

**THE NATIONAL COUNCIL FOR COMBATING DISCRIMINATION
Autonomous State Authority**

**DECISION NO.649
of 04.12.2008**

File No. 731/2008

Petition No. 13.897 on 29.10.200

Petitioner: Antidiscrimination Alliance of All Fathers

Plaintiff: “Grigore Alexandrescu” Emergency Clinical Hospital for Children

Object of the petition: discrimination of fathers by prohibiting hospital admission together with their ill children

I. Name and domicile of the parties

I. 1. Name and headquarters of the petitioner

I. 1. 1. Antidiscrimination Alliance of All Fathers, Istria Street No. 3, Bl. 41, Sc. 1, Ap. 32, Sector 3, Bucharest

I. 2. Name and headquarters of the defendant

I. 2. 1. “Grigore Alexandrescu” Emergency Clinical Hospital for Children, Iancu de Hunedoara BLVD No. 30-32, Sector 1, Bucharest.

II. Object of the petition

The petitioner shows that on the defendant’s notice board there is a notice stating that “*children up to 3 years of age are admitted along with their mothers*”, “*Mother - not relatives*”.

III. Description of the alleged act of discrimination

The petitioner considers that some of the hospitals’ practices of admitting only mothers with their ill children is discriminatory. The petitioner shows that on the defendant’s notice board there is a notice signed “*Hospital management*”, according to which “*children up to 3 years of age are admitted along with their mothers*”, “*Mother - not relatives*”

IV. Subpoena of parties

The parties were subpoenaed for 04/11/2008 (file pages 4 and 7).

The parties were not present at the hearing of 04/11/2008.

At the request of the petitioner, the parties were subpoenaed again for 25/11/2008.

The petitioner was present at the hearing of 25/11/2008.

The subpoena procedure was fulfilled according to the law.

V. Statements of the parties

In the petition *No. 13.897/29.10.2008* registered at the National Council for Combating Discrimination (further referred to as NCCD), the petitioner considers that some of the hospitals' practices of admitting only mothers with their ill children is discriminatory. It shows that on the defendant's notice board there is a notice signed "*Hospital management*", according to which "*children up to 3 years of age are admitted along with their mothers*", "*Mother - not relatives*".

They submit a photo of the notice as evidence (file page 2).

The defendant, in *Communication No. 3.711 of 04/11/2008*, shows that:

- the paediatric hospitals have no separate circuits for fathers and mothers, especially bathrooms and showers;
- the paediatric hospitals have beds approved for attending mothers;
- there are cases of breastfeeding, and it is immoral and embarrassing for the mothers in such situations to have a man present in the room;
- there are medical procedures in which mothers are actively involved and children accept these procedures more willingly under the supervision of their mothers;
- there are more women working as medical assistants in the medical system;
- it is not the only hospital in the country that impose such a rule.

VI. The facts and the law

As to the facts, the Steering Board bears in mind that the defendant admits refusing to hospitalize male persons, invoking justifications for this differentiation.

As for the law, the Steering Board holds the following:

The Romanian Constitution, in Article 16, para. 1 guarantees the right to equality: "*Citizens are equal before the law and public authorities, without any privilege or discrimination.*"

Protocol No. 12 to the European Human Rights Convention, in Article 1, provides the general prohibition of discrimination: "*The enjoyment of any right set forth by law 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.*"

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.*"

Art. 2, para. (4) of **G.O. No. 137/2000**, on preventing and sanctioning all forms of discrimination, republished, reads as follows: "*Any behaviour, active or passive which,*

through the effects it generates, unduly favours or disadvantages, or subjects a person, a group of persons or a community to an unjust or degrading treatment, as opposed to other persons or communities, triggers administrative liability in conformity with the present ordinance, if it does not fall under the provisions of criminal law.”

According to **Article 10 of G.O. No. 137/2000**, on preventing and sanctioning all forms of discrimination, republished, *“In conformity with the present ordinance, it is considered an administrative offence, if the fact does not fall under the criminal law provisions, the discrimination of a natural person, a group of persons, because of their belonging or the persons who administer the legal person belonging to a certain race, nationality, ethnic group, religion, social category or a disadvantaged category, respectively on the basis of personal beliefs, age, sex or sexual orientation of the persons concerned, by means of (...)*

b) refusing the access of a person or groups of persons to public health care services - choosing the family physician, medical assistance, health insurance or other health care services; (...) h) refuse to provide, to a person or groups of persons, certain rights or facilities.”

6. 1. With reference to the case-law of the National Council for Combating Discrimination, as it has been stated before (see **Decision No. 278 of 22/04/2008**, **Decision No. 631/13.11.2008**), after analysing the **Ministry of Health and Family (M. H. F.) Order No. 178/2006**, the Steering Board does not find the existence of any distinctions based on gender, between persons who are in comparable situations, which have as aim or effect the violation of a right provided by law. Thus, **Order No. 1781 of 28 December 2006 for approving Methodological Regulations applicable to the Framework Agreement governing the conditions for providing medical assistance through the social health insurance system, for the year 2007**, published in the **Romanian Official Journal No. 1.057 of 30 December 2006**, in Annex No. 17 regarding the requirement for providing medical services in health units, reads that *“Hospitals shall use their income and expenditure budget to bear expenses related to standard hotel services (standard accommodation and meals at food allowance level) for the attendants of ill children that are up to 3 years of age, and for attendants of persons with serious disabilities.”*

At the same time, **Government Decision No. 1.842 of 21 December 2006 for approving Methodological Regulations applicable to the Framework Agreement governing the conditions for providing medical assistance through the social health insurance system, for the year 2007**, published in the **Romanian Official Journal No. 1.034 of 27 December 2006**, provides in Art. 67 that *“Hospitals shall bear [...] all expenses according to the law, including those for: [...] d) standard hotel services (accommodation and meals) for the attendants of ill children that are up to 3 years of age, and for attendants of persons with serious disabilities, according to the law.”*

Taking into consideration the aforesaid and the facts of the case, the Steering Board notes that by virtue of law, standard hotel services in hospitals are available and covered for the “attendants” of ill children up to 3 years of age, without any differentiation; therefore there are no distinctions based on sex, between male and female attendants, i. e. mother or father, that can be found in legally binding documents.

6. 2. The practice of prohibiting fathers from being hospitalized together with the minor child results in a serious violation of the right to access health care services for children (according to the legislation of Romania, the best interest of the child must prevail).

The Steering Board considers that generally, a distinction between parents based on sex (meaning that the father cannot be hospitalized along with the patient who is up to 3 years old, as opposed to the mother, who is admitted to the hospital), which can turn into an order, rule or provision governing the admission in medical units, has to be justifiable on objective and solid grounds for reaching a legitimate aim.

Lacking these particular grounds, such a distinction might take the form of a differential treatment and, subsequently, of discrimination based on sex.

6. 3. The objective justification includes the existence of a legitimate aim, reached through adequate and necessary methods.

Regarding the objective justification, The European Court of Human Rights, throughout its case-law, has stated the following principles:

- *The Convention* does not prohibit any type of differential treatment, but only the differential treatment that does not have a reasonable and objective justification, given that there are many situations in which states must adopt legislation that stipulates a differential treatment aimed at correcting factual inequalities; the justification must be analysed in relation to the legitimate aim and the effects of the measure that has been taken in a specific situation (*Case “relating to certain aspects of the laws on the use of languages in education in Belgium” v. Belgium*, 23 July 1968);
- Discrimination means a differential treatment applied to persons found in comparable situations, without having an objective and reasonable justification; Art. 14 of the *Convention* does not prohibit the High Contracting Parties from treating certain groups differently, in order to correct factual inequalities; in some circumstances, the absence of a differential treatment represents a violation of the aforementioned provision; 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; a potential discrimination might arise from a factual situation. (*D. H. and others v. The Czech Republic*, 13 November 2007, *Sampanis and others v. Greece*, 5 June 2008);
- The objective and reasonable justification must pursue a legitimate aim, and the means employed must be proportional to that aim; where the difference in treatment is based on race, colour or ethnic origin, the notion of objective and reasonable justification must be interpreted as strictly as possible (*D. H. and others v. The Czech Republic*, 13 November 2007, *Sampanis and others v. Greece*, 5 June 2008);

Analysing the legitimate aim implies analysing its existence in relation to the right it interferes with, (for example, according to *The European Convention of Human Rights*, the freedom of expression can be restricted for the following legitimate aims: national security, territorial integrity or public safety, the prevention of disorder or crime, the protection of health or morals, the protection of the reputation or rights of others, preventing the disclosure of information received in confidence, or maintaining the authority and impartiality of the judiciary).

When analysing the appropriate and necessary means, it must be ascertained if the means employed achieve the desired aim and if there are no other available means that could have been used to reach the same purpose without creating a situation of differential treatment.

6.4. The statement that “*there are medical procedures in which mothers are actively involved*” does not stand as an objective justification, since fathers have the right to parental leave and, furthermore, there are cases of children with no mother. The relationship between mother and child cannot be privileged by any public authority or institution, as opposed to the relationship between father and child. The only persons able to decide who will provide the child with medical care are the parents or the legal guardian, but by no means a hospital. Stressing out “*Mother - not relatives*” shows that the claimant wrongly excludes the possibility that a child might be raised by other persons rather than the mother.

The Steering Board takes into consideration the provisions of Art. 97 of the **Family Code**, which state that “*Both parents have the same rights and responsibilities towards their minor children, without any distinction being made as to whether the children were born in or out of wedlock or were adopted. They exercise their parental rights solely in the interests of their children.*”

In its case-law, the European Court of Human Rights states the following in the case of **Petrovic v. Austria** (27 March 1998) regarding discrimination based on sex: “*While aware of the differences which may exist between mother and father in their relationship with the child at this age (early age), the Court starts from the premise that so far as taking care of the child during this period is concerned, both parents are similarly placed.*” With respect to this, in the **Hoffman v. Austria** case (23 June 1993) it is shown that there is a fundamental *inter alia* equality between parents, with regard to parental rights. (See also **Salguiero Da Silva Mouta v. Portugal**, 21 December 1999).

6. 5. Other justifications that were invoked are not legitimate (“*we are not the only hospital in this country that imposed such a rule*”). The fact that other persons discriminate cannot be accepted as a justification for discrimination.

6. 6. The lack of appropriate conditions for hospitalizing both women and men (the lack of separate housing for men and women) could be held as legitimate, but the means employed (prohibiting the hospitalization of men) are not adequate. Adequate means would be, for example, arranging the hospital space in an appropriate manner in order to respect the child’s right to adequate medical care.

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 THAT:**

1. Prohibiting the hospitalization of any other attendant rather than the mother represents an act of discrimination, according to Art. 1, paras. (1) and (4) in conjunction with Art. 5 of **G.O. No. 137/2000**, republished;

2. The “Grigore Alexandrescu” Emergency Clinical Hospital for Children, represented by Ulmeanu Coriolan, shall be issued a fine of 600 RON, according to Art. 26, para. 1 of **G.O. No. 137/2000**, republished;

3. A copy of the present decision shall be issued to the parties, The Ministry of Public Health and the Public Finances General Directorate of Bucharest (for the collection of the fine owed to the state).

VII. Payment of the fine: At the Bucharest Treasury, according to *Ordinance no. 2 of 12 July 2001 on the legal regime of contraventions*. The person issued with the fine is obliged to send the proof of payment to the Nation Council for Combating Discrimination (also specifying the number of the file) within 15 days from the moment when the title regarding the issuing of the fine becomes enforceable, according to Art. 20, para. 10 of *G.O. No. 137/2000, on preventing and sanctioning all forms of discrimination*, republished.

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]
IONIȚĂ GHEORGHE - Member	[Signature]
PANFILE ANAMARIA – Member	[Signature]
TRUINEA ROXANA PAULA – Member	[Signature]
VASILE MONICA – Member	[Signature]

Date of drafting: 04/12/2008

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.