain group of people. For an act to be regarded as harassment, the actions of a person must be addressed directly to a particular person (or group of persons). The installation of the monument is clearly not oriented towards a particular person or group of persons. The interpretation of the definition of harassment, in a universal and extended version, according to which a certain action would represent harassment of some non-identified and hypothetic persons is aberrant and at variance with law. The reasons and goal of the monument have been presented during the conference and let us inaugurate a monument, that will be the gravestone of those 6 million of aborted children“ (...)“we will remember those unborn children, we will raise awareness among the ones under pressure of committing abortion, maybe they will change their mind, we believe that the monument will have a strong message, but at the same time we want it to give hope for persons who committed abortions or had anything to do with them”. It is obviously that he monument represents just a message, a call, that a certain person can either consider or ignore. The basic message of our speeches is about life. By this message we want to emphasize once again the importance of each person in particular and of all

14 Women on Waves and others v. Portugal, No 31276/05, Judgment of 3 February 2009, § 39

15 Women on Waves and others v. Portugal, No 31276/05, Judgment of 3 February 2009, § 42

16 Women on Waves and others v. Portugal, No 31276/05, Judgment of 3 February 2009, § 40

17 D.F. v. Austria, No 21940/93, the Judgment of the Commission as of 2 September 1994; Annen v. Germany, No 2373/07 and 2396/07, Judgment of 13 March 2010

18 Hoffer and Annen v. Germany, No 397/07 and 2322/07, Judgment of 13 January 2011, § 44

19 Axei Springer AG v. Germany (No 2), No 48311/10, Judgment of 10 July 2014, § 54

20 Wingrove v. the United Kingdom, Judgment of 25 November 1996, § 58; Animal Defenders International v. the United Kingdom, No 48876/08, [GC], Judgment of 22 April 2013, § 102

human beings altogether, including that of an unborn child. The monument is an appeal to give birth to conceived children. Petitioners' attempt to qualify the monument as a way to put pressure and force someone into something does not correspond to the truth and is based on a subjective perception, which is assumed by the undersigned of the complaint. Our statements and intention to install the monument cannot and should not be interpreted as acts of harassment, because harassment is a social phenomenon, while our statements are generated from religious point of view and exclusively refer to the individual relation of each person with the God. As we see it, abortion is a crime from the religious perspective (it is a sin), but not a crime from the perspective of criminal law. Sinning harms a person's soul and religious life (...)" (case file pages 30-31)

- 4.10 The defendant affirms that putting the monument up does not represent an act of discrimination, arguing that "(...the petitioners are annoyed not with the putting up of a monument or of another artwork – otherwise we could assume that a public anti-abortion billboard would not be discriminatory, because it is not a "monument" – but namely with the public expression of an anti-abortion attitude. Any public anti-abortion statement made is equal to any public pro-abortion statement. If we admit that the public expression of an anti-abortion attitude is discriminatory towards women who terminated their pregnancy or intend to do it, then the public expression of a pro-abortion attitude is discriminatory towards women who did not terminate their pregnancy and do not intend to do it. Accordingly, assuming that the installation of the monument is an act of discrimination, then we end up to a situation where any public pro-abortion statement is an act of discrimination against women who did not terminate their pregnancy and do not intend to do it, which is absurd. One of the main objectives of the State in the health sector is to reduce the abortion rate. It is clear that the objective to reduce the abortion rate is an anti-abortion one. If we follow the arguments of the authors of the complaint, then the objective to reduce the abortion rate, which results from our legislation, is discriminatory in respect to women, it makes them feel "symbolic and mental pressure", it "stigmatizes and marginalizes them, because it is an anti-abortion objective" (case file page 32)
- 4.11 The defendant argues that the monument does not break the right to terminate the pregnancy "(...) it does not limit the right to terminate pregnancy. None of our actions or statements affect the possibility to terminate the pregnancy. As it was already mentioned, the installation of the monument is a form of public expression of attitude towards abortion and is a message addressed to women who terminated their pregnancy or intend to do it. However, the decision to terminate pregnancy belongs exclusively to them, while the monument cannot limit in any way such a decision and the right of a woman to do it. Moreover, the putting up of the monument is supported by the law in force (...)" (case file page 33)
- 4.12 In addition, the defendant affirms that the complaint is based on the subjective attitude of the petitioners, because they are unable to know which would be the psychological state of women who terminated pregnancy or intend to do it. This fact shows the subjectivism and irrelevance of the allegations invoked by the signers of the complaint. At the same time, even if we admit that some women, who terminated pregnancy or intend to, would regard the monument as a mental pressure on them, then such an attitude would be subjective and individual, being caused by the internal psychological factors of the person in question, and not by the monument itself. This is proved by the fact that there are lot of women who terminated pregnancy or intend to, who confirmed that the monument is not exposing them to any mental pressures (...) The installation of the monument represents a public expression of the attitude towards abortion and it results from our religious beliefs and is based on the freedom of religious conscience and freedom of expression, enshrined in Articles 31 and 32 of the Constitution. We don't and didn't want to force our opinions on anybody, we only shared them. Prohibiting one to express an opinion, in this case by installation of a monument, just because this involves a religious belief, represents religion-based discrimination and will not allow us to enjoy freedom of expression, enshrined in Article 10 of the European Convention on Human Rights. We can assume that several actions (letter of the signers sent to the Ministry of Health shall be annexed at this reference) have been taken to intimidate us in enjoying pro-family and pro-life activities, in order to stop us, to determine us to give up on this idea. Satisfying the claims presented by the signers of the complaint will represent religion-based discrimination and an ungrounded limitation of our freedom of

expression, except for the cases exhaustively provided by law in relation to limitation of freedom of religion. We bring into the spotlight the fact that not only religious teachings treat the embryo as a person from the moment of conception. On the contrary, the legislation of several EU states expressly establishes this fact. As a result, our opinions and attitude towards abortion coincide with the provisions of international law. This proves once again that the attempt of the petitioners to assume that our opinions represent “manipulation and distortion”, is tendentious and discriminatory.” (case file pages 35-38)

- 4.13 In the end, the defendant asks for petitioners’ request to consider the monument in question and other anti-abortion monuments discriminative towards women, to be rejected.

V. The Relevant National and International Law

- 5.1 **Article 16 (2) of the Constitution of the Republic of Moldova** guarantees the right to equality: “All citizens of the Republic of Moldova shall be equal before the law and public authorities, regardless of the race, nationality, ethnic origin, language, religion, sex, opinion, political affiliation, property or social origin.” **Article 24** provides: (1) The State guarantees everybody the right to life and to physical and mental integrity. **Article 28** The State shall respect and protect private and family life. **Article 31** (1) The freedom of conscience is guaranteed. Its manifestations should be in a spirit of tolerance and mutual respect. (2) The religious cults are free to organize themselves according to their own statutes under the rule of law. (3) In their mutual relationships, religious cults shall be forbidden to resort to incitement to enmity. (4) Religious cults are autonomous from the State and shall enjoy the latter’s support, including that aimed at providing religious assistance in the army, in hospitals, prisons, homes for the elderly and orphanages.
- 5.2 **The Law on Equality No 121 of 25 May 2012** provides in **Article 1 (1)** that “The goal of this Law is to prevent and fight discrimination and ensure equality of all persons in the Republic of Moldova in political, economic, social, cultural and other areas of life, irrespective of race, color, nationality, ethnic origin, language, religion or belief, sex, age, disability, opinion, political affiliation or any other similar criteria. **Article 2** defines incitement to discrimination as “any behavior that a person displays the media or intentional conduct of third persons to discrimination on the basis stipulated in this Law”. **Article 3** provides that “subjects in the discrimination are natural and legal persons from public and private”. **Article 4.** The worst forms of discrimination c) placing discriminatory messages and symbols in public places;
- 5.3 **Law No 64 of 23 April 2010 on Freedom of Expression**, provides in Article 3 (1) and (2) (1) Everyone shall have the right to free of expression. This right shall include freedom to seek, receive and share information and ideas of all kinds. (2) Freedom of expression protects both the content, as well as the form in which information was expressed, including information that offend, shock or disturb.
- 5.4 **The Law on Reproductive Health No 128 of 15 June 2012** provides in **Article 2** the definition of “*reproductive health* – a state of physical, mental, and social well-being in all matters related to the reproductive system, at all stages of life. Reproductive health, therefore, implies that people are able to have a safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so; reproductive health includes the rights of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, and the right of access to appropriate health care services that will enable women to go safely through pregnancy and childbirth”; **Article 3** provides: “Reproductive health services, (d): safe termination of pregnancy”; **Article 4 (2):** “Any adult woman and man have the freedom to decide freely and responsibly the number and spacing of their children, as well as on matters regarding reproductive health, without coercion and influence from outside”; **Article 5:** “The State ensures: f) to every woman – access to safe methods of abortion, in compliance with the regulatory acts of the Ministry of Health; **Article 8** stipulates: ” Principles of enjoyment of reproductive rights at **letter d)** confidentiality in matters regarding the reproductive health;”.
- 5.5 **The Law on Patients’ Rights and Responsibilities No 263 of 27 October 2005** provides in **Article 9 (1):** The patient has the right to choose the safest ways to protect reproductive health, through health care services. **(2)** Any patient has the right to safe and effective family planning methods. **(3)** The patient has the right to information, education and services

necessary for a normal sexual and reproductive health, without discrimination. **(4)** Woman's right to life shall prevail over a pregnancy that presents a serious and immediate risk to mother's life.

- 5.6 **The Law on Reproductive Health Care and Family Planning No 185 of 24 May 2001 provides in Article 5 the following:** The freedom of choice regarding reproduction **(1)** Any person has the right decide freely on the number and spacing of their children, born in or outside the marriage. **(2)** The State guarantees its non-intervention in the realization of the citizens' right to freedom of choice as regards the reproduction. **Article 6.** The right to information about own reproductive health and family planning status. Every person has the right to accurate and comprehensive information about own reproductive health and family planning status, which is provided by the state and private health care facilities, which have license for such an activity, within the limits of competences. **Article 7.** The right to be provided with **reproductive health care and family planning services.** **(1)** Every person has the right to be provided with reproductive health care and family planning services. **(2)** The reproductive health care and family planning services shall be provided by state and private health care facilities, education and social assistance institutions, in the manner prescribed by the laws in force.
- 5.7 **Law on Health Care No 411 of 28 March 1995, Article 32** Voluntary termination of pregnancy **(1)** Women are granted the right to decide themselves the maternity issue.
- 5.8 **Order of the Ministry of Health No. 647 of 21 September 2010 on Voluntary Termination of Pregnancy in Safety Conditions, Regulation on Voluntary Termination of Pregnancy, Item 2:** "The notion of voluntary termination of pregnancy is defined by termination of pregnancy on own decision, both based on women's right to reproductive health in terms of human rights, including women's right to motherhood and to freedom of choice of health care facilities that provide voluntary termination of pregnancy services (hereinafter referred to as health facility), electively and based on medical and social indications, set in this Regulation by the Ministry of Health. **3.** Ensuring the universal access of a pregnant woman to services of voluntary termination of pregnancy. **11.** The health facility guarantees the free and immediate access of pregnant women to services of voluntary termination of pregnancy and carrying out under conditions of confidentiality.
- 5.9 **The European Convention on Human Rights, Article 10** stipulates: Everyone has the right to freedom of expression. This right shall include freedom to have opinions and to receive and share information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises; **(2)** The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and which are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary; **Article 14** stipulates: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".
- 5.10 **Protocol 12 of the European Convention on Human Rights, Article 1** stipulates the general prohibition of discrimination: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."
- 5.11 **United Nations Convention on the Elimination of all Forms of Discrimination against Women, Article 2 (f)** stipulates that "States Parties shall take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women".

VI. In conclusion, the Council found the following:

- 6.1 Having examined the file materials, the Council finds that the petitioners, pleading as stakeholders, argue that the “Memorial to Unborn Children” ²¹ represents an expression of sex-based harassment against women.
- 6.2 The Council reminds that both the national legislation (*Article 15(1) and 19 from Law No 121 on Ensuring Equality*), and the practice of the European Court of Human Rights (see, *inter alia*, the case *D.H. and others vs the Czech Republic* para 82-84, para 177, case *Chassagnou and others vs France* para 91-92, *Timishev vs Russia* para 57) stipulates a special rule for the burden of proof in litigations on discrimination, in particular: the burden of proof lies on the defendant, when the petitioner brings evidence of a possible discriminatory treatment. Considering the allegations made in the complaint, in order to prove the discrimination in the form of harassment – the petitioners were supposed to present facts that would show:
 - a) undesired behaviour, which
 - b) leads to an intimidating, hostile, humiliating, degrading environment, which
 - c) aimed at injuring human dignity
- 6.3 Thus, the Council found that the materials attached to the file satisfy the burden of proof imposed on the petitioners, respectively, the burden to prove that the image of the monument does not represent an expression of sex-based harassment against women was on the defendant. To meet the burden, the defendant affirmed that their actions fall under the right to freedom of expression. The form of expression, chosen in this case, was the building of this monument and installing it in a public space.
- 6.4 The Council notes that this form of expression falls under the notion of harassment, defined in Article 2 of the Law on Equality No 121, in particular – “any unwanted behavior that leads to an intimidating, hostile, degrading, humiliating or offensive environment, with the purpose or effect to violate the dignity of a person based on the criteria stipulated in this Law. In this respect, the Council found that Article 8(2) of the Law No 5 of 09 February 2006 on Ensuring Equal Opportunities for Women and Men stipulates that “Any public speeches and materials that describe the image of a particular gender in the way that affects one’s dignity is inadmissible and must be addressed in accordance with the legislation”.
- 6.5 The Council underlines that, although the freedom of expression is one of the fundamental human freedoms, it still is not an absolute freedom. It can and should be narrowed down when the expression of an idea, information or opinion represents a non – tolerant and degrading expression, which violates human dignity, in our case the dignity of women. Freedom of expression carries duties and responsibilities, thus, in the context of religious opinions and beliefs, it may include an obligation to avoid, as far as possible, expressions that are gratuitously offensive to others and thus an infringement of their rights (§ 49 case of *Otto-Preminger-Institute vs. Austria* Application No 13470/87 of 20 September 1994).
- 6.6 Accordingly, the monument that the defendant is trying to install, in particular a women kneeling in front of a child, represents a form of expression of religious opinions and beliefs needs to be restricted, as it affects directly the dignity of women regardless of their religious beliefs. The Council does not question the legality of the pursued goal, especially the one of reducing the rate of abortions, but notes the lack of reasonable relation of proportionality between the means employed and the considered goal. The Council was not provided with enough arguments regarding the extent in which the kneeling woman would contribute to the reduction of abortion rate. Furthermore, the defendant failed to consider that the termination of pregnancy occurs also on medical indication, in cases when the woman’s life is at risk, or as a result of pressures put on woman, or in the respective situation, the monument in question does not justify its goal. On the contrary, this could put significant pressures on women who experienced such a situation, regardless of their will.
- 6.7 The Council explains, that displaying the kneeling woman in front of a child is an expression of harassment, because it exposes the woman to humiliation, creating an intimidating and

²¹ a women kneeling in front of a child who is standing and is trying to comfort her with his right hand

degrading environment for her, which damages her dignity and reproductive capacity as a woman.

- 6.8 The Council takes into consideration the statements made by the defendant, according to which such monuments that aim at rising awareness in society and at promoting their moral beliefs as regards abortion, in other countries are accepted without any critics or limits. The Council analyzed the images annexed as evidence to the case file (case file pages 50-59) and finds that none of the analyzed images features the image of a woman. These monuments feature images of divinities or parts of the human body, without putting the spotlight on woman and without exposing her in a humiliating way, that would damage her dignity.

Thus, on the basis of Articles 1, 2, 3, 13-15 of the Law on Equality No 121 of 25 May 2015, being empowered with making recommendations in order to ensure the instatement of the victim into his rights and to prevent such situation in the future,

THE COUNCIL, UNANIMOUSLY, DECIDES:

1. The monument entitled "Memorial to Unborn Children" represents an expression of sex-based harassment against women, as defined in Articles 1, 2, 3 of the Law on Equality No 121.
2. The defendant shall inform the Council within 10 days about the measures taken and/or planned measures to implement Item 2 of this Decision.
3. A copy of the current decision shall be communicated to the parties and will be disclosed to the public on www.egalitate.md.
4. This Decision can be challenged in the administrative court, according to the provisions of the Law on Administrative Courts No 793 of 10 February 2000.

Council members who attended the deliberation meeting:

Oxana GUMENNAIA – President

Doina-Ioana STRAISTEANU – Member

Andrei BRIGHIDIN – Member

Ian FELDMAN – Member