

THE NATIONAL COUNCIL FOR COMBATING DISCRIMINATION
Autonomous State Authority
DECISION NO. 95
of 09.06.2010

File No. 15A/2009

Petition No. 10.092/12.11.2009

Petitioner: *ex officio* petition

Defendant: The Ministry of Health

Object of the petition: Using points to prioritise the requests for financing medical treatments abroad, with the effect of disadvantaging persons over 60 years old.

I. Name and domicile of the parties

I. 1. Name and headquarters of the petitioner

I. 1. 1. The National Council for Combating Discrimination, Valter Mărăcineanu Square, No. 1-3, Sector 1, Bucharest

I. 2. Name and domicile of the defendant

I. 2. 1. The Ministry of Health, Cristian Popișteanu Entrance, No. 1-3, Sector 1, Bucharest.

II. Object of the petition

The *ex officio* petition No. 10.092/12.11.2009 concerns the using of points to prioritise the requests for financing medical treatments abroad, with the effect of disadvantaging persons over 60 years old.

III. Description of the alleged act of discrimination

The *ex officio* petition shows a possible violation of Art. 1, para.1, and Art. 10, pt. (b) of G.O. No. 137/2000, on preventing and sanctioning all forms of discrimination, republished, by using points to prioritise the requests for obtaining financial aid for financing medical treatments abroad, with the effect of disadvantaging persons over 60 years old.

IV. Subpoena of parties

The defendant was subpoenaed for the date of 29.04.2010 (page 13) at the headquarters of the National Council for Combating Discrimination (further referred to as the NCCD).

The defendant was not present at the hearing of 29.04.2010.

The subpoena procedure was fulfilled according to the law.

V. Statements of the parties

The *ex officio* petition (page 1 of the file) shows that the defendant issued **Order No. 1352/2009**, by which it prioritises the requests for financing medical treatments abroad, with the effect of disadvantaging persons over 60 years old.

The *ex officio* legal action is based on the article titled “*Patients discriminated on age*” published in the *Ziua* newspaper on 5 November 2009 (page 2 of the file).

The Ombudsman submitted, for further competent analysis and evaluation, the answer received from the former Acting Minister of Health (**Communication No. 1352/15.03.2010**, registered to the NCCD under **No. 2193/18.03.2010**, pages 4-5 of the file), showing that it has started *ex officio* procedures, considering that, as a result of the rating of persons older than 60 years, a discrimination based on age has been created. The Ombudsman requested the amending of the order, but the request was rejected by the defendant.

The defendant’s reply is annexed (pages 6-8 of the file).

In this reply (**Communication No. A. V. 1742/10.12.2009**), regarding the object of the petition, the defendant shows that the age criterion is not disqualifying. Even if a person who is over 60 years old obtains a lower score, based on age, he or she can get a higher score on other priority criteria, depending on their medical situation.

A similar point of view (**Communication No. SG 56258/10194/14.12.2009** registered at NCCD under **No. 11.023/21.12.2009**, pages 10-12 of the file) was submitted by the defendant and attached to the file.

In the point of view sent to the NCCD by **Communication No. 24975/28.04.2010** (registered at the NCCD under **No. 3.496/04.05.2010**, pages 14-15), the defendant also shows that for the year 2009, from a total of 138 medical files submitted (requests for financing treatments abroad) and solved, a number of 7 pertained to patients over 60 years old, all of the requests being approved. At the same time, the defendant shows that a new Order will be issued, which will exclude the criteria of age.

The defendant submits the summary note and the draft order as evidence.

VI. The facts and the law

As to the facts, the Steering Board notes that the defendant issued **Order No. 1352/2009**, by which he used points to prioritise the requests for financing treatments abroad, with the effect of disadvantaging persons over 60 years old.

As to the law, the Steering Board holds that:

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

According to the **Romanian Constitution**, in Art. 20, para. 1, “*Constitutional provisions concerning the citizens’ rights and liberties shall be interpreted and enforced in*

conformity with the Universal Declaration of Human Rights, with the Covenants and other Treaties Romania is a party to.”

Protocol No. 12 to the European Convention of Human Rights stipulates the general prohibition of discrimination in Art. 1: *“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.”*

By analysing the case, the Steering Board refers to the definition of discrimination, as it is stipulated in the Romanian legislation and the relevant international treaties ratified by Romania. According to the definition, discrimination represents a differentiation based on a criterion, which interferes with a right, without an objective justification.

1. The differentiation is created in relation to persons under 60 years of age. As opposed to persons under 60 years of age, the category of persons who are older can benefit from financing for treatment abroad only if they score higher on other priority criteria.
2. The criterion is age.
3. The right that has been interfered with is the right to medical treatment in conditions of equality. This condition of equality is not absolute; the medical criteria should be the ones that make the difference between patients.
4. The objective justification includes the existence of a legitimate aim, reached through adequate and necessary means.

As to the objective justification, the European Court of Human Rights has stated the following principles in its case-law:

- **The Convention** does not prohibit all types of differential treatment. It prohibits only that kind of differential treatment which does not have a reasonable and objective justification, given that there are many situations in which states must adopt legislation that stipulates 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 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 differential treatment represents a violation of the aforementioned provision. 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);

- An 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 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 will achieve the desired aim and if there are no other available means that could have been used to reach the same aim without creating a situation of differential treatment.

On the one hand, it is ascertainable that the means employed did not reach the desired aim, since even the defendant stated that none of the requests pertaining to persons older than 60 were rejected. However, it cannot be said that the Order in question did not trigger discriminatory effects, since there is a possibility that persons over 60 years did not apply for the financing of treatments abroad, considering that they were older than 60 years and such an application would be worthless.

On the other hand, the defendant claimed that he wants to exclude the age criterion from the priority criteria, which shows that the means employed are not necessary.

The means employed are totally inadequate, affecting a category of persons who feel socially excluded and victims of the restrictive means sought by the Government. The only adequate means of prioritising can be the application of objective and medical criteria that differentiate the patients according to diagnosis, risks, estimated benefits, etc.

In conclusion, using points to prioritise the requests for financing treatments abroad, with the effect of disadvantaging persons over 60 years old, represents an act of direct discrimination.

As to the aforesaid, in conformity with 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 facts shown in the *ex officio* petition represent an act of discrimination, according to Art. 2, para. 1 of *G. O. No. 137/2000*, republished;

2. Recommends the Ministry of Health to amend **Order No. 1352/2009**, by eliminating the age criterion from the process of prioritising by points in order to obtain financial aid for medical treatment abroad.

3. A copy of the present Decision shall be communicated to the defendant, the Ombudsman and the *Ziua* newspaper.

VII. Payment of the fine: -

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]
PANFILE ANAMARIA – Member	[Signature]
VASILE ALEXANDRU VASILE – Member	[Signature]
VLAŞ CLAUDIA-SORINA – Member	[Signature]

Date of drafting: 21.06.2010

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.