

**THE NATIONAL COUNCIL FOR COMBATING DISCRIMINATION**  
**Autonomous State Authority**  
**DECISION NO.149**  
**of 17.10.2007**

**File No.** 383/2009

**Petition No.** 8594 on 23.09.2009

**Petitioner:** Roma Center for Health Policies Sastipen

**Defendant:** [the name has been erased by the National Council for Combating Discrimination for confidentiality reasons]

**Object of the petition:** Medical services. The right to personal dignity. Ethnic origin (Roma).

**I. Name, domicile or residence of the parties**

**I. 1. Name, domicile or residence of the petitioners**

I. 1. 1. Roma Center for Health Policies Sastipen, with headquarters at Modoran Ene Street, No. 6, Bl. M94, Sc. 2, Ap. 95, Sector 5, Bucharest.

**I. 2. Name, domicile or residence of the defendant**

I. 2. 1. [the name has been erased by the National Council for Combating Discrimination for confidentiality reasons, for purposes of translation we will use "Dr. X"], whose mailing address is Târgu Neamț Hospital, with headquarters at Târgu Neamț, Ștefan cel Mare BLVD, No. 35, Neamț County.

**II. Object of the petition**

2. 1. The petition regards the differential treatment applied by the defendant, infringing upon the right to personal dignity of an ethnic Roma person, in the context of accessing medical services.

**III. Description of the alleged act of discrimination**

3. 1. Through the petition registered under No. 8594 on 23.09.2009, the petitioner notifies the N. C. C. D, showing that [the name has been erased by the National Council for Combating Discrimination for confidentiality reasons, for purposes of translation we will use "Mrs. Y"], person or Roma ethnic origin, two months pregnant, went to the Obstetrics and Gynaecology Department of the Târgu Neamț Hospital for a check-up; however, by the way she was approached and examined by the defendant, she was discriminated against, on grounds of her ethnic origin, and suffered a violation of her personal dignity.

**IV. Subpoena of parties**

4. 1. Following to the petition registered under No. 8594 on 23.09.2009, according to Art. 20 para. 4 of Governmental Ordinance no. 137/2000 on preventing and combating all

forms of discrimination, republished, the National Council for Combating Discrimination fulfilled the subpoena procedures.

4. 2. Through the Communication registered under No. 8969 of 08.10.2009, the petitioner was subpoenaed. Through the Communication registered under No. 8968 of 08.10.2009, the defendant was subpoenaed. The parties were subpoenaed within the time limit established by the Council, on 27.10.2009. The parties were not present at the hearing.

4. 3. Through Resolution No. 16 of 28. 10. 2009, an investigation was ordered at the Târgu Neamț City Hospital, Obstetrics and Gynaecology Department. The N. C. C. D. investigations took place on 10.11.2009 and 11.11.2009. The investigation report was attached to the file.

4. 4. Following the investigation, the N. C. C. D. decided upon a new day of hearings. The petitioner was subpoenaed through the Communication registered under No. 10467 of 25.11.2009. The defendant was subpoenaed through the Communication registered under No. 10468 of 25.11.2009. The parties were subpoenaed for the hearing on 12.01.2010, as it was established by the Council. The parties were not present at the hearing. Both parties submitted points of view, documentary evidence, and witness statements.

4. 5. Through Communications No. 373 and 379 of 14.01.2009, the Board set up a time limit for the parties to file submissions until 15.02.2010. The petitioner filed their submissions through Communication No. 1173 of 15.02.2010 and the defendant filed their submission through Communication 1174 of 15.02.2010.

4. 6. Between 28 November 2009 and 22 April 2010, the NCCD Board was unable to organise hearings. Following to the consecutive termination of 6 of the NCCD Board's members, the proceedings of appointment by the Parliament were initiated, according to Art. 22 para. 2 and Art. 24 of G. O. 137/2000 republished. New members of the NCCD Board were appointed through Parliament Decision No. 265 of 22.04.2010. File No. 383/2009 was settled on 07.07.2010.

## **V. Statements of the parties**

### **Statements of the petitioner**

5. 1. 1 The petitioner claims that on the date of 28 August 2009, Mrs. Y, two months pregnant, came to the hospital, where Dr. X was on duty. The doctor performed a physical examination and sent her home, "saying that there is nothing wrong" and "that's just the way you gypsies are". Still feeling ill between 28 and 30 August (over the weekend), on 31 August, around 11:00 a. m., Mrs. Y arrived again at the Târgu Neamț Hospital's Obstetrics and Gynaecology Department. The same doctor, Dr. X, was on duty. In the Doctor's office there was another patient, pertaining to the majority population, who was undergoing medical examination. After that examination was over, Mrs. Y approached the Doctor, claiming that she was feeling ill, but the Doctor refused to see her, saying that "Today I don't talk to anyone". Deciding to go home, the patient observed that there were several patients pertaining to the majority population that were next to the Doctor's office, waiting to be examined. According to the petitioner, these patients entered Dr. X's office and were examined by him.

5. 1. 2. That evening, around 21:00 hours, Mrs. X, together with her husband and mother, arrived once more at the Obstetrics and Gynaecology Department of the same hospital, where the defendant was still on duty. When he saw them, the Doctor said the following: “Go home; I don’t want to see you around here anymore”. In response to the victim and her mother’s insistent requests, the Doctor sent a nurse who gave the patient an injection. Mrs. Y claims that the injection was performed on her while she was standing near the radiator, instead of being seated.

5. 1. 3 The petitioner shows that on 1 September 2009, Mrs. Y went to a Private Practice clinic from Târgu Neamț, for an ultrasound scan, in order to ascertain the reason why she was feeling ill. The ultrasound scan highlighted the existence of an intrauterine pregnancy whose “development was stopped”. Taking into consideration the result of the ultrasound scan and the Doctor’s advice to undergo a gynaecologic examination, the patient went along with her husband to the Târgu Neamț Hospital’s Obstetrics and Gynaecology Department, where the defendant was on duty. Doctor X told the husband that the patient was fine and that he was probably tired. Mrs. Y and her husband returned to the Private Practice. She was referred to the Emergency room, where she was received and administered a perfusion. Afterwards, she returned to the Doctor’s office. In the Hospital yard, she met with the defendant.

5. 1. 4. On 2 September, feeling ill, the patient went again to the Doctor’s office. Initially, the defendant said: “What’s wrong? There’s nothing wrong with you. Go home, or else I’ll use a beating club on you”. There were also SASTIPEN members on the site. Learning this, the Doctor received the patient, dispensed a prescription, but was heard telling the medical assistants: “don’t welcome gypsies anymore. If you see them on the stairs, strike them with the broom.”

### **Statements of the defendant**

5. 2. 1. The defendant claims that the medical services were provided to Mrs. Y only on 28 August 2009 and 2 September 2009. On 28 August 2009, a person of Roma ethnic origin came in for a medical examination, without any referral or ID for identification and registration. He gave her a check-up and an ultrasound scan and told her that she had an 8 week-old pregnancy and suffered from Hyperemesis gravidarum. He dispensed a prescription for Uscosin - suppository and Metroclopramid tablets, and the patient told him that her name was Mrs. Y.

5. 2. 2. On 1 September she went to see [the name has been erased by the National Council for Combating Discrimination for confidentiality reasons, for purposes of translation we will use “Dr. Z”], who discovered an intrauterine pregnancy whose “development was stopped”. During the same day, at 11:50 she went to the Emergency room and following the relevant medical examination, she was diagnosed with abdominal pain and was recommended to receive a perfusion with serum, Metroclopramid and Nospa. The patient left the Emergency room in an overall good condition, not requiring further hospitalization.

5. 2. 3. The defendant claims that on the date of 2 September 2009, a group of 11 Roma ethnic men and women arrived at the Hospital Department and they made such a big scene, by uttering insults towards him and the Department’s medical staff, so that all the patients came out of their rooms. The group pressured the defendant to examine two women of Roma origin pertaining to the group. He refused, arguing that these are not the conditions

in which he practices medicine. Receiving more pressure from the family and the entourage, the Doctor called Security.

5. 2. 4. The defendant claims that all the patients that have been found pregnant are admitted for further laboratory investigations, irrespective of ethnic origin or term of pregnancy.

5. 2. 5. According the aforesaid, the defendant considers that he did not restrict ethnic Roma women's access to Obstetrics and Gynaecology medical services in the Târgu Neamț Hospital.

## VI. The facts and the law

6. 1. The NCCD Board refers to the European Court of Human Rights's case law regarding Article 14, on the prohibition of discrimination, which held that **discrimination implies a difference in treatment, without an objective and reasonable justification, applied to persons placed in relatively similar situations** (see the Case of *Orsus and others v. Croatia*, Judgement of 16.03.2010, and the Case of *Willis v. United Kingdom*, No. 36042/97, § 48, ECHR 2002-IV, Case of *Okpiz v. Germany*, No. 59140/00, § 33, 25 October 2005). Article 14 does not prohibit the High Contracting Parties from treating certain groups differently, in order to correct factual inequalities. Nevertheless, in some circumstances, **the actual absence of a differential treatment represents a violation of Article 14** (see *Case "relating to certain aspects of the laws on the use of languages in education in Belgium"* v. *Belgium*, § 10; Case of *Thlimmenos v. Greece*, no. 34369/97, §44, ECHR 2000-IV; Case of *Stec and others v. United Kingdom* [GC], No. 65731/01, §51, ECHR 2006-VI). The High Contracting Parties benefit from a certain margin of appreciation in order to determine if and to what extent the differences in analogous or comparable situations are able to justify differences in legal treatment applied.

6. 2. The European Court of Human Rights held that **a discrimination might occur when a certain policy or general measure has disproportionately prejudicial effects on a group of people, even if it was not specifically aimed or directed at that group** (see the Case of *D. H. and others v. The Czech Republic*, 13 November 2007, the Case of *Hugh Jordan v. United Kingdom*, No. 24746/94, §154, 4 May 2001, the Case of *Hoogendijk v. The Netherlands* (dec.), No. 58461/00, 6 January 2005 ). At the same time, the Court considered that a **potential discrimination prohibited by the Convention might arise from a factual situation** (the Case of *Zarb Adami v. Malta*, No. 17209/02, §76).

6. 3. The Court of Justice of the European Union considered **the principle of equality as a general principle of the European Union law. In the area of European Union law, the principle of equality excludes that comparable situations be treated differently and different situations be treated in the same way, unless such treatment is objectively justified.** (see *Sermide SpA v. Cassa Conguaglio Zuccheri and others*, Case 106/83, 1984 ECR 4209, para. 28; *Koinopraxia Enoseon Georgikon Synetairismou Diacheiriseos Enchorion Proionton Syn PE (KYDEP) v. Council of the European Union and Commission of the European Communities*, Case C-146/91, 1004 ECR I-4199; Case C-189/01 *Jippes and others* 2001 ECR I-5689, para. 129.; Case C-149/96 *Portugal v. Council* 1999 ECR I-8395, para. 91).

6. 4. The International Convention on the Elimination of All Forms of Racial Discrimination provides in **Art. 5, letter e, pt. 4** that "In compliance with the fundamental obligations laid down in Article 2 of this Convention, States Parties undertake to prohibit and

to eliminate racial discrimination in all its forms and to guarantee the right of everyone, **without distinction as to race, colour, or national or ethnic origin**, to equality before the law, notably in the enjoyment of the following rights: (...) e) Economic, social and cultural rights, in particular: (...) 4) The right to **public health, medical care**, social security and social services;...”

6. 5. The Convention on the Elimination of All Forms of Discrimination against Women stipulates in Art. 12 that “States Parties shall take all appropriate measures to **eliminate discrimination against women in the field of health care** in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning. (...) **States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary** (...).

6. 6. The Revised European Social Charter proclaims the right to social and medical assistance in Art. 13. According to this Article, “With a view to ensuring the effective exercise of the right to social and medical assistance, the Parties undertake: 1. to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted **adequate assistance, and, in case of sickness, the care necessitated by his condition**; 2. to ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights; 3. to provide that everyone may receive by appropriate public or private services such **advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want**; 4. to apply the provisions referred to in paragraphs 1, 2 and 3 of this article **on an equal footing with their nationals to nationals of other Parties lawfully within their territories**, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11 December 1953.”

6. 7. According to Article 2, paragraph 1, of the Governmental Ordinance (G.O.) No. 137/2000, on preventing and sanctioning all forms of discrimination, republished, “discrimination represents any distinction, exclusion, restriction or advantage, based on the race, nationality, ethnicity, language, religion, social category, beliefs, sex or sexual orientation, age, disability, chronic non-contagious illness, infection with HIV or the belonging to a disadvantaged category or any other criteria, which has as goal or effect the restriction or elimination of acknowledgement, of use or exercise, in equal conditions, of the human rights and fundamental freedoms recognized by the law, in the domain of politics, economy, society, culture or in any other domain of public life.” At the same time, Article 2, paragraph 3 of G.O. No. 137/2000, on preventing and sanctioning all forms of discrimination, republished, provides that “It is deemed to be discriminatory, according to the present Ordinance, apparently neutral provisions, criteria or practices that disadvantage certain persons, based on the criteria set out in para. 1 as opposed to other persons, unless those provisions, criteria or practice are objectively justified by a legitimate aim and the means for reaching that aim are appropriate and necessary.” Art. 2 para. 5 reads that “It is considered harassment and is sanctioned as an administrative offence, any behaviour on grounds of race, nationality, ethnicity, language, religion, social status, beliefs, gender, sexual orientation, membership of a disadvantaged category, age, disability, refugee status or asylum seeker or any other criterion which leads to creating an intimidating, hostile, degrading or offensive environment.”

6. 8. Taking into consideration the statements of the parties and the written evidence submitted to the file, the Board notes that on the date of 28 August 2009, Mrs. Y, being two months pregnant, arrived at the Hospital’s Obstetrics and Gynaecology

Department, where the defendant gave her a medical exam and sent her home, telling her that there was nothing wrong, that “that’s just the way you gypsies are!”. On the morning of 31 August, feeling ill, Mrs. Y arrived again at the hospital, attended by her husband [the name has been erased by the National Council for Combating Discrimination for confidentiality reasons, for purposes of translation we will use “Mr. Y”]. After a patient (AN of Romanian nationality) had been examined, Mrs. Y told the defendant that she is feeling ill and asked him to examine her. He claimed that “Today I don’t talk to anyone”. However, other patients waiting outside the Doctor’s office were examined (AN, on the same facts, the declaration of Mr. Y). In the evening of the same day, Mrs. Y went once more to the hospital, attended by her mother, [the name has been erased by the National Council for Combating Discrimination for confidentiality reasons, for purposes of translation we will use “Mrs. T”], and her husband, Mr. Y. When the defendant saw them, he said “Go home, I don’t want to see you around here anymore”. However, following the pleas of the patient and her family, the defendant sent over a medical assistant who gave Mrs. Y an injection, while the patient was standing next to a radiator.

6. 9. On the morning of 1 September 2009, Mrs. Y went over to a Private Practice office in order to ascertain her state of health and get an ultrasound scan. The scan indicated the existence of an intrauterine pregnancy whose “development was stopped” (see the laboratory test report No. 2616 of 01.09.2009, signed by Dr. Z, specialist doctor). The doctor recommended a specialty consult, therefore Mrs. Y and her husband went to the hospital. After being pressured by the husband to offer Mrs. Y a physical examination, the defendant told him to go home, that maybe “he is tired” and “there is nothing wrong” with Mrs. Y. (AN the couple’s statement, attached to the file). Subsequently, the couple returned to the Private Practice clinic, where they were referred to the Emergency Room of the City Hospital. At the Emergency Room, Mrs. Y was taken in and administered a perfusion. The same day, Mr. and Mrs. Y met with the defendant, who told Mr. Y that “You are asking me to help you. But your father in law threatens that he will call Bucharest”.

6. 10. On the date of 2 September 2009, feeling ill, Mrs. Y returned to the hospital, accompanied by her mother, [the name has been erased by the National Council for Combating Discrimination for confidentiality reasons, for purposes of translation we will use “Mrs. T”] and her aunt, [the name has been erased by the National Council for Combating Discrimination for confidentiality reasons, for purposes of translation we will use “Mrs. S”]. The President of Roma Centre for Health Policies Sastipen, [the name has been erased by the National Council for Combating Discrimination for confidentiality reasons, for purposes of translation we will use “Mr. P”] was also on the site. After waiting for 10 minutes, when the defendant saw Mrs. Y, he said “What’s wrong? There’s nothing wrong with you. Go home, or else I’ll use a beating club on you”. After Mrs. Y unsuccessfully asked to be examined, she mentioned that there is also somebody from Bucharest present. The defendant replied “Wait until I call the Police”. Subsequently, he examined Mrs. Y, dispensed a prescription and told the medical assistants “don’t welcome gypsies anymore. If you see them on the stairs, strike them with the broom.” (AN see also Mrs. Y’s statements regarding this fact).

6.11. The Board notes that, in the defendant’s opinion, the medical services were provided to Mrs. Y only on 28 August and 2 September. On 28 August she came to the hospital without any referral from her family physician or ID, for identification and registration. He examined her and informed her that she had an 8 week old pregnancy and suffered from Hyperemesis gravidarum. He dispensed a prescription and was told that her name was Mrs. Y. He instructed her to return to the hospital on 31 August. This person went

on 31 August to the family physician [the name has been erased by the National Council for Combating Discrimination for confidentiality reasons, for purposes of translation we will use “Dr. F”], who registered her on the basis of the prescription. In this context, the family physician did not issue a referral for hospitalization and did not recommend any other treatment (the information result from the medical records of Mrs. Y, whose family physician is Dr. F).

6. 12. On the date of 1 September 2009, Mrs. Y underwent an ultrasound scan procedure provided by Dr. Z, who dispensed a prescription similar to that of the defendant, but without any referral for hospitalization. The defendant states that “It is interesting that, although she did not request hospitalization neither from the family physician, nor from the obstetrics and gynaecology specialist doctor, in the same day of 1 September 2009, she came to the Emergency Room (where she did not mention that she was diagnosed with pregnancy). Following the examination provided at this level, she is diagnosed with abdominal pain and is recommended to receive a perfusion with serum, Metrocloramid and Nospa. Around 13:30 and 14:00, she leaves the Emergency Room in an overall good state and does not request hospitalization.”

6. 13. On the date of 2 September 2009, the defendant shows that a group of 11 ethnic Roma people appeared at the Hospital Department and started a scandal by uttering insults towards him and pressuring him to examine two Roma women. He refused to exercise his profession in such conditions and called the Hospital Security. He examined the two women, and one of them, probably Mrs. Y, wanted to know if the embryo was moving. The defendant replied that it was too early to know, because the pregnancy is in a too early stage for this to be ascertained, and instructed her to return for further laboratory tests and hospitalization. Finally, the defendant shows that Mrs. Y came to the Hospital Section on 2 occasions, never requested hospitalization or laboratory tests and did not return repeatedly to the Hospital Department.

6. 14. Taking into account the aspects of the petition, as it was formulated, the Steering Board refers to the provisions of Art. 5 para. 5 of G. O. No. 137/2000, republished. According to Art. 2 para. 5, “It is considered harassment and is sanctioned as an administrative offence, any behaviour on grounds of race, nationality, ethnicity, language, religion, social status, beliefs, gender, sexual orientation, membership of a disadvantaged category, age, disability, refugee status or asylum seeker or any other criterion which leads to creating an intimidating, hostile, degrading or offensive environment.” Harassment is a form of discrimination, introduced by the Romanian Legislator in the process of transposing Council Directive 2000/43/CE of 29 June 2000, which implements the principle of equal treatment between persons irrespective of racial or ethnic origin, published in the Official Journal of European Communities L180 of 19 July 2000.

6. 15. On this matter, we note that, in the area of non-discrimination legislation, following the transposition of the EU acquis, in order for a situation of harassment to exist, there are certain constitutive elements that have to be met cumulatively. Thus, the act of harassment represents a behaviour that can take different forms. The legal text contains the phrase “any behaviour”. The term “any behaviour” indicates the Legislator’s intention to encompass a wide range of behaviour, and thus it is not a restrictive phrasing, allowing different interpretations in practice, that vary from case to case, taking the form of messages expressed through words, gestures, acts and facts, etc. The motive or the cause of the behaviour is conditioned by an inherent criterion, which is expressly stated by the Legislator, in an open-ended list, taking into consideration the fact that the legal text shows, in an enumeration of a decisive nature, the criteria of “race, nationality, ethnicity, language, religion, social status, beliefs, gender, sexual orientation, membership of a disadvantaged

category, age, disability, refugee status or asylum seeker”. The open-ended nature is implied by the phrase “any other criterion”, added to the criteria expressly listed in Art. 2 para. 5. The phrase “any other criterion”, practically offers the possibility of taking into consideration any other element unspecified by the law, but materialized as a determining fact in realising the form of discrimination known as harassment.

6. 16. Behaviour based on any of the criteria stipulated by the law “leads to creating an intimidating, hostile, degrading or offensive environment.” This constitutive element of harassment allows taking into consideration all those behaviours that, even if they were not acted out with intention, still have the effect of creating an environment that is “intimidating, hostile, degrading or offensive”.

6. 17. The inclusion of harassment as a form of discrimination in the EU acquis, which is subsequently transposed into national legislation, is very important. Discrimination does not manifest itself *per se*, solely as a legal provision or practice, but also as behaviours that create an impact on the environment, and vary from physical violence and racist, sexist, xenophobic, etc. remarks or statements, all the way to general exclusion. This form of discrimination affects, in a psychological and emotional way, the dignity of persons pertaining to different minorities (see “A comparison between the EU Racial Equality Directive and the Starting Line” in I. Chopin and J. Niessen, National Laws of the EU Member States and Accession States, 2001, p. 26, 27).

6. 18. Taking into consideration the aforementioned, in conjunction with the petition and the evidence submitted, the Board takes notice of the statements of the petitioner and the witnesses, the statements of the defendant and of the persons indicated by him, the written evidence (medical papers, observation sheets, prescriptions, etc.). At the same time, the Board notes that the petitioner also submitted the reply received from the Neamț College of Physicians. As to the law regarding the burden of proof in cases of discrimination, stipulated in Art. 20 para. 6 of G. O. No. 137/2000, republished, and taking into consideration its own jurisprudence (see Decision No. 180 of 17.07.2007, Decision No. 440 of 30.07.2008), the Board stated that, according to this principle, the interested party, in this case the petitioner, has to indicate sufficient elements that create the assumption of an existing act of discrimination. These elements can be considered evidence supporting the existence of a differential treatment (exclusion, restriction, preference, distinction) applied to the petitioner, directly or indirectly. Nevertheless, it must be said that, according to Art. 20 para. 6, the obligation imposed on the petitioner entails “proving the existence of certain facts”, which places us in the context of the general principle of the burden of proof, which imposes upon the petitioner the obligation of proving the facts. However, the Legislator stipulates an exception regarding “the facts that allow the assumption of an existing fact of direct or indirect discrimination”, as they are defined by G. O. No. 137/2000, republished. This aspect imposes a procedural obligation upon the petitioner, to support his or her claims by evidence of facts able to trigger the presumption of differential treatment applied. Subsequently, the person against whom the petition was filed has the obligation to prove that the facts do not amount to an act of discrimination. Therefore, it can be undoubtedly ascertained that this is an exception from the general rules of the burden of proof, since the petitioner is not obliged to prove the lack of justification for the differential treatment (distinction, exclusion, restriction, preference).

6. 19. Certainly, it must be stressed out that the obligation does not refer to proving a negative fact, but an actual positive fact regarding an objective and reasonable justification.



In the absence of an “objective” explanation, capable of overthrowing the presumption that a prohibited criterion lays at the basis of the differential treatment, a jurisdiction, or any competent authority, is entitled to find the existence of an act of discrimination. Applying the principle of the reversed burden of proof is similarly contextualized by the European Court of Justice, which shows that when the person who claims to have been discriminated is able to establish facts that allow the presumption of the existence of a direct or indirect discrimination, the actual application of the principle of equality would impose the burden of proof upon the person accused of discrimination, who would have to prove that there has been no violation of the present principle. In this context, the defendant could challenge the existence of such a violation, establishing by any legal means, that the treatment applied to the person who claims to have been discriminated is objectively justifiable and different from any discrimination based on a prohibited criterion. (On the same subject, see the jurisprudence of the European Court of Justice, Case of Bilka Kaufhaus, para. 31; Case C-33/89 Kowalska [1990] ECR I-2591, para. 16; Case C-184/89 Nimz [1991] ECR I-297 para. 15; Case C-109/88 Danfoss [1989] ECR 3199, para. 16; Case C-127/92, Enderby [1993] ECR 673, para. 16).

6. 20. From the claims of the petitioner and the written evidence submitted to the file, the Board holds that the ethnic origin of the petitioner is not contested; on the contrary, it is recognized by all the parties involved as being a well known fact. The Board notes that, taking into consideration the petitioner’s state of health, travelling and appearing before the Doctor’s Office of the Piatra Neamț City Hospital’s Obstetrics and Gynaecology Department, on the dates of 28 August, 31 August, 1 September and 2 September 2009, the behaviour is imputable to the defendant, namely the means through which he approached the petitioner’s situation, and the method used for providing healthcare. The Board considers that the issues raised by the petitioner, in terms of the way in which Mrs. Y and her husband were treated by the defendant, shed light upon the presumption regarding facts that are capable of affecting personal dignity, based on ethnic origin. The presumptions entailed by such facts are directly connected to the way in which the defendant addressed the victim, starting from 28 August, when the latter was examined and told that there is nothing wrong with her, that “that’s just the way you gypsies are”; then on 31 August when she was told that “Today I don’t talk to anyone” and “Go home, I don’t want to see you around here anymore”, but subsequently being examined; 1 September, when the defendant, after being pressured by the husband to examine the petitioner, said “maybe you are tired” and that there is “nothing wrong” with the petitioner; and 2 September when the defendant stated that “There’s nothing wrong with you. Go home, or else I’ll use a beating club on you”, proceeded to examine the petitioner and was heard telling the medical assistants: “don’t welcome gypsies anymore. If you see them on the stairs, strike them with the broom.” The Board notices that, basically, the defendant challenges the statements of the petitioner, claiming that he actually provided healthcare services to the petitioner, but only on the dates of 28 August and 2 September 2009. At the same time, the defendant’s statements are based on the lack of medical papers regarding the referral from the family physician or the specialist doctor, the lack of an ID, respectively the lack of an express request from the petitioner for hospitalization and laboratory testing, which would allegedly amount to an objective and reasonable justification for his behaviour.

6. 21. The Board holds that, according to Art. 373 of Law No. 95 of 14 April 2006 regarding the Reform in the Health Sector, modified and amended, **the medical profession** has the primary **purpose** of ensuring health status by preventing illness, promoting, maintaining and recovering the individual and the community’s health. In order to reach this aim, all throughout the exercise of the profession, **the doctor has to show availability**, correctness, devotion, loyalty and **respect towards the human being**. According to Art. 373 para. 3 of Law No. 95/2006, “**Decisions and judgements of a medical nature** will be made

considering the interest and rights of the patient, generally accepted medical principles, non-discrimination between patients, **respect for human dignity, principles of the medical ethics and deontology**, care towards the health of the patient and the public.” At the same time, according to Art. 652, para. 2 of Law no. 95/2006, “The medic, the dentist, the medical assistant/midwife **cannot refuse to provide medical assistance/care** based on the **criteria** of ethnic origin, religion, sexual orientation, or any other discriminating criteria prohibited by law.”

6. 22. The Medical Code of Deontology, adopted by the Romanian College of Physicians and published in the Romanian Official Journal No. 418 of 18 May 2005, provides, in Art. 3, that “The human health is the supreme aim of the healthcare. **The doctor’s obligation consist in** defending the physical and mental health of humans, relieving the suffering, **respecting the life and dignity of the person, without any discrimination** based on age, sex, race, ethnic origin, religion, nationality, social status, political ideology or any other ground, during peace, and also during war. The respect owed to the persons does not cease after their death.” According to Art. 4 and Art. 5, “When exercising the profession, the doctor gives priority to the interests of the patient, which outweigh any other interests. When exercising the profession, the doctor is **bound to respect the fundamental human rights** and the ethical principles of bio-medicine”.

6. 23. Law No. 46 of 21 January 2003, published in the Romanian Official Journal No. 51 of 29 January 2003 stipulates the rights of the patient. According to Art. 3 of Law No. 46/2003, “**The patient has the right to be respected** as a human being, **without any discrimination**”.

6. 24. Taking note to these regulations that are specifically applicable to the medical profession, the Board holds that within the exercise of this profession, the respect towards personal dignity, in close connection with the principle of non-discrimination, represents an essential characteristic that accompanies the fulfilment of medical acts. The Legislator stipulated these aspects, viewing them as a fundamental part of the profession, while providing that “all throughout the exercise of the profession” the medic has to show availability, correctness, devotion, loyalty and respect, and the medical decisions will be made specifically, among others, with respect to human dignity and non-discrimination. In order to reinforce these principles, the Statutory Bodies of the medical profession adopted the Code of Deontology, which reiterates that the obligation of the doctor consists in the respect for human life and dignity, without any discrimination, and when exercising the profession, the doctor is bound to respect the fundamental human rights. In the same line of thought, the Legislator stipulated the rights of the patient in a separate legislative act, reaffirming the right to be respected as a human being, without any discrimination. Hence, what counts in the present case is in what way the behaviour of the defendant interferes with the right to personal dignity, and if this interference is likely to amount to an act of discrimination, according to Art. 2 of G. O. No. 137/2000, republished.

6. 25. In the view of the Board, with reference to the evidenced submitted, the presumptions held in the case, regarding the manner in which the defendant addressed the petitioner, Mrs. Y, considering her ethnic origin, are not overthrown in order to allow a reasonable and objective justification for the statements attributed to the defendant in the period between 28 August and 2 September 2009. These claims were essentially denied. Moreover, the claims of the defendant refer to the fact of providing health care services in spite of the relevant legal provisions, showing that these services were provided although the patient did not have a either referral from the family physician or the clinic, nor an ID. At the same time, it is shown that the family physician did not issue a referral for hospitalization on 31 August 2009. To the same effect, the defendant finds relevant the fact that, although the petitioner did not request hospitalization neither from the family physician, nor from the

specialist doctor, she appeared on 1 September 2009 at the Emergency Room. Actually, the defendant concludes that the petitioner never requested hospitalization or laboratory tests. Moreover, it is claimed that a tense situation had been created by the causing of a scandal and use of strong language, amounting to pressure being exerted on him.

6. 26. Considering these arguments, the Board refers to the European Court of Human Rights. In the Case of D. H. and others v. The Czech Republic and the Case of Oršuš and others v. Croatia, by the Judgement of 13.11.2007, respectively 16.03.2010, the Grand Chamber of the European Court of Human Rights held the violation of Art. 14 (prohibition of discrimination) and Art. 2 of Protocol No. 1, in the situation of differential treatment applied to Roma children in the area of education, by placing them in separate classes in the special schools for disabled children and respectively in the General Education System. In both cases, the European Court of Human Rights considered that it cannot be ignored that the applicants are of Roma ethnic origin, and therefore the specific status of the Roma population must be taken into account. The Court noted that as a result of their history the Roma have become a specific type of disadvantaged and vulnerable minority. This situation of vulnerability entails that a special attention must be paid to the different needs and lifestyle when establishing legal frameworks and making decisions in particular cases concerning the members of this minority (see Judgement of 13.11.2007, para. 182, Judgement of 16.03.2010, para. 147). In these two cases before the European Court, an issue arose regarding the consent of Roma parents for enrolling their children in the special classes, but the Court considered that this consent was not informed and declared that it was not satisfied that the parents of the Roma children, who were members of a disadvantaged community and often poorly educated, were capable of weighing up all the aspects of the situation and the consequences of giving their consent (see Case of D. H. and others vs. the Czech Republic, Judgement of 13.11.2007, para. 202-203, Case of Orsus and others v. Croatia, Judgement of 16.03.2010, para. 178-179).

6. 27. Regarding to the claims of the defendant as to the scandal caused in the hospital premises, uttering of strong language or exertion or pressure, the Board considers that these aspects pertain to the area of public safety and represent facts that can be ascertained and punished distinctively by the Police. Such actions, as long as they are ascertained by the competent authorities, must be punished. However, these facts are not attributable to the petitioner, Mrs. Y. However, regarding the fact that the petitioner, Mrs. Y, did not have a referral from the family physician or clinic, the Board notes that these claims can be held as being objective. Nevertheless, the fact that she never requested hospitalization or underwent laboratory testing, neither at the family physician's office nor at the clinic or Emergency Room, rises the question whether such a claim is relevant to a person found in a special medical situation (pregnancy), who is part of the Roma community and is in a situation of socio-economic or educational disadvantage as opposed to the majority of the population. The same question can be asked of the person who pertains to the majority of the population, who does not have the knowledge in order to assess their own medical situation or particularly, the necessity of hospitalization or medical testing that should be expressly requested to an attending physician or an emergency service. Such argumentation actually challenges any patient's right to be appropriately informed regarding the medical care he or she is being provided, and which should be "at the highest standard available to the society", according to Law No. 46/2003.

6. 28. Referring to the particular elements of the present case and the evidence submitted and analysed, the Board considers that the effect triggered by the means employed by the defendant in order to address the petitioner's situation, uttering of statements that, explicitly or implicitly, were related to the ethnic origin known by the defendant, led to the creation of an intimidating or offensive environment, according to Art. 2, para. 5 of G.O. No. 137/2000, republished. The Steering Board has reaffirmed in many cases throughout its

jurisprudence, that the right not to be subjected to discrimination represents one of the fundamental rights in a democratic society, and the right to equality has a direct application, given that discrimination itself is an offence towards human dignity. Frequently, the discriminating treatment also aims at humiliating, degrading or interfering with the dignity of the discriminated person, particularly if this treatment is applied in public. Treating someone less favourably based on inherent criteria suggests, first of all, contempt or lack of respect towards their personality.

6. 29. From this point of view, it is important that, when exercising the medical profession, the doctor should be exigent in the relationship with any potential patient, with regard to the way in which information is being communicated, and should have a flawless physical, mental and emotional behaviour towards the patients, respecting their dignity and the principle of non-discrimination safeguarded by the Romanian Constitution and G. O. No. 137/2000, republished, which provides in art. 1 that “(1) In Romania, democratic and social state, subject to the rule of law, the human dignity, rights and liberties of the citizens, the free development of human personality, are supreme values and are guaranteed by law. (2) The principle of equality between citizens, of exclusion of privileges and discrimination are guaranteed...” Any natural or legal person is under the obligation to respect the principles stated in para. (2).

As to the aforesaid, according to Article 20 para. (2) of G.O. No. 137/2000, on preventing and sanctioning all forms of discrimination, republished, by **solid vote** of the members present at the hearing,

#### **THE STEERING BOARD HOLDS:**

1. The aspects found regarding the way in which the defendant approached the petitioner, Mrs. Y, considering her ethnic origin, fall under the provisions of Art. 2, para. 5 of Governmental Ordinance No. 137/2000, on preventing and sanctioning all forms of discrimination, republished;

2. The sanctioning of the defendant, Dr. X, with a written warning, according to Art. 2 para. 5 and Art. 26 para. 1 of Governmental Ordinance No. 137/2000, on preventing and sanctioning all forms of discrimination, republished;

3. Closing the file;

4. The parties shall receive a reply concerning the decision;

5. A copy of the decision shall be sent to the parties: Roma Center for Health Policies Sastipen, with headquarters in Modoran Ene Street, No. 6, Bl. M94, Sc. 2, Ap. 95, Sector 5, Bucharest; Dr. X, whose mailing address is Târgu Neamț Hospital, with headquarters at Târgu Neamț, Ștefan cel Mare BLVD, No. 35, Neamț County.

**VII. Payment of the fine: not relevant.**

**VIII. Appeal and time limits for appeal**

The present decision can be appealed before the Administrative Appeal Court within the legal time limit according to *G.O. No. 137/2000, on preventing and sanctioning*

*all forms of discrimination*, as well as according to the provisions of *Administrative Appeal Law No. 554/2004*.

**The members of the Steering Board present at the hearing:**

ASZTALOC CSABA FERENC - President	[Signature]
GERGELY DEZIDERIU – Member	[Signature]
HALLER ISTVAN – Member	[Signature]
JURA CRISTIAN - Member	[Signature]
NIȚĂ DRAGOȘ TIBERIU - Member	
PANFILE ANAMARIA – Member	[Signature]
TRUINEA ROXANA PAULA – Member	[Signature]
VASILE ALEXANDRU VASILE – Member	[Signature]

**Date of drafting:** 30.07.2010

Decision Drafted. G. D. Drafted up. A. P., 3 copies.

**Note:** The Decisions issued according to the law by the Steering Board of the National Council for Combating Discrimination, which are not appealed to the Court of Administrative Appeal within the legal time limit, according to *G.O. No. 137/2000, on preventing and sanctioning all forms of discrimination*, as well as according to the provisions of *Administrative Appeal Law No. 554/2004*, are enforceable.