Legal analysis of the decisions of the Equality Council and the decisions of the domestic courts on discrimination cases of the Republic of Moldova

CONSILIUL PENTRU PREVENIREA ȘI ELIMINAREA DISCRIMINĂRII ȘI ASIGURAREA EGALITĂȚII
СОВЕТ ПО ПРЕДУПРЕЖДЕНИЮ И ЛИКВИДАЦИИ ДИСКРИМИНАЦИИ И ОБЕСПЕЧЕНИЮ РАВЕНСТВА
COUNCIL FOR PREVENTING AND ELIMINATING DISCRIMINATION AND ENSURING EQUALITY

UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER

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LEGAL ANALYSIS
OF
THE DECISIONS
OF THE EQUALITY COUNCIL
AND
THE DECISIONS
OF THE DOMESTIC COURTS
ON
DISCRIMINATION CASES
OF THE REPUBLIC
OF MOLDOVA

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The views expressed in this analysis are those of the authors and do not necessarily reflect those of the OHCHR, UNDP Moldova, the Ministry of External Affairs of Norway, People's Advocate Office and the Council on the prevention and elimination of discrimination and ensuring equality.

The study is available in Romanian, Russian and English (original) languages on www.md.one.un.org and www.egalitate.md webpages.

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Acronyms

Equality Council	Council on the Prevention and Elimination of Discrimination and Ensuring Equality
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
CERD	Convention on the Elimination of all form of Racial Discrimination
CEDAW	Convention on the Elimination of all form of Discrimination against Women
CRPD	Convention on the Rights of Persons with Disabilities

Executive Summary

The research for this report was undertaken in the summer of 2016 and was designed to assess the remedies available for victims of discrimination in the Republic of Moldova. First, an analysis of a number of selected decisions of the Equality Council, including all of its decisions that have been contested in the courts and, the decisions of courts following those challenges, was undertaken. The second part of the analysis was based on the substantive nature of the decisions of the Equality Council, issues of discrimination law itself and the impact of the decision on the complainant. Thirdly, this report considered the decisions issued by the national courts, appeal courts, the Supreme Court of Justice and the Constitutional Court in cases where complaint against discrimination was filed directly in one of those courts.

It is clear from the wealth of information provided to the authors that the Equality Council and the national courts are in the process of creating an impressive set of institutions designed to deliver protection for minorities and to promote equality. The majority of people consulted for this report were dedicated to making the Republic of Moldova a more fair and equal society. It is unfortunate, but inevitable, that this report has had to focus on the issues where improvement is needed. Hopefully the ideas and recommendations proposed in this report will be received in a positive manner and on the basis that they are made – to promotes a fairer and more equality society for all.

The introduction of anti-discrimination laws in Moldova was very positive, particularly so, because they have been accompanied by systems that provide real and concrete remedies for the victims of discrimination. The authors also welcome the fact that individuals have a choice of remedies, either to make a complaint to the Equality Council or to use the courts.

The Equality Council is making important strides towards the promotion of equality and to end discrimination and has taken the initiative to deal with some of the more controversial issues in Moldova with both energy and imagination. It needs extra support and the removal of the obstacles that prevents it from doing an even better job. In its short period of existence it has provided an effective complaints procedure, largely making very good decisions and has developed the ability to use its cases to forge systemic change. The legislation and administrative arrangements for the enforcement of its decisions or for obtaining compensation for victims are problematic however and, challenges to their decisions in the courts have created additional problems in pursuing these objectives. With an increase in their reputation and visibility with the public the Equality Council needs more

resources to avoid delays in dealing with cases and staff and Member remuneration needs to be increased.

The Equality Council has already taken some steps themselves to improve its practices and impact, including making recommendations for legislative and procedure review highlighted by its cases, initiating cases itself where there are clear systemic issues of discrimination, better structured decisions, greater compliance with international human rights and equality standards and resisting the temptation to try to deal with the many complaints from people who have been ill-treated but where the evidence of discrimination is not so clear. The Equality Council needs to continue taking steps in this direction and there are other steps that it could take itself, including by ensuring greater clarity about the nature of the discrimination that has been identified in the decisions, an even more proactive approach to evidence gathering, taking the initiative to create more cases where there are clearly issues of systemic discrimination in Moldova, and, finally, a greater focus on basing decisions on the evidence.

The courts are a little further behind in making their contribution to equality but there are many judges working hard to make a difference. In addition, there have been some important decisions of both the Constitutional Court and the Supreme Court that have set new standards and have upheld the international approach to equality. They have more to do but the direction of travel seems to be the right one. The domestic courts do, however, represent an important component of the national mechanisms for combating discrimination in the Republic of Moldova. The victims of alleged discrimination can complain directly to the courts for judgments declaring whether or not an act was discriminatory and can order compensation for moral and material damages. The decisions issued by the courts on discrimination cases have been criticized by some of stakeholders that were consulted as part of the research for this report on the basis that they neither follow the national law, international legal principle on equality nor make proper assessments of the evidence. Unfortunately, the authors of this report have found evidence of each of these problems.

However many judges, including those consulted as part of this project, were clearly committed to ensuring that both domestic and international law standards on equality were properly respected and used when discrimination cases were being considered. The courts do not always seem to have achieved a correct balance between the right of freedom of religion, freedom of expression and equality. These freedoms do not trump claims of equality and the careful balance being created by, for instance, the European Court of Human Rights, seems not to have percolated through the national courts.

Similarly, the approach to the requirement that the burden of proof is on respondents to demonstrate that there was no discrimination does not seem to have always been grasped by the courts either.

Perhaps the biggest issue is that relatively few victims have chosen to use the courts rather than the Equality Council, especially given the fact that compensations is only availably through the latter. The reasons for this probably include: unfamiliarity and fear of taking court proceedings (including fear of costs), the relatively short deadline for taking proceedings, low awareness of the availability of the remedy not just amongst victims but also lawyers, and the real issue of access to knowledgeable lawyers and the inability to pay for them.

The analysis is divided in five chapters. Chapter I sets out the methodology used in the research, which was the basis of this report. Chapter II analyses the work of the Equality Council and is divided into three sections: (1) Procedure; (2) Substantive decisions on issues of discrimination; and (3) Findings and Conclusions. Chapter III analyses the work of the national courts and is divided into five sections: (1) Criminal courts; (2) Administrative offences; (3) Civil courts (including the Supreme Court); (4) Constitutional Court; and (5) Findings and Conclusions. Chapter IV sets out the overall Conclusions of the research and is followed by a list of Recommendations. Chapter V contains the annexes on: (1) Case selection criteria; (2) Analyzing the cases: methodology; (3) Cases reviewed; and (4) Questions guide for consultations.

Introduction

The Law No. 121 on ensuring equality was adopted by the Parliament of the Republic of Moldova on 25th May 2012 and entered into force on 1 January 2013. The Law No. 298 dealing with the procedures of the Equality Council was adopted by the Parliament of the Republic of Moldova on 21st December 2012 and also entered into force on 1 January 2013. Since its adoption, the Law No. 121 has been the subject of regular discussions among professionals and development partners. Recently, a specific legal assessment has been conducted to consider the compliance of the national legislation, including Law No. 121, with the international and regional anti-discrimination standards and practices. This analysis, as well as others developed by civil society, have proposed specific recommendations for amending the Law No. 121.

The implementation of the Law No. 298 on the activity of the Equality Council also raised serious questions among professionals and within the Equality Council itself and a specific analysis of Law No. 298 from the point of view of compatibility with the international standards is being undertaken by the Council of Europe in the Republic of Moldova.

There are many other reports comparing and analyzing Moldovan legislation, including Law No. 121 on ensuring equality, with the European standards on Equality and non-discrimination. We mention here only two of the most recent reports: (i) the Legal Recourses Centre from Moldova[1] and (ii) From Words to Deeds by the Equal Rights Trust and Promo-Lex[2], which were both very helpful to the authors during the writing of this report. There remains, however, a need to carry out a comprehensive legal analysis of the decisions of the Equality Council on substance and procedures, as well as of the decisions issued by the courts on discrimination cases. The purpose of this analysis is to identify the existing gaps from a legal perspective in order to develop recommendations for the improvement and further harmonization of the national mechanisms on combating discrimination in the Republic of Moldova.

[1] Legal Resources Center From Moldova, Pavel Grecu, Nadejda Hriptievschi, Iustina Ionescu, et. al. "*Compatibility analysis of Moldovan legislation with the European standards on equality and non-discrimination*", Chișinău, July 2015, available at: http://crjm.org/wp-content/uploads/2015/07/LRCM-Compatib-MD-EU-nondiscrim-legisl-2015-07.pdf

[2] The Equal Rights Trust, Promo-LEX Association, "*From Words to Deeds. Addressing Discrimination and Inequality in Moldova. Country Report Series: 7",* London, June 2016, available at: http://www.equalrightstrust.org/ertdocumentbank/From%20Words%20to%20Deeds%20Addressing%20Discrimination%20and%20Inequality%20in%20Moldova.pdf

Chapter I. Methodology[3]

This analysis is designed to be comprehensive and to look into the following two sets of decisions:

1. The decisions issued by the Equality Council: An analysis of a selected number of strategic decisions of the Equality Council, including all the decisions that have been contested in the courts and the decisions of courts following those challenges, decisions which have attracted adverse publicity or which are subject to international litigation, etc.[4] The analysis of contested decisions has considered both issues of the lawfulness of public administrative acts, from the point of view of compliance with the internal procedures of the Equality Council and its legal competence. The second part of the analysis has been based on the substantive nature of the decisions, issues of discrimination law itself and the impact on the complainant. The analysis of these decisions considers both the positive and negative aspects of them and both their substantive and procedural issues. The report tries to identify the challenges faced by the Equality Council and to offer concrete recommendations.

2. The decisions of the courts regarding discrimination cases: An analysis of the national jurisprudence, related to Law No. 121 selected to illustrate this national mechanism designed to combat discrimination. This section includes two groups of decisions issued by courts, first one are related to decisions of the Courts in the process of contesting the decisions of the Equality Council (see above) and the second group related to decisions of the national courts, appeal courts, Supreme Court of Justice and Constitutional Court in cases where complaint against discrimination was filed directly in one of the courts. Recommendations have been developed with regard to the enhancement of the synergy between the Equality Council and the courts and with a view to ensuring the better legal protection of the victims of discrimination regardless of which remedy is chosen.

In relation to both sets of cases a specific and defined methodology was developed to assist with this analysis.[5] This report does not concern itself with the substance of Law No. 121 or Law No. 298 or the extent to which it complies with the international obligations of the Republic of Moldova or international principles of equality law except where this is directly relevant

[3] More details on the general criteria used to select cases is attached as an appendix to this report.
[4] For more details of the selection criteria see the appendix.
[5] For more details see the methodology appendix.

to one of the decisions selected for analysis.[6] There is other material available that deals with these issues, including, reports by the OSCE[7] and the Council of Europe.[8]

The process of preparing the report has included a set of meetings where the authors consulted a number of stakeholders who were willing to contribute with their views about the effectiveness of the national mechanisms for combating discrimination.

In this context, relevant information was provided by:

No.	*Name of stakeholder*	*Participants*	*Focus group/semi-structured interview*	*No. of partici-pants*	*Date*
1.	Equality Council	Staff	Focus group	3	16.06.2016
		Members	Semi-structured interview	1	16.06.2016
			Skype/phone interview	2	07.06.2016 16.06.2016
2.	Constitutional Court	Staff	Focus group	2	17.06.2016
3.	Supreme Court of Justice	Vice President Criminal College General Secretary	Focus group	2	17.06.2016
4.	First and second level instances	Judges from Buiucani Court and Appeal Court	Focus group	4	17.06.2016
5.	Parliamentary Committee for human rights and inter-ethnic relations	Staff	Semi-structured interview	1	17.06.2016

[6] The report also does not consider in detail the issues of legal capacity for those with mental health disabilities except by reference to one case discussed in more detail below, registration issues for religious groups in Moldova or the particularly issues for those living in Transnistria.

[7] Opinion on the revised draft law on preventing and combating discrimination of the Republic of Moldova, available at: www.legislationline.org/documents/id/16676

[8] Ivana Roagna and Nevena Petrusic, "*Assessment of the Law on ensuring equality in the Republic of Moldova in compliance with the Council of Europe anti-discrimination standards*", Council of Europe, February 2016.

No.	*Name of stakeholder*	*Participants*	*Focus group/semi-structured interview*	*No. of partici-pants*	*Date*
6.	Meeting with People's Advocate Office staff	Staff	Focus group	5	17.06.2016
7.	Human rights lawyers who have litigated cases on discrimination		Focus group	4	17.06.2016
			Skype/phone interview	4	07.06.2016 08.06.2016 23.06.2016 23.06.2016
8.	Civil society organizations (NGOs)		Focus group	2	17.06.2016
			Skype/phone interview	3	18.06.2016 24.06.2016 24.06.2016

It is clear from the wealth of information provided to the authors that the Equality Council and the national courts are in the process of creating an impressive set of institutions designed to deliver protection for minorities and to promote equality. The majority of people consulted for this report were dedicated to making the Republic of Moldova a fairer and equality society and are committed to ensure that the Law No. 121 and the other laws promoting equality are used properly and to the fullest extent. It is unfortunate but inevitable that this report has had to focus on the minority of issues that can be improved but hopefully the ideas and recommendations proposed will be received in a positive manner and on the basis that they are made for the same motive – a fairer and more equality society for all.

Chapter II. Council on the Prevention and Elimination of Discrimination and Ensuring Equality (Equality Council)

(1) Procedural issues

In general the authors found that the Equality Council's process and procedures are properly constructed and sensibly followed. For instance, although the procedures and processes of the Equality Council have been criticised by the courts in other cases, including the Supreme Court, that Court has also commented favourably on those procedures:

> "According to the probation material annexed to the case file, it was established with certainty that the Council on the Prevention and Elimination of Discrimination and Ensuring Equality has provided real possibility to all the involved parties to present data, information, and documents related to the confirmation or information of the discriminatory actions and conduct invoked in the claim of the petitioner Bodiul Natalia, and afterwards voted with the majority vote to adopt the motivated decision for the given case.
>
> It was also established that the discrimination claim was examined by the Equality Council observing the principle of transparency in the procedure, celerity and adversarial procedure."[9]

There are, however, some small steps which could be taken to improve procedures and processes.

The authors believe that the requirement that decisions of the Equality Council must be made by all the Members of the Equality Council despite the fact that some of them are not able to have been present at hearings and did not heard the evidence given, should be reviewed[10]. Although a detailed note of the hearing is kept by the staff and given to the absent members who can then also listen to the recording of the hearing, this arrangement is not necessarily best practice. If the Equality Council's decisions are to be regarded as authoritative as those of the courts only those Members who are present at the hearing and who have heard and seen the evidence and watched

[9] Supreme Court of Justice, Case No. 3ra-848/15, Decision dated 30 September 2015, in relation to decision 28/13 of the Equality Council. Unofficial translation.

[10] See case nr. 271/15 S.S. vs. Bender Police Inspectorate and the General Police Inspectorate, decision dated 01 September 2015, available at: http://www.egalitate.md/media/files/files/9-decizie_272ш1_engl_5573196.pdf

the demeanour of the witnesses and their reactions to questions (and are therefore able to assess their credibility) should make the final decisions in cases. Obviously, this change would only be possible if the law was altered to allow decisions to be made by, say, three Members of the Equality Council rather than by all the Members.

There were concerns expressed by stakeholders that the Equality Council did not work closely enough with the Ombudsman and much might be gained by the synergy of powers and strategy. In fact, the Equality Council and the Ombudsman do refer cases to each other and collaborate on equality issues in other ways. However, the Ombudsman does not appear to prioritise equality issues although this is perhaps no surprise given the existence of the Equality Council and, in fact, a number of significant equality issues had been taken up by the Ombudsman. However, the absence of a power of the Equality Council to issue referrals to the Constitutional Court suggests that an even closely liaison would be productive, especially in the light of the progressive nature of some of the decisions of the Constitutional Court. Secondly, the absence of a power of the Ombudsman to issue rulings on complaints on discrimination might suggest closer ties could assist both institutions in the promotion of equality in Moldova.

(a) Quality of decision writing: courts and the Equality Council

The authors, having read very significant number of decisions of the Equality Council (and the courts), believe that these decisions could be more accessible and less legalistic and bureaucratic and could reduce perception that, in some cases, the reports of decisions are overwhelmed by details.[11] However, it should be noted that more recent decisions of the Equality Council are much easier to read and much better structured.[12]

Judgments and decisions are one of the key ways in which a quasi-judicial or judicial body can promote its work, explain what it does and ensure that people understand the nature of decisions and why they were made. No one can expect the media or other key stakeholders (or even the parties themselves) to read the whole judgment so a two or three paragraph summary of the circumstances, the decisions and reasons should be drafted and be placed at the very top of the first page of any judgment. Providing such a summary will make it easy for the case to be understood and reported and will

[11] See case nr. 001/2013, Ruslan Saachian vs. Vladimir Maiduc and Dorin Recean, decision dated 17 October 2013, available at: http://www.egalitate.md/media/files/files/2013_10_17_decizia_cauza-001_13-r-saachian-finala-eng_1__3705447.pdf

[12] Cf. with decision dated 09 December 2014, case 157/2014, M.M. vs. SRL „Remta-Transport-Privat" and V.L., available at: http://www.egalitate.md/media/files/files/11-decizie_157_14_depersonalizat_6487263_eng_8168845.pdf

make it less likely that other people's incorrect summaries will proliferate. If necessary, a disclaimer can be added as a footnote to the summary avoiding any interpretation that this summary constitutes any part of the formal decision.

(b) Proactive approach to the collection of evidence

The Equality Council has taken important steps to develop a proactive approach to the collection of evidence and information. For instance, in case 47/14 the Equality Council states:

> "an investigation group of the Council paid an emergency visit to Section No. 8 of the Psychiatric Hospital from Codru Town at the request of the petitioner, who alleged victimisation as a result of the complaint filed with the Council. The investigation team developed a report on the results and observations made during the investigation on the site (case file page 21)."

In Case 052/14, regarding discrimination based on disability (concerning people with mental health problems) in relation to the provision of legal assistance by the lawyers appointed by the Territorial Offices from Balti Municipality and Chisinau Municipality of the National Council for State Guaranteed Legal Assistance:

> "the Council sent a delegation to the Court from Orhei so as to study the cases for which it has requested access. The working group studied 10 criminal cases in which the state guaranteed legal assistance services were provided by the lawyers, the investigation group went to the Court from Balti Municipality, where it analyzed 4 civil cases and 89 criminal cases in which the state guaranteed legal assistance services were provided by the lawyers."

In both cases, however the investigation encountered difficulties, the Center Court from Chisinau Municipality and the Psychiatric Hospital attempted to prevent access in their institutions and denied the Equality Council's right to carry out the investigations.

(c) Power to initiate investigations

The Equality Council has an important power to initiate cases itself[13], which it has used several times.

[13] Law on ensuring equality No. 121 (adopted on 25 May 2012, entered into force on 01 January 2013), article 13 (1).

> "In the first case which was launched on its own initiative [was] after repeated complaints about the lack of access to buildings, the CPPEDAE [the Equality Council] carried out the analysis of legislation in the field, notifying the authorities responsible for ensuring the accessibility of buildings and constructions, without referring to any particular building. The CPPEDAE concluded that, although the legislation is sufficiently comprehensive in terms of accessibility, yet practical enforcement of these provisions is flawed."[14]

The courts are not, however, as open to complaints from groups of alleged victims of discrimination:

"…it seems that the trade unions and the associations may submit complaints to the courts only on behalf of specified persons. This conclusion can be inferred from Art. 18 par. (2) of Law no. 121, which states that "The trade unions and public associations in the field of promotion and protection of the human rights may also initiate proceedings before the courts to protect those who consider themselves to be victims of discrimination". The Civil Procedure Code does not provide the possibility of associations to submit a court complaint on their behalf without a power of attorney from the individual victims/*actio popularis.*"[15]

(d) Role of the Equality Council in "shaking the tree"

In reply to the criticism made to the authors that the Equality Council sometimes acts beyond its remit or makes decisions to help individuals that have been poorly treated but not subject to discrimination, it was suggested that the issues of inequality and discrimination in Moldova are so deeply entrenched and prevalent that the Equality Council needs to act as a catalyst – to "shake the tree" to initiate systemic changes. To some extent such an approach, if it is not within the powers of the Equality Council, is a negation of the rule of law – but it is easy to see why such an approach is chosen. Given the recent creation of Law No. 121 and the Equality Council itself, it is not always clear exactly how any particular provision will be interpreted by the courts. This report sets out a number of examples of sensible actions taken by the Equality Council which have not found favour with the courts but which, in turn, illustrate why the Equality Council's powers need to be enhanced. For instance, the apparently appalling failure of lawyers to act

[14] Case 160/14, decision dated 11 December 2014, against the Ministry of Regional Development and Construction, The State Inspection in Construction and General Direction Architecture, Urban Planning and Land Relations, available at (Romanian language): http://www.egalitate.md/media/files/files/decizie_160__depersonalizat_9525096.pdf

[15] LRCM "*Compatibility analysis of Moldovan legislation"*, page 41.

properly for clients detained in psychiatric institutions needed to be highlighted and, whether or not the Equality Council was acting beyond its remit is, perhaps, less important than the substance of the issues being raised.[16]

> "…before taking a position in the court as the voice of the client, the lawyer must prove the increased professional diligence and speak or attempt to speak with the client before the trial to establish if the person can discern the consequences of his actions based on one's own conviction and not on assumptions or prejudices, to study the case materials integrally, ensuring the presentation of other evidence besides the conclusion of the psychiatric institution, in other words to have a similar attitude as in situations when s/he represents other clients. Furthermore, lawyers should be even more active in relation to persons with mental illnesses given their state of extreme vulnerability. The lawyer is obliged to represent the person before the court ensuring the entire range of procedural guarantees resulting from national and international standards."[17]

For the future, an approach that prioritised work on systemic or strategic cases or helped with the creation of such cases them using the Equality Council's wider powers would be welcomed by the authors. Examples of the need for such action might include challenging discriminatory practices such the failure to care properly for those in institutions, or to deal with the fact that Roma children are being not properly educated or that women subjected to domestic violence receive inadequate assistance from the police or prosecution authorities.

(e) Precedent not respected

There was some criticism from some NGOs in Moldova that a few decisions taken in the past on the basis of a particular approach were now no longer being followed.[18] In fact in the case referred to in the previous footnote, the Equality Council found an additional ground of discrimination (residence).

[16] See Case 52/14, decision dated 29 April 2014, ex-officio against the lawyers appointed by the Territorial Offices from Balti Municipality and Chisinau Municipality of the National Council for State Guaranteed Legal Assistance, available at: http://www.egalitate.md/media/files/files/22-decizie_052_2014_autosesizare_engl_depersonalizat_8046534.pdf

[17] See LRCM "*Compatibility analysis of Moldovan legislation"*, page 143.

[18] See Case 254/15 which appears to be an example of this change of approach, decision dated 4 September 2015, P.N. vs. Ialoveni Social Assistance and Family Protection Division, available at: http://www.egalitate.md/media/files/files/14-decizie_254_2015_de_modificare_depersonalizat_7779367_eng_1226484.pdf

Although no strict rule of precedent can apply to a quasi-judicial body like the Equality Council some might think that if a "settled' approach is no longer to be followed this should be subject to some kind of consultation process or at least a public statement. If, as this report argues, some early decisions were not as sufficiently logical, structured on the law or evidence-based as they could be, this criticism cannot be justified.

(f) Delays in making decisions and the 90-day time limit for the resolution of complaints by the Equality Council

Delays in resolving complaints about discrimination are not acceptable and sufficient resources need to be provided to the Equality Council to avoid this happening. Any delay beyond the 90-day time limit may be used as an argument for the annulment of the decision by any of the parties to the case. Even if over 95% of decisions are made within 90 days, the evidence shows that decisions are often not sent to the victims for another 30 days delay. Delays by the Equality Council to complete cases also create other problems if a victim wants subsequently to take a case directly to court because of the one-year time limit for issuing proceedings. This is particularly problematic if an Equality Council application is not successful or is subsequently quashed in court following a challenge by the respondent.

(g) Conflicts of interest for Equality Council members

A number of stakeholders consulted in advance of preparing this report raised concerns about the possibility of conflict of interests for some members of the Equality Council.

Cases 002/13 and 052/14 concerned issues of discrimination of residents of psychiatric institutions by the lawyers when those lawyers were providing state guaranteed legal assistance services to those residents. One member of the Equality Council initiated the cases ex-officio and based on the information acquired in the course of also acting as the Ombudsman for psychiatric institutions.

Ordinarily for a conflict of interest to exist, it is necessary for there to be a personal interest which conflicts (or might conflict) with the responsibilities imposed as a result of an official function. In the case discussed both positions impose tasks related to protection of the residents of psychiatric institutions and there are no obvious competing goals and both objectives are in the public interest. Obviously, if there was an allegation that the Ombudsman for psychiatric institutions was failing to properly consider issues of

discrimination of people detained then the conflict would be an obvious one but this was not the situation.

Being a part time Member of the Equality Council does come with restrictions with regard to any other activities undertaken by the Member and the full-time President of the Equality Council, may only combine his role with scientific and teaching activities.

In case 064/14, the Equality Council established that there was discrimination in the actions taken by a priest, who during a television programme tried to impose a religious ritual on a lesbian person by splashing her with holy water and made statements inciting intolerance. Subsequently, the Equality Council's decision was contested in court, raising the problem of the conflict of interest, as the lawyer for the victim of the action by the priest was also member of the Equality Council. A more detailed analysis of this case demonstrates however that even if one member did have a possible conflict of interest the decision of the Equality Council was adopted with the vote of 4 members with the abstention of the lawyer member who declared that conflict of interest in advance.

(h) Evidence

The Equality Council appears sometimes to apply the evidence burden incorrectly. [19] Whilst the burden is on the respondent to prove that the "committed act does not constitute discrimination"[20] this does not mean that the Equality Council can use this shared burden to assist it to establish the core facts – who did what or said what. The use of this "reverse" burden should only be applied to the second stage of the analysis – to ascertain what was the basis for these actions or statements. The authors are concerned that this rule has been used in slightly more general way and to resolve conflicts in evidence over the core facts. The process for assessing the facts of the case should be as follows. The Equality Council must first ascertain whether the alleged act which might constitute discrimination actually occurred or not.[21] That is by analysing the evidence to determine: who said or did what to whom – the actions themselves. If that act did not occur or rather if there is evidence that the alleged act did not occur then this evidential burden is not relevant. Only once the core facts about what happened have been established is it

[19] See for example, case 157/14.

[20] Law on ensuring equality nr. 121 (adopted 25 may 2012, entered into force 01 January 2013), article 15(1).

[21] See the guide to decision making "Key points about discrimination cases in a work situation" by the UK Equality and Human Rights Commission, available at: https:// www.equalityhumanrights.com/en/multipage-guide/key-points-about-discrimination-cases-work-situation.

necessary for the burden on the respondent to apply. If the respondent challenges the basic facts as alleged by the complaint then, which party the Equality Council chooses to believe, is a simple matter of evidence and the burden of proof of discrimination is irrelevant in that task. In practice, in cases decided by the Equality Council, often the shifting of the burden onto the respondent is unnecessary anyway because the evidence of behaviour or acts which are discriminatory is all too obvious from the evidence itself.[22]

(i) Situational testing

The Law No. 121/2012 does not provide for, or regulate, the procedure of "situational testing" as a way of establishing discrimination. The Equality Council has expressed its opinion about the use of the technique in the case B. and others vs SRL Company "Haiducel"[23]. The Equality Council established that there was discrimination in relation to five people from the Roma community whose access to a swimming pool was restricted.

The petitioners in the case decided to test whether respondent discriminated systematically against people from the Roma community. The Equality Council was more open to considering the issue compared to the approach taken by courts (see the case Zapescu versus "Trabo Plus" SRL), stating:

> "when applying the discrimination test, the minimum essential requirements imposed by this situation should be observed, namely, to determine from the beginning what groups or individuals should be compared in order to establish differential treatment. Hence, the situational tests imply usually two groups, one is called "test", characterized by that feature (criterion) that might lead to the discrimination and a "control" group that should be identical in terms of relevant characteristics (age, clothes, etc.). Comparing these two groups should be beyond any reproach, so the suspect feature is the only element that allows building a case of discrimination prima facie"[24].

In majority of EU states discrimination cases built on situational testing occur relatively frequently. There are sometimes, however, objections to these techniques, particularly because they create an artificial situation, and the candidates playing the fictitious roles can be tempted to intentionally or

[22] Case 271/15, S.S. vs. Bender Police Inspectorate and the General Police Inspectorate, decision dated 01 September 2015, available at: http://www.egalitate.md/media/files/files/9-decizie_271_engl_5573196.pdf

[23] Case 349/16, B. and others vs SRL Company „Haiducel", dated 9 February 2016, available at: http://www.egalitate.md/media/files/files/15-decizie_349_2016_constatare_eng_depersonalizat_3561248.pdf

[24] Ibid, p. 6.8.

unintentionally distort the outcome. In practice, often the alleged discriminator argues that the "victim" has actually instigated the act complained about and that the evidence was not acquired legally. However, discrimination is often secret or hidden either because the bias is unconscious or because the person discriminating does not want to admit it. Situational testing is often the only effective technique for exposing discrimination and, with safeguards, it is a tool that the Equality Council should adopt.

(j) Sanctions and monitoring

It is clear that the Equality Council's ability to reduce discrimination is hampered by the complex and inadequate nature of the sanctions that it has available and, in particular, the requirement for there to be subsequent action in the national courts. The authors of this report support the recommendations in the report "Assessment of the Law on ensuring equality in the Republic of Moldova in compliance with the Council of Europe anti-discrimination standards" that the Equality Council should have the resources to monitor systematically the results, recommendations and sanctions in their cases and those of the courts.[25] Without such follow up the cases decided will have less effect and will promote fewer positive changes. In its most recent annual report the Equality Council reported:

> "In 2015, the Council continued the monitoring over the implementation of the recommendations made in its decisions. As a result, the Council prepared 15 administrative offence protocols for failure to fulfill the recommendations made in the decisions. Unfortunately, the court has dismissed all protocols because of the fact that these did not contain offender identification data. The Council was unable to include in the protocol data from the offender's ID because the offender did not come to the Council's office, although he had been summoned legally. On the other hand, the Council has no access to such data since its premises do not provide a secured perimeter and this hinders the registration of the Council as a personal data operator."[26]

[25] Roagna and Petrusic, Page 164.
[26] Equality Council, Annual Report for 2015, "General Report On The Situation In Preventing And Combating Discrimination In The Republic Of Moldova 2015", page 162, available at: http://egalitate.md/index.php?pag=page&id=883&l=en

In relation to the ability of the Equality Council to ensure change has been considered in the recent report of the Equal Rights Trust and Promo-Lex stated:[27]

> "Ostensibly, the Contravention Code is an important component in the legislative framework to combat discrimination in Moldova. It gives some teeth to the CPEDEE, empowering it to establish that administrative offences have been committed. Further, under Article 72-2, the Code penalises various forms of conduct that interfere with or otherwise undermine the directions of the CPEDEE. Where no such offences have occurred, the CPEDEE's powers are relatively insipid: under the Law on Ensuring Equality it is able to make recommendations as to the restoration of rights and to propose disciplinary measures to the competent bodies.
>
> In practice, however, courts routinely strike out referrals from the CPEDEE in respect of administrative offences. Indeed… the CPEDEE has aborted the practice of making such referrals. There are other problems with the Contravention Code. Certain administrative offences are ill-defined and therefore potentially unenforceable. In particular, what constitutes "discrimination of any kind" in Article 260 is unclear."[28]

Finally, it is clear that the Equality Council does not have the power to require that other public bodies overturn decisions following a finding of discrimination. The Supreme Court has decided that only recommendations can be made:

> "…as it content implies an imperative prescription for the public authority and not a recommendation, a fact which contravenes art. 12 par. (1) let. f) of the Law on Ensuring Equality, which sets forth that the Council gives to public authorities proposals of a general character regarding the prevention and combating discrimination, and the improvement of the behavior towards persons subject to this law. And point 61 of the Regulation on Operation of the Council on the Prevention and Elimination of Discrimination and Ensuring Equality, approved via the Law No. 298 dated December 21, 2012 provides that the decision of the Council covers in its resolution the formulated recommendations for ensuring the recovery in rights of the victims of discrimination and the arguments used to reason them.

[27] "From Words to Deeds", available at: https://promolex.md/wp-content/uploads/2016/08/ENG_doc_1469547155.pdf
[28] Ibid, page 280.

> In these circumstances, the Equality Council, according to the duties assigned by the law, cannot subrogate the right of the Municipal Division for Child Rights' Protection to decide about the cancelation of its own decision and does not replace the role of the court."[29]

Such a restriction is an unnecessary obstacle and should be removed because it prevents the decision making of the Equality Council from providing an effective remedy to the victims of discrimination.[30]

(k) Challenges to the Equality Council's decisions

If a decision of the Equality Council is quashed by the courts then, although the decision can be subsequently reconsidered by the Equality Council if this is ordered by the court if the fault identified by the court can be avoided in the second procedure (for instance, if the failure was based on the respondent not being informed about the date for the hearing) there is a danger that the victim will not receive an appropriate remedy. It is also likely to be too late for the victim to make a new application to the courts. Whilst the courts have a vital role in ensuring that all public bodies follow law and procedure, if a decision by the Equality Council is overturned for procedural reasons rather than reasons of substance the victim of the discriminatory act should not go without a remedy[31].

In a case concerning notional contributions for the period when parents are caring for children with disabilities at home which are subsequently used to calculate the rate of state benefits, the Equality Council found a violation of Law No. 121. Victims subsequently requested a court to order a re-calculation of their entitlement but this was rejected by the court (and this position was maintained by Appeal and Supreme Courts) which decided it was not bound by the Equality Council's decision – at best this decision could be part of the evidence in the case. New direct applications to the courts had therefore to be made by the victims.[32]

The Equality Council found discrimination by association on grounds of the disability of the child and by comparison with the parents, whose children

[29] Supreme Court of Justice, Case No. 3ra-848/15, Decision dated 30 September 2015, in relation to Equality Council decision 28/13, unofficial translation.
[30] In violation of the right to an effective remedy in Article 13 of the ECHR and Article 2(3) of the ICCPR.
[31] Law on ensuring equality, article 14 "The Council will reject the claim if c) it is a repeated claim that does not contain new information and new evidence".
[32] See Conclusion of SCJ no. 2ra-2822/15, dated 02 December 2015, Ciobanu Natalia vs the Ministry of Labour, Social Protection and Family, the National Social Insurance Office and Territorial Office of Social Insurance, available at: http://jurisprudenta.csj.md/search_col_civil.php?id=24371

also with severe disabilities but who had decided to institutionalize their children.[33] The Equality Council found discrimination and decided that the Ministry should develop appropriate provisions to ensure positive transitory measures for parents who took care of children with severe disabilities.

On 25 May 2014 Natalia Ciobanu (the alleged victim) filed a request to the court against the Ministry of Labour, Social Protection and Family, the National Social Insurance Office and Territorial Office of Social Insurance, on the basis of the decision of the Equality Council to order a recalculation by including the period when she took care of her daughter who had a severe disability. The courts rejected the complaint and the first instance court held that:

> "As regards the decision of the Council on the Prevention and Elimination of Discrimination and Ensuring Equality of 13 February 2014 which is mandatory, at that moment it had the form of a recommendation, [...] The Council on the Prevention and Elimination of Discrimination and Ensuring Equality did not undertake any measures (to sanction discriminatory acts, of addressing a hierarchically superior body to undertake corresponding measures, intervening with the respective bodies with applications to initiate disciplinary proceedings in relation to persons holding responsible positions who committed in their activity discriminatory acts etc.) of the Ministry of Labor, Social Protection and Family for non-execution of the recommendations outlined in its decision of 13 February 2014.."

The Equality Council is, as result of these rulings, obviously now clearer in making its decisions. However, the courts also have to understand the nature and status of the Equality Council's decisions and recommendations to avoid violations of the equality law going without an effective remedy.[34]

In subsequent challenges in the courts to the decisions of the Equality Council by respondents, the Equality Council, as a public body with powers over private citizens, has duty to prove that its decision is correct and lawful. However, it has been suggested that because the equality Law No. 121 places the burden of proof on the defendant in the original discrimination case dealt with by the Equality Council there is some kind of contradiction. These two different burdens are not essentially the same. Any perceived contradiction in these two different burdens would be avoided if both the key concept of

[33] See Case 030/14, A.M., V.M. and N.C. with the Chisinau Municipality Social Assistance Division and the Ministry of Labor, Social Protection and Family, dated 13 February 2014, available at: http://www.egalitate.md/media/files/files/decizie_030_2014_eng_6938518.pdf

[34] In violation of the right to an effective remedy in Article 13 of the ECHR and Article 2(3) of the ICCPR.

equality law – the burden of proof being on the respondent – and, the duty on public bodies to justify their decisions when challenged in court[35] should be made more explicit by the courts themselves when considering these cases and in their judgments.

(l) Refer materials to the prosecutor's office

According to the Law on ensuring equality[36], the Equality Council has an obligation to remit materials to the prosecution authority when the complaint contains facts which suggest that a crime may have been committed. In case 235/15[37], the Equality Council decided to send the case materials to the prosecution authority to consider the criminal allegations based on Art. 176 of the Criminal Code of the Republic of Moldova.[38] This provision can be used when the Equality Council examines a case and finds the elements of crime, punishable under the Criminal Code. The Equality Council should have the resources to follow up such references to ensure that they are dealt with properly.

(2) Substantive decisions on discrimination issues

The Equality Council has developed its substantive decision making very impressively despite the short time it has been established. It has taken a truly modern approach to decision making, ensuring that the international treaties that Moldova has ratified inspire and inform its decisions and its interpretation of national laws protecting equality, particularly Law No. 121. For instance, in case 28/13, concerning alleged discrimination against a mother obtaining visiting access to her children, the absence of the specific category of sexual orientation as a protected ground in Article 1 of that law was resolved by a consideration of the jurisprudence of the European Court of Human Rights.[39]

[35] Law on Administrative Litigation, nr. 793 of 10.02.2000, Article 24 (3) "When administrative court examines the annulment of the request, the burden of proof is assigned to the defendant".

[36] Law No. 121, art. 12 para. l), art. 15 para. (9).

[37] See case 235/15, B.I. vs. M.E., Deputy Principal of the School of Arts 'Alexei Stircea, decision dated 5 May 2015, available at: http://www.egalitate.md/media/files/files/12-decizie_235_2015_depersonalizat_7888847_eng_1422631.pdf

[38] Criminal Code, art. 176 (1) discrimination "a) committed by a person in a position of responsibility; b) which caused significant damage; c) committed by placing discriminatory messages and symbols in public places; d) committed under two or more criteria; e) committed by two or more persons, paragraph (2) Promoting or supporting the actions specified in the 1st paragraph, committed through mass media".

[39] Salgueiro da Silva Mouta v Portugal, and see the report from the Equal Rights Trust and Promo-LEX, page 280: http://www.equalrightstrust.org/ertdocumentbank/From%20Words%20to%20Deeds%20Addressing%20Discrimination%20and%20Inequality%20in%20Moldova.pdf

The keys findings from this decision were subsequent upheld by the national courts, including the Supreme Court.[40]

In some early cases the evidence was clear that the complainant had been badly treated by a public body, an employer or another institution but, in the opinion of the authors, there was sometimes too little evidence to suggest that the treatment was on the grounds of one of the "protected characteristics" as set out in Law No. 121, Article 1(1). In some cases neither the complainant not the Equality Council set out explicitly either the characteristic that was being considered in the case, who the proper comparator might be or whether the comparator was different in other ways other than only the particular characteristic alleged.[41] The authors' conclusion on this point is supported by others, for instance:

> "…the CPPEDAE found sex discrimination in the schedule of meetings between parents and children; in two of these the petitioners were women, in one case the petitioner was a man. However, even if there was a differential treatment of the parents, the CPPEDAE reasoning does not certainly result in the fact that the unfair establishment of the schedule of meetings between parents and children was determined especially by the sex of parents and not by other considerations taken into account by the authorities or abuses, other than the discriminatory treatment."[42]

As is clear from its more recent cases, the Equality Council needs to establish whether the applicant has shown that he or she has been treated differently (and unfavourably) compared with others who are in all other relevant ways in similar position. The respondent will then need to argue that the real reason for the difference in treatment is not because of a prohibited ground but for some other lawful reason in order for there not to be a finding of discrimination. Whether or not the facts as alleged are true is a question of evidence and for the assessment by the adjudicator, the Equality Council.

As an illustration of the difficulty in making these decisions, in Burden v UK two unmarred sisters had lived together all their life but could not benefit from the same inheritance tax exemption available to married couples or gay

[40] See Decision of SCJ No. 3ra-848/15, dated 30 September 2015, Municipal Division for Child Rights' Protection against the Council on the Prevention and Elimination of Discrimination and Ensuring Equality.
[41] See, for example, case 47/14, dated 11 April 2014 and 254/15, dated 4 September 2015, available at: http://www.egalitate.md/media/files/files/decizie_047_2014_eng_depersonalizat_1933917.pdf, http://www.egalitate.md/media/files/files/14-decizie_254_2015_de_modificare_depersonalizat_7779367_eng_1226484.pdf
[42] LRCM, "*Compatibility analysis of Moldovan legislation",* page 61.

and lesbian couples with civil partnership agreements. The Court decided that the sisters' situation was qualitatively different than that of married and civil partnership couples and there was therefore no discrimination and no violation of article 14 of the ECHR.[43] Deciding whether two groups of people are in an analogue situation is not easy and in both Burden and Carson cases a minority of the judges from the Court also gave dissenting opinions, finding violations of article 14.

Secondly, there needs to be a little more clarity in the decisions of the Equality Council about whether the case concerns direct or indirect discrimination and, if it is about indirect discrimination, whether the correct approach has been adopted.[44] Indirect discrimination has been defined as follows:

> "a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group… and that discrimination potentially contrary to the Convention may result from a *de facto* situation."[45]

Thirdly, there is sometimes a lack of evidence (or recorded evidence) of the specific discrimination (rather than "mere" bad treatment) which would found a violation of the equality law.[46] Often the complainant is from a group more likely to be subject to discrimination and is likely to have been subject to discrimination but a more precise analysis of what was proved needs to be set out. What is sometimes lacking in the decisions appears to be a description of a logical process which raises the correct legal tests, asks the correct questions and flushes out the crucial evidence that is required to establish discrimination.[47]

All of these problematic issues are, thankfully, more prevalent in the older cases than in the more recent decisions.

(a) "Instigation" of discrimination cases and balancing rights

[43] See also *Carson v UK case*.
[44] See, for example, cases 56/14, 182/14 and 241/15 available at: http://www.egalitate.md/media/files/files/decizie_056_2015_eng_4244612.pdf, http://www.egalitate.md/media/files/files/decizie_182_2014_eng_depersonalizat_1673643.pdf, http://www.egalitate.md/media/files/files/decizie_241_2015_eng_8999081.pdf
[45] *DH v Czech Republic*, ECHR, 13 November 2007, (Application no. 57325/00), para. 175.
[46] Particularly cases involving custody or access to children disputes, for example 34/13.
[47] Ibid, available at: http://egalitate.md/media/files/files/4-decizia_conf_cauza_nr__034_i_t_catre_ip_botanica_si_dmpdc_1867867__engl_8846278.pdf

There are a few of these types of cases and there are a few problems with some of them.[48] First, it is not always clear what the expression "instigation" in Law No. 121, Article 2(g) is supposed to mean. This is a fault in the law itself. However, in the first cases that the Equality Council had to deal with, it did not set out its own view of how this law should be interpreted. In some jurisdictions "instigation" implies that one person has influenced, ordered or instructed another person to discriminate – maybe a manager, a customer or another person with power or direct influence has instigated the discriminatory act carried out by another person. Secondly, it is not clear from the law itself whether the expression "instigation" is intended to include circumstances where anyone has made say a sexist or racist comment in the media, even when they were not directing their comments to any particularly person and were not suggesting that anyone act in any specific way.

However, it is clear that the Equality Council is succeeding now in adopting a sensible approach which balances the desire to promote equality with a recognition of the importance of freedom of expression (even the freedom of offensive expression) despite the number of offensive and potentially statements that are made by politicians and others in the media which denigrate minority groups or women. The Equality Council deserves praise for its work in this area and the authors wish to acknowledge cases such as case number 90/14 which involved high level public officials publicly suggesting that allegations of ill-treatment in accommodation provided by the state itself can be ignored because the alleged victims have mental health problems:

> "*why are you listening to them, these are sick children"*, or
>
> *"These are people with disabilities and they can say anything."*[49]

Apart from the obvious discriminatory intent – the statements suggest that those with responsibility for investigating the alleged ill-treatment and the media and public at large should ignore the allegations merely because of the disability of the person making the allegation. In fact of course state officials

[48] Case 108/14 180/14, 284/15, 286/15, 359/15, available at:
http://egalitate.md/media/files/files/6-decizie_cauza_108_28_07_2014_depersonalizat_8508578_eng_1533249.pdf
http://www.egalitate.md/media/files/files/decizie_180_2014_eng_5421479.pdf
http://www.egalitate.md/media/files/files/decizie_284_2015_eng_2017674.pdf
http://www.egalitate.md/media/files/files/decizie_286_2015_eng_2663350.pdf
http://www.egalitate.md/media/files/files/19-decizie_359_2016_constatare_eng_depersonalizat_7729313.pdf

[49] Case 090, decision dated 19 June 2014, this was suggested by the Minister of Labor, Social Protection and Family, p. 4.1, available at: http://www.egalitate.md/media/files/files/10-decizie_cauza_090_19_06_2014_depersonalizat_1638597_eng_7048858.pdf

have a particular duty (the investigatory duty of article 3 of the ECHR) to carry out an effective investigation themselves, to get to the truth and to punish anyone responsible for ill-treatment.[50]

In balancing the promotion of equality against freedom of expression it must be acknowledged that both the Equality Council and the courts are emanations of the state for the purposes of the European Convention of Human Rights and a finding of discrimination for exercising a right of free speech in this way, even without a particular criminal sanction, may engage article 10 (although not necessarily violate it). Freedom of expression: "constitutes one of essential foundations of such a society, one of the basic conditions for its progress and for the development of every man"[51] but is subject to restriction, particularly to ban hate speech.

Although in the cases the Equality Council will often refer to freedom of expression it does not, for instance, ask whether the restriction it is about to impose is "prescribed by law"[52] – there is a question given the vagueness of the expression "instigation" whether the law is sufficiently precise. It might be easier to accept that the finding of discrimination has a legitimate purpose (to protect people from hate speech or discrimination) but this needs to be considered carefully in the context of the actual case and needs to be set out clearly for the parties to see and understand. Lastly, the importance of the aim of the restriction on freedom of expression, the nature of the speech and the speaker as well as the nature of the restriction and the possible sanction all need to be carefully weighed up. It is difficult to see how statements by politicians which do not instigate specific discriminatory acts but are part of a wider political discussion could be subject to a sanction and still be in compliance with article 10.[53]

[50] Assenov and others v Bulgaria, ECHR, 28 October 1998, available at: http://hudoc.echr.coe.int/eng#{"fulltext":["Assenov and others v Bulgaria"],"documentcollectionid2":["GRANDCHAMBER","CHAMBER"],"itemid":["001-58261"]}

[51] Handyside v UK, ECHR, (Application no. 5493/72), para 49, available at: http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-57499&filename=001-57499.pdf&TID=erlfalnvcx

[52] Sunday Times v UK (No 1), ECHR, (Application no. 6538/74), 26 april 1979, available at: http://hudoc.echr.coe.int/eng?i=001-57584

[53] However the ECtHR, does accept that combatting hate speech it a vital task, Jersild v Denmark. The ECtHR has also stated that "as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance)", Gunduz v Turkey para 40.

The preamble to the Law No. 121 on Ensuring Equality states that it creates the necessary framework to implement Directive 2000/43/EC[54] and Council Directive 2000/78/EC.[55] Art 2(4) of Directive 2000/78/EC states:

> "An instruction to discriminate against persons on any of the grounds referred to in Article 1 shall be deemed to be discrimination within the meaning of paragraph 1."

Similar provisions have been included in the national legislation of the great majority of EU Member states to deal with the concept of "instigation" although those provisions are both more narrow and more precise and are not about hate speech. Under Bulgarian and Croatian law, only intentional instruction to discriminate is regarded as discrimination[56] and in the UK the problem is dealt with by having a specific law banning employment agencies from discriminating on behalf of employers and by introducing legislation criminalising hate speech.

The expression "instruction" in UK law implies that the person doing the instructing has some degree of power over the person being instructed. One commentator describes it like this:

- "power relationship – moves responsibility up the line of command
- relationship of authority, or one in which A could be expected to act on instructions of B
- the act is the giving of an instruction– not actual act of discrimination."[57]

An employee refusing to carry out an instruction to discriminate might also be protected under the equality law.[58]

(b) Discrimination on the grounds of opinion

Complaints about opinion-based discrimination are difficult for the Equality Council to resolve given the lack of clarity in the national law and the lack of precise parallels in international jurisprudence, see further details below. The authors believe that early decisions by the Equality Council stretched this

[54] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32000L0043
[55] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32000L0078
[56] http://www.era-comm.eu/oldoku/Adiskri/01_Overview/2011_04%20Chopin_EN.pdf
[57] http://www.era-comm.eu/oldoku/Adiskri/02_Key_concepts/2012_schindlauer_EN.pdf
[58] See a UK case http://www.bailii.org/ew/cases/EWCA/Civ/1998/1938.html

provision a little too far, albeit sometimes to do justice when other protections (such legislation to protect "whistle-blowers" did not exist).[59] Such cases have also been criticised by others.

However, more recent cases suggest that the Equality Council has substantially improved its approach by analysing the nature and importance of the opinion held. The importance of the decision underlying the fact that "trivial opinions" are not the target of the protection found in Law No. 121:

> "The Council reiterates that in accordance with Law No. 121/2012, in order to be considered a protected criterion, the opinion criterion should express a set of values based on principles of democracy and human rights accompanied by a great power of conviction and well justified, which refers to a subject of public interest and which becomes part of the identity of the person who express it and differentiate this person from others in the society. Furthermore, this should be coherent, expressed in the public space and constantly."[60]

Article 14 of the ECHR and article 26 of the ICCPR include as a protected category against discrimination:

> "political or other opinion"

The Equality Law of Moldova is drafted slightly differently than the ECHR and ICCPR and protects:

> "religion or belief… opinion, political affiliation or any other similar criteria".

There appears to be no specific decisions or judgments either from the European Court of Human Rights or the UN Human Rights Committee on whether discrimination based on a trivial belief or opinion is unlawful. There

[59] Case 1/13, 168/14, 282/15, available at: http://egalitate.md/media/files/files/2013_10_17_decizia_cauza-001_13-r-saachian-finala-eng_1__3705447.pdf, http://www.egalitate.md/media/files/files/20-decizie_168_2014__engl_depersonalizat_3417146.pdf, http://www.egalitate.md/media/files/files/decizie_282_2015_depersonalizat_5371569.pdf

[60] Case 371/16, T.K.vs. S.B., President of the FNSAA, dated 12 April 2016, available at: http://www.egalitate.md/media/files/files/18-decizie_371_16_neconstatare_eng_depersonalizat_9646857.pdf

are some arguments that suggest that such trivial violations of article 14 are not protected in international law.[61]

(c) Language based discrimination

The Equality Council has considered a number of cases following complaints by members of the public that some public or private bodies have refused to communicate with them in the Russian language. In those cases it has declared that this refusal was discriminatory but often the issue concerned the specific right to use a particular language in the communication rather than discrimination per se.

There are some specific issues raised in cases involving language rights and discrimination in Moldova.[62] A language right has a special position in the Constitution of the Republic of Moldova.

A person who is discriminated against because they speak (or do not speak) a particular language is treated unlawfully (this is direct discrimination). However, a failure hold an event in a particular language or to translate a document into another language is only likely to constitute indirect discrimination.

[61] The European Court of Human Rights gives greater status to some of the categories set out in article 14 compared with others (Eweida v UK, para 71). The Court will now require particularly strong justifications for differential treatment if that treatment concerns a "suspect category" such as: sex, race, nationality, birth, religion, sexual orientation, or HIV status. Opinion is not a "suspect category" and, arguably, discrimination on this ground can be more easily justified. It is also likely that if the opinion concerns a trivial matter any justification will be even easier to demonstrate. In addition, given the importance of some specific kinds of opinions and beliefs which are given their own specific protection in Article 9 (freedom of thought, conscience, religion and belief) or approach taken by the Court towards the importance of some kinds of expression (political) compared with other kinds (commercial), the Court will regard discrimination in relation to some kinds of opinion as more deserving of protection than others (*Markt Intern Verlag v Germany)*.

[62] For example, 9/13, 111/14, 198/14, 206/14, 217/15, 268/15, 284/15, available at:
http://www.egalitate.md/media/files/files/decizie_009_2013_eng_5063801.pdf
http://www.egalitate.md/media/files/files/decizie_111_2014_eng_depersonalizat_2510015.pdf
http://www.egalitate.md/media/files/files/decizie_198_2015_eng_depersonalizat_9831187.pdf
http://www.egalitate.md/media/files/files/decizie_206_2015_eng_depersonalizat_2750358.pdf
http://www.egalitate.md/media/files/files/decizie_217_2015_eng_820219.pdf
http://www.egalitate.md/media/files/files/decizie_268_2015_depersonalizat_eng_4390671.pdf
http://www.egalitate.md/media/files/files/decizie_284_2015_eng_2017674.pdf

Many countries have specific laws (not necessarily anti-discrimination laws) that require the use of more than one language in courts or by public bodies. In Moldova the Law No. 3465 of 1 September 1989 on the Use of Languages Spoken on the Territory of Moldovan SSR in article 11 provides that "The State bodies, state administration, social organizations, enterprises, institutions and organizations shall receive and examine documents from citizens in Moldovan or Russian language". Article 3 explains that "The Russian language, as a language of communication between the nations of the Union of SSR, shall be used on the territory of the republic together with the Moldovan Language as a language of inter-ethnical communication between nations, which ensures a real National-Russian and Russian-National bilingualism". Article 2 provides that "In settlements where the majority of residents are Gagauz, the official language in various spheres of life is the state language, Gagauz or Russian".

Law No. 382 on the rights of persons belonging to minorities and the legal status of their organizations explains in Article 12 (1) that "Persons belonging to national minorities shall have the right to contact the public institutions in writing or verbally in the Moldovan or Russian languages and to be answered in the language in which the application was written."

These national provisions are important and provide very important rights for the many people in Moldova that speak Russian rather than the national language. Although having a dual language law is not a requirement of any international human rights or anti-discrimination treaty and it is not a requirement of article 14 of the ECHR or article 26 of the ICCPR, it is a fundamental principle of international human rights law that the ratification or compliance with a human rights treaty must not result in a reduction of the protections that already exist in that State (article 5(2) ICCPR and article 53 of the ECHR). Higher standards in relation to the use of language are provided by the law in Moldova and these standards should be maintained and should not be reduced.

The ECHR itself gives several specific rights in relation to language itself in its text. Article 6(3) states:

> "Everyone charged with a criminal offence has the following minimum rights:
>
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

For those seeking language rights in a civil court the right to a fair trial in article 6 includes the concept of "equality of arms" between the parties, the requirement that a person is able to effectively participate in the proceedings.

In addition, a language barrier preventing a person taking proceedings in court might also violate article 6(1).[63] Difficulty in understanding the language of the court could also, for instance, be a reason for the provision of a lawyer at public expense if a lawyer when this is "indispensable for effective access to court" (Airey v Ireland, paragraph 26). There is no right to an interpreter if the person understands the language of the court but this language is not his or her mother tongue (Guesdon v France, UNHRC). There is also, of course, a right to be informed of the reasons for an arrest or detention "in a language that he understands".[64]

It is clear that there are many disputes in Moldova over the use of language, some of these relate to the obligations to communicate with public bodies (including courts) in the preferred or only language of the citizen and some raise questions of discrimination of citizens because of the language that they use. The national language rights law needs to be complied with and enforced and there should be greater clarity in the law which should allow citizens to communicate in the language of their choice. The authors were pleased to hear at one of the events organized to discuss their findings that judges have decided (unofficially at least) to accept complaints in any language.

However, perhaps a new body should be created that can enforce these language rights, leaving the Equality Council to focus on language discrimination itself.[65] Another option would be to give the Equality Council an increased mandate (and resources) to deal with both functions.

(d) Legislative review

In a number of cases the Equality Council has made recommendations for changes in the national law following its consideration of the facts of the case.[66] This is a useful way of identifying laws and rules that need to be amended to avoid future acts of discrimination. The recommendations may not constitute remedies for the particular complainant but many complainants will wish to know that the case that they took to the Equality Council will

[63] Case No 009/2013, dated 2 December 2013, Igor Mocan and Serghei Ulanovici vs Buiucani Court of Law, available at: http://www.egalitate.md/media/files/files/decizie_009_2013_eng_5063801.pdf
[64] ECHR, Article 5(2).
[65] In the United Kingdom the Welsh Language Act creates such a body to enforce the use of the Welsh language bodies in Wales, http://www.legislation.gov.uk/ukpga/1993/38/contents.
[66] For example cases 8/13, 60/14, and 110/14.

result in other people not being discriminated against in the future. Obviously, the Equality Council would need to make other rulings in addition to such recommendations to give proper redress to the complainant.[67] It was not clear exactly what institutional systems the Equality Council have for following up such recommendations but it was clear from discussions with staff from the Equality Council that individual staff members tracked developments. Finally, however, ad hoc recommendations resulting from particular cases is not a substitute for a more strategic approach to reviewing legislation more generally for compliance.

The Equality Council has a significant power to ensure the implementation of its recommendations. The Equality Council has the right to initiate enforcement proceedings in cases when the recommendations have not been executed. These proceedings have a punitive character and need to be used each time the Equality Council's recommendations are ignored. However, there are real problems with the procedure (see below) and unsurprisingly the Equality Council now hesitates to use this tool. As a result of the procedural difficulties there appears to be no case when a person or institution was punished for the non-execution of such recommendations.

(3) Findings and Conclusions

The Equality Council has developed its substantive decision making very impressively despite the short time it has been in existence. It has taken a truly modern approach to decision making, ensuring that the international human rights treaties that Moldova has ratified inspire and inform its decisions and its interpretation of national laws protecting equality, particularly Law No. 121.

a. Redress and compensation for the victims of discrimination

The process of seeking a remedy for discrimination should be efficient and proportional.[68] However, even if the discrimination fact is established by a decision of the Equality Council the victim is then required to initiate court proceedings to obtain moral or pecuniary damages.[69] The Equality Council's decisions can obviously be challenged by the respondent in a court and this procedure itself can be lengthy and on average last for around one year, then

[67] See Roagna and Petrusic "*Assessment of the Law on ensuring equality",* page 161.
[68] The European Court of Human Rights has emphasized the importance of an effective remedy in the context of discrimination, see case of Cobzaru v Romania.
[69] The availability of compensation in appropriate circumstances is a requirement of Article 13, Edwards v UK, Oneryildizv Turkey.

if the victim wants compensation it has to be followed by the additional procedure for seeking damages in court, often also lasting for another year.[70]

It was suggested to the authors that the Equality Council itself should recommend the payment of damages in its own decisions where it believes that it is appropriate to do so. This might encourage the respondent to pay those damages quickly and without the need for further litigation. The authors believe that this is a sensible suggestion. Where the respondent did not follow a recommendation by the Equality Council to pay damages the fact of such a recommendation might also assist the court in making its decisions if the victim subsequently took legal proceedings.

Potential victims who go directly to the court therefore have an advantage because the same court procedure resolves both whether or not there was a discriminatory act and provides the remedy, hence shortening significantly the duration of the case. However, taking court proceedings without making a complaint to the Equality Council does not provide an opportunity for the Equality Council to impose an administrative sanction on the perpetrator as only the Equality Council is entitled to initiate this sanction.[71] This is a perverse incentive reducing the deterrent effect of the remedy against discrimination which, is in turn an essential tool for eliminating discrimination more widely.

Even a well-informed discrimination victim has to choose: either a lengthy procedure in the courts or a more simplified and quicker procedure in the Equality Council, but with no compensation and, at present, with little chance of any sanction being imposed on the respondent.

b. Principles of decision-making

Both the courts and the Equality Council would benefit from assistance with writing decisions and judgments so that they are easier to understand, more logical and more accessible. The following principles were developed by one of the authors following a previous specific project working with the Equality Council.

i. Good decisions are properly structured to ensure logical and clear thinking, leading to the right decisions.

[70] Miftahov Maxim versus "Remta-Transport-Privat" Ltd, Decision of the SCJ No. 2r-426/16 dated 25 May 2016, case initiated on March 31, 2015.

[71] Art. 423^5 par. (1) of the Contravention Code "The offences specified in art. 54^2 [equality violation in the labor area], 65^1 [Discrimination in education area], 71^1[Discrimination in access to services and goods publicly available] and 71^2 shall be established by the Council for prevention and combating discrimination and ensuring equality".

ii. The judgment should be set out in an understandable manner and to reduce the risk of dissatisfaction of either party and any subsequent challenge or appeal.

iii. Thinking through the structure of the eventual decision also helps to structure the hearing itself.

iv. A good judgment, like any well-written document, should have clearly identifiable parts arranged in a logical sequence.

v. As much as possible should be written in plain, simple language, very much as a person might explain it to your friend who is not a lawyer or expert

vi. Short words and short sentences, and break up sections with clear headings.

vii. Avoid verbiage, repetition, technical terms, legalese and other languages.

viii. In order to keep the length of the judgment within reasonable limits and to incorporate lengthy documents, textbooks passages or cases that may have been consulted or relied on use footnotes.

ix. The judgment outline should start by addressing any preliminary or threshold issues that must be resolved before the case can proceed on its merits. It should be structured in chronological order or a thematic approach. The outline should also be based on the substantive allegations (although issues about admissibility can be grouped together at the start).

c. Need for strategic litigation

Whilst a few NGOs are particularly expert in national and international discrimination law many are not and, even fewer lawyers have the resources or interest in creating strategic cases in the courts which might have a systemic effect on reducing inequality in Moldova.

The Equality Council itself needs to have the resources and needs to increase its own commitment to use its own procedures, the law and cases in the courts

in more strategic way. Relying on the complaints that happen to be lodged by individuals is not going to be sufficient to deliver equality in practice over the long term.

There are clearly several unresolved issues in the nature of domestic law and its conformity with the articles in the Constitution of Moldova, a few of these have been already considered by the Constitutional Court itself. The Equality Council now has very considerable expertise in dealing with discrimination and an unrivalled understanding of all of the various national discrimination laws and it is sensible for the Equality Council to be given the power to make direct applications to the Constitutional Court to resolve any possible conflicts or ambiguities. The importance and role of international human rights treaties for Moldova and the fact that those that have been ratified are automatically incorporated into the law is an additional reason for providing this additional tool for the Equality Council.

d. Limited deadline for initiating actions against discrimination

The national legal framework requires that a person must initiate an action in a court within three years[72] but in cases of discrimination – this period is limited to one year.[73] The Equality Council has had to reject 15 complaints of discrimination, of which 4[74] complaints referred to alleged discrimination committed after the entry into force of the Law No. 121 on Ensuring Equality.[75]

This time restriction, whilst not unusual compared with other countries, limits the right to an effective remedy in a country when few people understand their rights and where there are few sources of reliable information about discrimination law and procedure. There also seems to be little justification

[72] Civil Code of the Republic of Moldova, article 267 "(1) The general term within which the person may defend his/her infringed right by way of filing an action with the court is 3 years general".

[73] Law on Ensuring Equality No. 121/2012, article 13 "The complaint can be submitted to the Council in term of one year from the moment when the individual could find that it was committed" and article 20 "The term of prescription for bringing an act into the court, based on this law provision, is one year from the moment of committed act or from the moment when the individual could find that it was committed."

[74] Case 206/15, 292/15, 300/15, 339/15, available at: http://www.egalitate.md/media/files/files/decizie_206_2015_eng_depersonalizat_2750358.pdf
http://egalitate.md/media/files/files/decizie_292_2015_inadmisibilitate_4355781.pdf
http://egalitate.md/media/files/files/decizie_300_2015_depersonalizat_7123861.pdf
http://egalitate.md/media/files/files/decizie_339_15_inadmisibilitate_6558607.pdf

[75] Law on Ensuring Equality No. 121 (adopted 25 May 2012, entered into force 01 January 2013).

for requiring action for alleged discrimination to be taken in within one year compared with the three years available for other alleged wrong doing.

In addition, the courts need to ensure that if a decision by the Equality Council is subsequently challenged and quashed in court on the basis of procedural issues or mistakes by the Equality Council (rather than on the merits of the claim itself) the Equality Council is able to reconsider the case so that victims of discrimination are not without a remedy through no fault of their own.

e. Sanctions and remedies

Based on the Law No. 121/2012, the Equality Council formulates recommendations intended to ensure the redress for the victim's rights and to prevent similar violations in future.[76] The Contravention Code makes the Equality Council's recommendations binding[77] and allows the Equality Council to initiate a procedure to sanction those that fail to implement its recommendations.

In the case Natalia Ciobanu v Ministry of Labor, Social Protection and Family[78], the court referred to the Equality Council's decision not to hold the perpetrator accountable for enforcing its recommendations:

> "The Council on the Prevention and Elimination of Discrimination and Ensuring Equality did not undertake any measures (to sanction discriminatory acts, of addressing a hierarchically superior body to undertake corresponding measures, intervening with the respective bodies with applications to initiate disciplinary proceedings in relation to persons holding responsible positions who committed in their activity discriminatory acts, etc.) of the Ministry of Labor, Social Protection and Family for non-execution of the recommendations outlined in its decision of 13 February 2014".

[76] Ibid. Art. 15 par. (4) "[…] The Equality Council's decision includes recommendations for assuring the rehabilitation of victim's rights and preventing future similar cases."

[77] Contravention Code, Art. 71^1 of the "[…] ignoring intentionally and non-enforcing the recommendations provided by the Equality Council […] shall be sanctioned with fines from 50 to 100 conventional units applied to an individual, with a fine from 75 to 150 contravention units applied to responsible persons."

[78] Center Court Decision from September 12, 2014, Case No. 2-3562/14, Natalia Ciobanu vs Ministry of Labor, Social Protection and Family; National Social Insurance House; Territorial Social Insurance House, Buiucani, para. 42; http://www.jcn.instante.justice.md/apps/hotariri_judecata/inst/jcc/get_decision_doc.php?decision_key=FD033494-C370-E411-8956-005056A5FB1A&case_title=Dosar-20-2-5305-27052014-12477

This was in fact outside of the competence of the court and was not a viable argument from procedural point of view. The courts cannot justify their decisions on the basis of the Equality Council's omissions.

It is a cause of some concern that no person has been sanctioned for the failure to follow the recommendations of the Equality Council and therefore there is a question about whether this system provides an effective, proportional and deterrent remedy.[79] There are difficulties imposed by the national procedure in courts requiring the Equality Council, when it is seeking a sanction to comply with specific identity confirmation requirements which is difficult, particularly where the respondent is a public sector body and it is necessary to identify a specific person as the person who was responsible for the discrimination.

When initiating the procedure to sanction the perpetrator of a discriminatory act in a court after a finding of discrimination, the members of the Equality Council are required to jointly confirm the minutes regarding the administrative offence. These minutes are then submitted with the application to the court for an examination of the merits.

The Regulation of the Equality Council[80] in point 36 obliges "[…] *the member of the Council who has concluded the minutes regarding the administrative offence or another member assigned by the chair of the Council*" to attend the court hearing in person. It should be noted that if that Equality Council member is not present in the court for administrative offences the application is likely to fail because no other person is permitted to pursue the matter. It should be clear that if the Chair or a Member of the Equality Council has delegated a staff member to attend on their behalf this should be sufficient for the court to proceed.

Obviously, as part of any effective system of remedies, the Equality Council needs to send the materials to the criminal prosecution body each time the case appears to disclose evidence of a crime having been committed.

f. Complex issues of law and evidence

[79] DIRECTIVE 2000/78/EC of the Council dated 27 November 2000 establishing a general framework for equal treatment in employment and occupation, article 17 "The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive"; DIRECTIVE 2004/113/EC of the Council dated 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services "(27) Member States should provide for effective, proportionate and dissuasive penalties in cases of breaches of the obligations under this Directive."

[80] Law on Activity of the Council for prevention and combating discrimination and ensuring equality, No. 298 dated 21.12.2012.

Equality and anti-discrimination law and issues of evidence can be complex and, as set out above, further training and consultancy should be provided to Equality Council to assist it to improve its work even further.

g. Uncertain status of the Equality Council's decisions and challenges to decisions in courts

The courts have had difficulties when assessing if the decisions of the Equality Council are binding, enforceable and have the authority of *res iudicata*.[81]

The rule regulating the status of the decisions of the Equality Council is found in point 65 of the Law No. 298 *on Activity of the Council for prevention and combating discrimination and ensuring equality* which provides that

> "[…] *The decision which remained final is an official act to be enforced by the given subjects*".

Even though it has an apparently enforceable character, it is based on an ordinary law which contradicts the provisions of the Civil Procedure Code, which limits the power of acts by public authorities[82].

Given the fact that the Equality Council is a public authority[83], the status of its decisions is therefore uncertain, for instance, in the situations when the discrimination victim requests moral compensation from the court based on the Equality Council's findings. Such as application then generates an unnecessary and second examination of the merits in the courts.

Any confusion or perceived contradiction could be avoided if both the key concept of equality law – the burden of proof being on the respondent – and the duty on public bodies to justify their decisions if challenged in the court should be made explicit when the national courts deal with challenges to the decisions of the Equality Council.

[81] Center Court Decision from September 12, 2014, Case No. 2-3562/14, Natalia Ciobanu vs Ministry of Labor, Social Protection and Family; National Social Insurance House; Territorial Social Insurance House, Buiucani, point 42.
[82] Civil Procedure Code, Art. 123 par. (5) "the facts established through an act of the public authority have no power for the court before the trial and may be contested under the conditions set in the present code".
[83] Government Decision No. 1001 dated 26 December 2011, Annex No. 1, Sections II. Autonomous public authorities point 10 "Council for prevention and combating discrimination and ensuring equality".

Only those present at the hearings of the Equality Council should participate in the decision on the complaint. If that requires additional commitment from members and an increase in the fees paid to them this is a price worth paying for a fairer system and one less likely to be challenged.

h. Insufficient resources available to the Equality Council

The Equality Council has only twenty employees[84] and only five people work in the Division for Protection against Discrimination - the unit who are responsible for examining complaints against discrimination.

The duties of these five lawyers include: examining complaints, considering and drafting requests for further information, witnesses and documents, drafting the report of the case, organizing the hearings, drafting the minutes of the hearings, preparing the draft decision, formulating answers to applications contesting decisions, representing the Equality Council in the courts in the administrative cases and in cases where decisions are challenged. With significant levels of staff turnover[85] and delays in recruitment combined with regular increases in number of complaints of discrimination, decisions are now being issued at the limit of the maximum period set out for the resolution of complaints. The number of lawyers involved in settlement of complaints is also under the necessary minimum required.

The members of the Equality Council receive an allowance of 10% of the average salary in the national economy[86] for every meeting attended.[87] Based on the information provided by the Equality Council, the average number of meetings a month is between10 and 15, which amount to a monthly allowance of 5050-7075 MDL (235-330 Euro) per member. The Chair of the Equality Council, who works on full time basis, is remunerated with a gross monthly salary of 5000 MDL (230 Euro)[88]. This salary is some 40% less than the salary of the Ombudsman of Moldova.[89] The current success of the Equality Council has only be achieved and maintained by the extraordinary commitment of both groups despite these remuneration issues.

[84] Law on the activity of the Equality Council No.298, art. 1 para. b).
[85] According to the data from 28.07.2016 the Equality Council has 6 vacancies (of which 4 are for lawyers); and other 3 positions meant for lawyers have been staffed over the last 2 months.
[86] Government Decision No. 879 dated 23.12.2015, the average salary in the national economy accounts for 5050 lei for 2016.
[87] Law on Ensuring Equality, Art. 10 para. (12).
[88] Law on Payroll System in the Budgetary Sector, No. 355 dated 23.12.2005, Annex 3.
[89] Ibid.

The modest remuneration for Equality Council staff[90] and Equality Council Members restricts recruitment, demotivates the employees and drives many towards the private sector, where they are likely to be better paid.[91] Such problems impact negatively in the long term, delay the resolution of cases and damage the quality of the Equality Council's work in the short term.

i. Strengthening the co-operation between the Equality Council and the Ombudsman

The Equality Council has the power to consider and rule on complaints of discrimination, the Ombudsman has the power to seek declarations direct from the Constitutional Court. Both institutions have a mandate to promote equality but different powers and mechanisms (including both having some involvement in cases in the lower and appeal courts). The promotion of equality in Moldova would be more successful if both institutions collaborated in their work in this area ensuring that the best strategies were developed and which took advantage of all of the combined tools that are available to them. Regularly meetings and co-operation from both sides and at the highest level should be encouraged.

[90] Law on Payroll System for Public Servants, No. 48 dated 22.03.2012, Annex No. 1, the gross salary of a main consultant with the I payroll stage accounts for 3600 lei (150 euro).

[91] The lack of administrative support, for instance to take and process the minutes of the hearings consumes unjustifiably the lawyers' time, which could be focused on carrying out other essential activities.

Chapter III. The Courts

(1) Criminal courts

The issues raised by judges about hate crime (offences aggravated by racist motives) in the courts are outside of the remit of this project but are interesting and an important part of the fight for equality. However, the Equality Council can and does refer materials to the prosecutor's office to consider whether there should be a prosecution for a hate crime[92].

(2) Administrative offence cases

An essential part of an effective remedy in discrimination cases is the procedure for sanctioning the offender. Under the national law, the Equality Council can start the procedure for sanction under the following circumstances: violation of equality in employment, discrimination in education, discrimination in the access to goods and services available to the public, as well as hindering the activity of the Equality Council, which includes deliberate ignoring and failure to enforce the recommendations given by the Equality Council. To start the process the Equality Council has to prepare an official report on the offender and to send it to the court for examination.

Analysis of the courts process following such a referral shows that in the most of cases the procedure was stopped, mainly on procedural grounds, before the court issued a sanction. Unfortunately, sometimes the official reports drawn up by the Equality Council have not meet the formal requirements established by legislation. They lack the identification data for the offender, including information about their home address, data from the identity card and the absence of witnesses in cases when the official report was prepared without the offender being present at the hearing[93].

Also, in few case the Court has not applied a sanction because the application was outside the limitation period for applying such a sanction (three months). However, this problem has now been resolved. On 1st August 2016, this

[92] See chapter II, section *(k) above, Refer materials to the prosecutor's office*.
[93] See case 14-4-4106-28042015-7586, dated 12 June 2015, 14-4-621-26012015-7836 dated 22 May 2015, 14-4-1319-16022015-8588 dated 7 May 2015, 14-4-1397-17022015-8701 dated 10 Mach 2015, 14-4-7671-07072015-6007 dated 26 October 2015, 14-4-1313-16022015-7950 dated 3 May 2015.

limitation period was extended to twelve months[94]. This amendment is important and should allow for more effective remedies in some cases.

(3) Civil courts

The courts and categories of discrimination

(a) *Freedom of expression and association: LBGT*

The Balti Municipal Council decided to support the orthodox Church of Moldova and banned "propaganda of non-traditional sexual orientations" in the Municipality of Balti"[95]. The Supreme Court rejected the claim submitted by the information center "GENDERDOC-M" challenging this on the basis that the provision was discriminatory.[96] However the Supreme Court rejected the claim not on substance but because the Balti Municipal Council had already modified the decision.

The Balti Municipal Council's instead issued a new prohibition for the Balti municipality banning public activities which constituted "propaganda of LGBT".[97]

This time, when the ruling was challenged, based on second complaint submitted by Genderdoc-M, the Supreme Court maintained the decision of the Court of Appeal which had declared as null and void because the Municipal Council's new rule discriminated against members of the LGBT community[98].

Although both cases tackle the same issues of freedom of expression and association, they had different outcomes.[99] In the first case, the Supreme Court reject the complaint based on procedural issues, the Balti Municipal Council had already changed its own decision before the case was heard by the Supreme Court.

Another similar case was examined by the courts, based on complaint submitted by the People's Advocate against the People's Assembly of the ATU Gagauzia and the Bashkan of the ATU Gagauzia, who had adopted a

[94] Art, 30 para. (2), of the Contravention Code [amendments: LP134 dated 17.06.16, MO245-246/30.07.16 art.515].
[95] Balti Municipal Council decision no. 02/16 dated 23 February 2012.
[96] See SCJ Decision No. 3ra-318/14 dated 11 June 2014, Genderdoc-M vs the Balti Municipal Council.
[97] Balti Municipal Council decision no. 1/64 dated February 28, 2013.
[98] See Conclusion of SCJ no. 3ra-633/14 dated 22 May 2014, Genderdoc-M vs the Balti Municipal Council.
[99] See also Chapter III, Civil courts, *(b) Freedom of religion.*

law which declared that lesbian and homosexual sexual unions are deemed *"sinful and abnormal which destroys the traditional form of life of the Gagausian people*". [100] In this case the domestic courts applied the international standards and annulled the discriminatory content.[101]

The national courts, when examining such cases, should consider the problem raised through the lens of fundamental rights and follow international practice. For instance, the case Irina Fedotova v Russian Federation, where the UN Committee for Human Rights concluded that the sanction and banning of "propaganda of homosexuality among minors" is both unacceptably ambiguous and discriminatory and violate article 19 (freedom of expression), paragraph 2, read in conjunction with article 26 (equality before law) of the International Covenant on Civil and Political Rights (ICCPR).[102]

The Committee on Equality and Non-Discrimination of the Parliamentary Assembly of the Council of Europe requested an opinion from the Venice Commission [103] in 2012 on "the issue of the prohibition of so-called "propaganda of homosexuality" in the light of recent legislation in some Council of Europe Member States, including the Republic of Moldova, the Russian Federation and Ukraine". The Venice Commission, in its subsequent opinion, was clear that the "*legal provisions which prohibit "propaganda of homosexuality" are incompatible with international standards in the area of human rights and of the ECHR*".[104]

(b) Freedom of religion

In the Supreme Court of Justice case of *Genderdoc-M Information Center v Marchel, Balti and Falesti Bishop,* the Court considered whether the Bishop of the Balti and Falesti Diocese of the Orthodox Church had engaged in hate speech and incited discrimination against homosexuals.[105] The Bishop stated

[100] Law of the ATU Gagauzia No. 89 of 30.04.2013, art. 7 para. (7), art. 10 para. (2) (5) and art. 11.
[101] See decision of Appelate Court no. 3a-83/2014 dated 10 March 2015, People's Advocate vs the People's Assembly of the ATU Gagauzia and the Bashkan of the ATU Gagauzia. Also see decision of SCJ No. 3ra-1019/14 dated 29 October 2014, People's Advocate vs the People's Assembly of the ATU Gagauzia and the Bashkan of the ATU Gagauzia.
[102] CCPR/C/106/D/1932/2010.
[103] The Venice Commission is an advisory body of the Council of Europe, composed of independent experts in the field of constitutional law. It was created in 1990.
[104] Venice Commission Opinion No. 707/2012, "regarding the prohibition of the so-called "homosexuality propaganda" in some Member States of the Council of Europe", para. 83, available at: http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)022-e
[105] See decision of 1-Decision No. 2ra-1448_15 dated 16 September 2015 GDM vs Marchel and other.

that homosexuals should be banned from all spheres of life and that 92% of them have HIV/AIDS.

The first instance court found that the Bishop was liable and ordered that him to apologise and pay damages and legal costs. The Supreme Court, however, quashed the decision of the first instance court holding that the impugned speech was in fact consistent with the teachings of the Orthodox Church. However, it seems difficult to reconcile the decision of the Supreme Court with the provisions of Law No. 121, which states that the instigation of discrimination is unlawful. It is also difficult to reconcile this with the jurisprudence of the ECtHR. The ECtHR has stated in a case involving a claim of Article 10 and freedom of expression following similar homophobic statements:

> "The Court observes that, according to the leaflets, homosexuality was "a deviant sexual proclivity" that had "a morally destructive effect on the substance of society". The leaflets also alleged that homosexuality was one of the main reasons why HIV and AIDS had gained a foothold and that the "homosexual lobby" tried to play down pedophilia. In the Court's opinion, although these statements did not directly recommend individuals to commit hateful acts, they are serious and prejudicial allegations.
>
> Moreover, the Court reiterates that inciting to hatred does not necessarily entail a call for an act of violence, or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favor combating racist speech in the face of freedom of expression exercised in an irresponsible manner. In this regard, the Court stresses that discrimination based on sexual orientation is as serious as discrimination based on "race, origin or color".[106]

Apart from the factual inaccuracy of the comment about HIV in the second sentence of the statement by the Bishop, the statement appears to be designed to specifically to encourage discrimination in employment in specific institutions. It is also likely to have a real effect because it was made by a Bishop in a country where large numbers of people revere the church, where such a statement is likely to be trusted and accepted and where its plea to discriminate is likely to have significant influence with a substantial number of people in Moldova, leading to further acts of discrimination. Statements

[106] Vejdeland and others v Sweden, paragraph 55, where the Court found no violation of Article 10 despite the fact that the authors of the leaflets were given suspended sentences and fines for distributing the leaflets.

which are restricted to issues of doctrine, for instance, concerning the approach of the Church on the issue of sexual orientation which do not encourage flouting of the law or which only relate to the exclusion members of the LGBT communities from recruitment to the priesthood itself might justify the Supreme Court's approach. However, the Supreme Court's approach was not so restricted and, in the opinion of the authors, cannot be justified.

The Supreme Court has, however found discrimination against homosexuals unlawful. In *Genderdoc-M and Angela Frolov v Vitalie Marian*, the publication of a "blacklist" containing the names of individuals who supported homosexuality.[107]

The differing judgments in these similar cases, raise questions about the reasons for these differences and the quality of the decisions being made by the Supreme Court. It does not seem that more recent decisions are moving any closer to the international standards that bind the Republic of Moldova, since the case against Vitalie Marian was resolved in 2014, while the case Genderdoc-M vs Marchel, was decided in 2015. Perhaps the reason for these differences is not the judges' legal expertise, but rather the church's problematic influence over politics and the judiciary in Moldova.

Analysing the evidence

(c) Burden of proof

Civil courts in Moldova do not always seem to apply the provision which imposes on the respondent the burden of proof to disprove the allegation of discrimination. The solution to this problem may require changes to civil procedure code to ensure that the details of how the burden of proof should be applied in discrimination cases are set out and to ensure that this is applied properly in every case and is made explicit in the text of each and every judgment. In the case of Zapescu Grigore vs Trabo Plus SRL (Andy's Pizza)[108], which has recently been submitted to the UN Committee on the

[107] See Decision of SCJ No. 2ra – 731/14 dated 19 March 2014 Genderdoc-M and Angela Frolov vs Vitalie Marian.

[108] Case Zapescu Grigore vs Trabo Plus SRL, 1st Court (case No. 2-472/14), dated 27 June 2014, available at: http://www.jcn.instante.justice.md/apps/hotariri_judecata/inst/jcc/get_decision_doc.php?decision_key=F049AE51-9D1C-E411-8956-005056A5FB1A&case_title=Dosar-20-2-1640-07022013-13900
Appeal Court (case No. 2a3692/14), dated 22 January 2015, available at: http://cac.instante.justice.md/apps/hotariri_judecata/inst/cac/get_decision_doc.php?decision_key=839655AF-7FAC-E411-8112-005056A5D154&case_title=Dosar-02-2a-15181-26082014-35139

Elimination of Racial Discrimination, reveals systemic problems in the ways courts apply the burden of proof in discrimination cases. In this case Mr. Zapescu Grigore, from the Roma community, together with his colleague Baciu Vlad, of Moldovan ethnicity, applied to be waiter in the pizza chain "Andy's Pizza" (Trabo Plus SRL). Mr. Zapescu Grigore's physical appearance reflected his ethnicity and his CV included the fact that he understands the Romani language.

After an interview, he was informed that he would be told the result of the interview by the end of the week, and would be contacted by telephone. No one from Andy's Pizza ever contacted him. Baciu Vlad was interviewed on the same day and immediately after the interview he was accepted for the waiter's position and given a date to start work. The court, when considering the case, used the same general standards that apply in other civil cases, according to which both parties needs to prove their own case. Secondly, although the Law No. 121/2012 does not require the victim make an application to the Equality Council before taking action in the civil courts (see art. 13 par. (3) of the Law), the court stated that the:

> "public authority empowered with duties to prevent and eliminate discrimination and ensure equality mentions that there was no claim submitted by the applicant to the Council, and this fact confirms the lack of a real discrimination situation, otherwise the applicant would have lodged the claim so as to protect his violated right."

The court should have directly applied the relevant international standards to this discrimination cases because Law no. 121 itself was not yet in force. The court should have concluded, that the difference in treatment was unlawful and the unjustified refusal to employ a person from the Roma community was obviously discriminatory. [109] Equally court's rejection of the evidence submitted by the injured party combined with the appropriate burden of proof as determined by the principles expressed by the ECHR in the case D.H. and others vs. the Czech Republic should have resulted in a similar finding.

> "According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made

Supreme Court (case No. 2ra-2038/15), dated 16 Septembre 2016, available at: http://jurisprudenta.csj.md/search_col_civil.php?id=22032

[109] Law on Ensuring Equality, art. 7 para. (2) let. b).

and the Convention right at stake"[110] […]. Where the difference in treatment is based on race, color or ethnic origin, the notion of objective and reasonable justification must be interpreted as strictly as possible".[111]

(4) Constitutional court

(1) Different treatment of women and men on acquiring the age-limit pension right

The Law on State Social Insurance Pensions (Law No. 156 of 1998), sets the retirement age in Moldova at 57 for women and 62 for men, and consequently ends any employment relationships. The Equal Rights Trust has questioned the correctness of the decisions of the courts when they considered this provision[112]. On 22 March 2011 the Constitutional Court found that Article 62 (1) (d) of the Law on Public Function and Status of Civil Servants, which provides that employment may be terminated "when the public official reaches the age required for obtaining the age pension", did not violate the constitutional right to non-discrimination on the basis of age. The Court explained that the goal of the Law is to ensure a stable, professional, impartial, transparent and efficient public service in the interest of society and asserted that this necessitated a high standard of professionalism for those holding public office. The Court did not provide arguments as to why age is considered an essential professional requirement for civil servants. In its judgment, the Court stated that age is not stipulated as a protected ground in Article 16 (Equality) of the Constitution. The court's mistaken statement that age is not a protected characteristic and included in the International Covenant on Economic, Social and Cultural Rights, is of some concern. This opinion is contrary to universally recognized international standards[113].

(2) Religious beliefs – excepted from applying the nondiscrimination principle

The Law No. 121, in art 1 (2) (c) provides for an exception from the general provisions outlawing discrimination for religious organizations in relation to

[110] Cobzaru v. Romania (Application no. 48254/99), 26 July 2007, para 93.
[111] D.H. and others v. The Czech Republic (Application no. 57325/00), 13 November 2007, Grand Chamber, para. 196.
[112] "From Words to Deeds", page 210.
[113] See CESCR General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons, point. "since the prohibition of discrimination on the grounds of "other status" could be interpreted as applying to age"; see also General Comment No. 20 Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2), point. 29.

actions based on their religious beliefs. This provision was considered by the Constitutional Court in Decision No. 14 dated 16.05.2016[114]:

> "the right to hold certain beliefs is a subjective matter, but not the exterior manifestation of his/her beliefs[115].

In this respect, the Court underlined the fact that article 1 par. (2) let. c) of the Law No. 121 applies only to the extent that it refers to the teachings, cannons, and traditions of religions, those that adhere to those religions, the religious acts and in premises meant for such a purpose.[116]

The Court noted that the challenged provisions refer to religions and in relation to religious believers, and that therefore they are not contrary to the constitutional rules.[117]

Although the Constitutional Court accepted the constitutionality of this exception to the law outlawing discrimination, it limited it to ensure the protection of the inner belief of a person and not necessarily its external manifestation and stressed that the courts have to be prudent when applying this provision. Article 9 (1) of the ECHR provides that everyone has the right to manifest his religion or belief including in public, and any restriction of the respective freedom needs to comply with the limitations allowed in paragraph 2 – it has to be prescribed by law and to be necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

The Court's decision needs to be applied carefully in cases not related to the exception in article 1 of Law 121 to avoid judges unjustifiably limiting freedom of religion. Any restrictions on freedom of religion need to be justified on the basis of the 2nd paragraph of Article 9 of the ECHR. Without a more sophisticated approach this could result in minority religions, such as Islam, Falun Dafa etc. being vulnerable to unacceptable restrictions. When limits on the exercise of freedom of religion or belief are under examination there should be an explicit examination of the limitations set out in the 2nd paragraph of Article 9 ECHR.

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[114] Constitutional Court Decision No. 14 dated 16.05.2016 on unconstitutionality exception for article 1 par. (2) let. c) of the Law on Ensuring Equality No. 121 dated May 25, 2012 (application No. 28g/2016), available at: http://www.constcourt.md/download.php?file=cHVibGljL2NjZG9jL2hvdGFyaXJpL3JvLWgxNDI4ZzIwMTZyb2E4YzgwLnBkZg%3D%3D

[115] Ibid, point 82.

[116] Ibid, point 95.

[117] Ibid. point 96.

(3) Challenge to absence of sexual orientation in Article 1

The list of criteria enumerated in article 1 of the Law on Ensuring Equality does not include sexual orientation. However, in article 7 of the law, discrimination in employment on the grounds of sexual orientation is made unlawful.

In an application made on June 10, 2013 the Constitutional Court reviewed this law, and the absence of the "sexual orientation" discrimination in article 1. The case was initiated by a notification from a deputy and member of the socialist party, who voiced his opposition to the law on ensuring equality and in support of the "traditional values" of the Orthodox Church. In its analysis, the Court started its consideration taking account of the provisions set forth in article 4 (2) of the Constitution, which gives priority to international treaties in matters related to fundamental human rights. Therefore, the Court considered the details of art.14 of the European Convention on Human Rights, which sets out 13 specific grounds of discrimination and, furthermore, that the list is not exhaustive, reiterating the state's obligation to protect against discrimination all areas of life. The Court also confirmed the legality of the powers provided to Equality Council to examine complaints about discrimination[118]. However, the Constitutional Court judgment confirmed that sexual orientation is prohibited under the Law on Ensuring Equality. They decided that there is no reason in principle to confine Article 1(1) to the grounds explicitly set out there. The plain language of the Article includes analogous criteria and there is nothing about sexual orientation discrimination that renders it substantively different to, for example, discrimination on the grounds of race, sex or language. The Constitutional Court declared that the Law on Ensuring Equality itself provides protection against discrimination on grounds of sexual orientation.[119] This approach was absolutely right and it was necessary for the national law to be read in this way. However, it is essential that this approach is now followed by the other courts in Moldova.

(4) Military service for men and discrimination when exercising the right to child care leave

[118] Constitutional Court Decision to reject the application No. 27a/2013 for constitutionality control of some provisions from the Law on Ensuring Equality No. 121 dated 25 May 2012, para. 39-40.
[119] "From Words to Deeds", page 322.

In its decision No. 12, dated 01.11.2012[120], the Constitutional Court expressed its position regarding the application by the Ombudsman on the issue of gender equality in case of military service and the right to child care leave. In this case, the Court found as unconstitutional the provisions limiting this right to women only. This case demonstrated that the Constitutional Court properly considered the ECHR in practice and took account of its jurisprudence, with its specific reference to the case of Konstantin Markin v. Russia. In that case the Grand Chamber established that article 14 was violated in combination with article 8 of the Convention by the refusal of the Russian authorities to recognize the right to child care leave for the male applicant as compared to a woman for whom this right was explicitly recognized[121].

(5) Legal capacity of persons with mental disability

The Constitutional Court was asked by the Ombudsman to consider article 21 par. (5) let. e) of the Law No. 52 dated April 3, 2014, which provided that people deprived of legal capacity did not have the right to submit complaints to the Ombudsman's Office. [122]

The Court took account of art. 12 par. 1 of the UN Convention on the Rights of Persons with Disabilities, according to which "*persons with disabilities have the right to recognition everywhere as persons before the law*". The Court decided that the restriction imposed on a person without legal capacity to complain to the People's Advocate was contrary to the importance granted by the international texts for the protection of persons suffering from mental disorder and the need to ensure as far as possible each such person's practical autonomy.[123]

Unfortunately, the Court's progressive approach was limited by the nature of the actual application (the application referred just to right to submit the complaint to the Ombudsman's office) and, therefore, it did not have the opportunity to recognize the general legal capacity of the persons with disabilities as provided in the UN Convention on the Rights of Persons with

[120] Constitutional Court Decision No. 12 dated 01.11.2012 for constitutionality control of some provisions of article 32 par. (4) let. j) of the Law on Militaries' Status No. 162 dated July 22, 2005; http://www.constcourt.md/download.php?file=cHVibGljL2NjZG9jL2hvdGFyaXJpL3JvLWhfMTIuMjAxMi5yb20ucGRm
[121] Ibid. para. 91.
[122] Constitutional Court Decision No. 27 dated 13.11.2014 for constitutionality control of article 21 par. (5) let. e) of the Law No. 52 dated April 03, 2014 on People's Advocate (Ombudsman) (non-review of the complaints lodged by the incapable persons); http://www.constcourt.md/ccdocview.php?l=ro&tip=hotariri&docid=518
[123] Ibid. para. 88.

Disabilities, which provides that persons with disabilities need enjoy legal capacity on an equal basis with others in all aspects of life.[124]

The UN Committee for the Rights of Persons with Disabilities in its General Comment No. 1 argues that there has been a general failure to understand that the human rights-based model of disability implies a shift from a substitute decision-making paradigm to one that is based on supported decision making.[125]

In this context it is important to note that the Article 12 does not permit any discriminatory denial of legal capacity, but, rather, requires that support be provided to exercise that legal capacity[126]. Any approach that denies persons with disabilities legal capacity, including, for example, a restriction based on financial resources, must be replaced with an approach which includes support to exercise that legal capacity. In the same way as gender may not be used as the basis for discrimination in the areas of finance and property, neither may disability.[127]

Following the mission in Moldova of the UN Special Rapporteur for the Rights of the Persons with Disabilities, the Special Rapporteur recommended an amendment to the national legislation to ensure it complies with the provisions of art. 12 of the Convention.[128]

(5) Findings and Conclusions

a. Principles of decision-making

The courts would benefit from assistance with writing decisions and judgments so that they are easier to understand, more logical and more accessible. The principles set out above might be a helpful basis for such training.

b. Strategic litigation

[124] UN Convention on the Rights of Persons with Disabilities, art. 12 paragraph 2.
[125] General comment on Article 12: Equal recognition before the law, (CRPD/C/11/4), 25 November 2013, pct. 3.
http://www.ohchr.org/Documents/HRBodies/CRPD/GC/DGCArticle12.doc
[126] Ibid. para. 15.
[127] Ibid. para. 23.
[128] Report of the Special Rapporteur on the rights of persons with disabilities on her mission to the Republic of Moldova (A/HRC/31/62/Add.2), 2 February 2016, para. 65
http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Documents/A%20HRC%2031%2062%20Add.2_E.docx

More cases based on systemic discrimination (and using statistical evidence of inequality), as demonstrated by the case of DH v Czech Republic need to be pursued. Making resources and training available to encourage strategic litigation is essential if the courts are really to be a catalyst for change.

The courts also need to be open to actions by associations and NGOs representing victims or potential victims of discrimination. Cases taken by such bodies are often more efficient ways of dealing with such issues and are often more effective than the courts processing a series of individual cases which may or may not deal with the systemic problem that is creating those cases.

c. Use of court as a remedy

Whilst the number of applications to the Equality Council and the subsequent numbers of decisions it makes are increasing year on year, the number of cases taken directly to court appears to be tiny, perhaps something like 20 cases were examined by Supreme Court of Justice in any year. Given the difficulties in the process of obtaining compensation for victims who start their cases by making complaints to the Equality Council, the low number of cases in the courts might suggest that there are other obstacles to using the courts and they are substantial. It was beyond the scope of this report to investigate the detailed nature of these obstacles but they are likely to include lack of awareness of the remedy or how it can be used, procedural difficulties, the financial costs, and the difficulty in finding lawyers with the necessary expertise. It is suggested that action should be taken to publicize the availability of the court based remedy, reduce any difficulties that there might be in taking proceedings, and increase the resources of those who can assist victims (both by increasing resources for NGOs and for legal aid for those that cannot afford private lawyers).

Unfortunately, the few decisions that have been made by the courts, including the higher courts, too often show a distinct lack of understanding of how the national domestic law should be applied and an even greater absence of appreciation of the international jurisprudence and principles that are binding on the courts of Moldova. This includes failures to understand and apply the reverse burden of proof in discrimination cases.

These failings should be remedied by more training for lawyers, non-specialist NGOs and of judges at all levels.[129] It was suggested during the research carried out for this report that individuals are reluctant to go to court

[129] Obviously training judges needs to be provided with due respect to their constitutional independence and consequently needs to be provided by recognized experts.

because they believe that the court system is corrupt and only those that pay bribes win cases. Recommendations about this issue go much wider than the report's remit and no specific evidence of corruption was provided to the authors.

The Equality Council should, itself, provide more information on the remedies available to victims of discrimination, including a guide to assist people to understand both its own procedures and those of the courts and explain objectively the pros and cons of both the options.

d. Recording data on discrimination cases in the courts system

All the courts in Moldova, after examining a case, record its decision in a unique registry. However, the current system does not allow lawyers or researchers an opportunity to identify all the cases concerning discrimination. Without this data it is difficult to develop an objective or scientific analysis of the progress of anti-discrimination litigation in Moldova, to identify any positive lessons or to learn about obstacles which need to be overcome to improve the system.

e. Court Decisions are not always based on the principles and jurisprudence of international law and treaties which are binding on the Republic of Moldova

The national court's decisions unfortunately show a lack of consistent case-law, especially in relation to the limits of freedom of expression and of religion.

f. National courts do not take sufficient account of the international treaties that bind the Republic of Moldova and fail to apply international human rights instruments

Courts appear to have difficulties in applying the principles and jurisprudence of international law and the treaties which are binding on the Republic of Moldova. Case analysis shows that courts often apply the law without considering international standards or with only a passing reference to them, although the Constitution, under the Article 4 provides for this. It is necessary to raise awareness among judges of the importance of the direct application of international instruments on human rights. In this way it will be possible to increase of the quality of justice and ensures that any restrictions on the rights and freedoms will be framed properly within the principles of international law.

Chapter IV. Overall conclusions and recommendations

(1) Conclusions

The introduction of anti-discrimination laws in Moldova is very positive, particularly so because they have been accompanied by systems that provide real remedies to the victims of discrimination. It is also to be welcomed that individuals have a choice of remedies, either to make a complaint to the Equality Council or to use the courts. The Equality Council is making important strides to promote equality and to end discrimination and has taken the initiative to deal with some of the more controversial issues in Moldova with energy and imagination. They need extra support and the removal of the obstacles that prevent them from doing an even better job.

Since 2013, the Equality Council has examined 420 individual complaints and issued 230 decisions, and found that there was some element of discrimination in 103 cases[130]. The Members of the Equality Council initiated ex-officio notes in 17 discrimination situations. Out of the 230 decisions issued by the Equality Council, 35 have been contested in courts, of which 15 by the public authorities. From the total number of the contested decisions, the Supreme Court of Justice upheld 5 and overturned 2. The Equality Council has issued 32 contravention reports, 29 of which were annulled by the courts as a result of procedural issues, in 2 cases the persons was found guilty but there was no sanction because the application was outside the three month limitation period. In one case a person was sanctioned for hindering the activity of the Equality Council.

The Equality Council has made a very impressive contribution to promoting equality in Moldova. Both the staff and the Members of the Equality Council understand the objectives that have been set by Parliament for the Equality Council are making great strides towards those objectives. The Equality Council has made great strides in its short period of existence to provide an effective complaints procedure, largely makes very good decisions and has developed the ability to use its cases to forge systemic change. The legislation and administrative arrangements for enforcement of their decisions or obtaining compensation for victims are problematic however and challenges to their decisions in the courts have created additional problems for them in pursuing these objectives. With an increase in their reputation and visibility with the public they already need more resources to avoid increasing delays in dealing with cases and staff and Member remuneration needs to be increased.

[130] See official web site of the Equality Council http://egalitate.md/index.php?pag=page&id=930&l=ro

They have already taken some steps themselves to improve their practices and impact, including recommendations for legislative and procedure review highlighted by their cases, initiating cases themselves where they are clear systemic issues of discrimination, better structured decisions, greater compliance with international human rights and equality standards and resisting the temptation to try to deal with the many complaints from people who have been ill-treated but where the evidence of discrimination is not so clear.

They need to continue taking steps in this direction and there are other steps that they could take themselves including better links with the Ombudsman, greater clarity around the nature of the discrimination that they have identified in their decisions (including whether or not the allegation concerns direct or indirect discrimination), an even more proactive approach to evidence gathering, taking the initiative to create more cases where there are clearly issues of systemic discrimination in Moldova, a greater focus on basing decisions on the evidence, a more sophisticated approach to applying the reverse burden which is imposed on respondents, and a clearer analysis of international standards on the "instigation of discrimination", opinion based discrimination and language based discrimination.

The courts are a little further behind in making their contribution but there are many judges working hard to make a difference. In addition, there have been some important decisions of both the Constitutional Court and the Supreme Court that have set new standards and have upheld the international approach to equality. They have more to do but the direction of travel seems to be the right one.

The domestic courts do, however, represent an important component of the national mechanisms for combating discrimination in the Republic of Moldova. The victims of alleged discrimination can also complain directly to the courts for judgments declaring whether an act was discriminatory and can request compensation for moral and material damages. The courts can also overturn the Equality Council's decisions, following a challenge by either party. Although, the exact number of decisions on discrimination cases issued by the courts is unknown, at least a number of 45 decisions (including the contested decisions of the Equality Council) have been recorded by various stakeholders during different public events. The decisions issued by the courts on discrimination cases have been criticized by many of the stakeholders that were consulted as part of this report on the basis that they neither follow the national law, international legal principle on equality nor make proper assessments of the evidence and this problem has been confirmed by the above analysis.

However, many judges, including those consulted as part of this project, were clearly committed to ensuring that both the domestic and international law standards on equality were properly respected and interpreted when discrimination cases were being adjudicated. The courts do not seem to achieved a correct balance been the right of freedom of religion, freedom of expression and equality. These freedoms do not trump claims of equality necessarily and the careful balance being created by, for instance, the European Court of Human Rights, seems not to have percolated through the courts. Similarly, the approach to the reverse burden of proof on respondents does not seem to have always been grasped by the courts either.

Perhaps the biggest issue is the relatively few victims who have chosen to use the courts rather than the Equality Council, especially given the fact that compensations is only availably through the latter. The reasons for this probably include: unfamiliarity and fear of taking court proceedings (including fear of costs), the relatively short deadline for taking proceedings, low awareness of the availability of the remedy not just amongst victims but also lawyers, and the real issue of access to knowledgeable lawyers and the inability to pay for them.

Although it is not the function of this report to analyze the provisions of the substantive anti-discrimination law of Moldova, several issues have arisen in the decisions of the Equality Council and the courts which might indicate that amendments to the law might be sensible. These might include: (i) the extension of the grounds of discrimination in article 1 of Law No. 121 to include specifically discrimination on the grounds of sexual orientation; (ii) greater clarity and a narrower and more focused exemption for religious organizations; (iii) a clearer definition to the concept of "instigation" of discrimination in the same law; and (iv) a narrower definition of the concept of discrimination on the grounds of opinion to avoid trivial opinions being given the same protection as the more important categories of opinion such as political, religious or philosophical opinions.

(2) Recommendations

a. Redress and compensation for the victims of discrimination

The process of seeking a remedy for discrimination should be efficient and proportional. The Equality Council itself should recommend the payment of damages where appropriate and this recommendation should be accepted by the respondent and, if not, taken into account in any subsequent proceedings in court.

b. Principles of decision-making

Both the courts and the Equality Council would benefit from assistance with writing decisions and judgments so that they are easier to understand, more logical and more accessible.

c. Need for strategic litigation

Making resources and training available to encourage strategic litigation is essential if the courts are really to be a catalyst for change.

The courts also need to be more open to actions by associations and NGOs representing victims or potential victims of discrimination.

The Equality Council itself needs to have the resources and to increase its own commitment to use its own procedures, the law and cases in the courts in more strategic way.

The Equality Council should be given the power to make direct applications to the Constitutional Court to resolve any possible conflicts or ambiguities.

d. Limited deadline for initiating actions against discrimination

The time limit for action for alleged discrimination should be extended from one year to the three years available for other alleged wrong doing.

If a decision by the Equality Council is subsequently challenged and quashed in court on the basis of procedural issues or mistakes by the Equality Council (rather than on the merits of the claim itself) the Equality Council should reconsider the case so that victims of discrimination are not without a remedy through no fault of their own.

e. Amendments to the substantive law

The provisions of the substantive anti-discrimination law of Moldova should be amended as follows: (i) the extension of the grounds of discrimination in article 1 of Law 121 to include specifically discrimination on the grounds of sexual orientation; (ii) greater clarity and a narrower and more focused exemption for religious organizations; (iii) a clearer definition to the concept of "instigation" of discrimination in the same law; and (iv) a narrower definition of the concept of discrimination on the grounds of opinion to avoid trivial opinions being given the same protection as the more important categories of opinion such as political, religious or philosophical opinions.

f. Language rights and language discrimination

There needs to be greater clarity in the law which sets or the rights of citizens to communicate in the language of their choice. Consideration should be given either to the creation of a new body that can enforce these language rights, leaving the Equality Council to focus on language discrimination, or to give the Equality Council an increased mandate (and resources) to deal with both functions.

g. Use of court as a remedy and training of lawyers and judges

Action should be taken to publicize the availability of this remedy, reduce the difficulty of taking proceedings, and increase the resources of those who can assist victims (both by increasing resources for NGOs and for legal aid for those that cannot afford private lawyers).

Some of these failings could be remedied by greater training of lawyers, non-specialist NGOs and of judges at all levels including by providing information and assistance in the principles and jurisprudence of international law and treaties which are binding on the Republic of Moldova.[131] For lawyers, judges and prosecutors the process for initial and continuous training at the National Institute of Justice on discrimination should be strengthened and should occur in cooperation with the Equality Council.

The Equality Council should, itself, provide more information on the remedies available to victims of discrimination, including a guide to assist people to understand both its own procedures and those of the courts and explain objectively the pros and cons of all the options.

h. Use international standards

It is necessary to raise awareness among judges of the importance of the direct application of international instruments on human rights. In this way it will be possible to increase of the quality of justice and restrictions on the rights and freedoms will be framed properly within the principles of international law. This training in human rights should also focus on the burden of proof, the balance between cases of discrimination and freedom of expression, freedom of association and freedom of religion and belief.

[131] Obviously training judges needs to be provided with due respect to their constitutional independence and consequently needs to be provided by recognized experts.

i. Sanctions and remedies

The Contravention Code needs to be urgently reviewed to deal with the difficulties imposed by the requirement that the Equality Council needs specific identity confirmation where the respondent is a public sector body and it is necessary to identify a specific person as the person who was responsible for the discrimination.

When initiating the procedure to sanction the perpetrator of a discriminatory act in a court after a finding of discrimination, the member of the Equality Council needs to attend the court hearing in person. It should be sufficient that the Equality Council has official representation in court, without the need for a specific Equality Council member to be present.

j. The Equality Council training and support for staff and Members on complex issues of law and evidence

The UNDP, UNHCR and Council of Europe should continue to support the work of the Equality Council and should continue to provide resources for training, workshops and seminars particularly in the area of substantive equality and anti-discrimination law, advanced training in the field of human rights, and initiation of the sanctions procedure, and issues of evidence.

k. Uncertain status of the Equality Council's decisions and challenges to decisions in courts

The apparently enforceable character based on an ordinary law contradicts the provisions of the organic law, such as the Civil Procedure Code, which limits the power of the acts by public authorities. This should be reviewed by the government and urgently resolved to ensure that the Equality Council's decisions are binding and will be upheld and enforced by the courts.

The key concept of equality law – the burden of proof being on the respondent – and the, apparently, contradictory duty on public bodies to justify their decisions needs to be resolved by an amendment to law 298 upholding the former.

Only those present at the hearings of the Equality Council should participate in the decision on the complaint but decisions should be able to be made by three members of the Equality Council.

l. Insufficient resources available to the Equality Council

The Equality Council needs an increase in resources to increase its staffing levels and to increase the remuneration paid to its staff and Equality Council members.

m. Strengthening the co-operation between the Equality Council and the Ombudsman

Both institutions should collaborate more closely in promoting equality and ensure that the best strategies are developed and which take advantage of all of the combined tools that are available to them. Regularly meetings of the Ombudsman and the President of the Equality Council should happen every six months and regular meetings of the key staff every month to develop these complementary strategies.

n. Recording data on discrimination cases in the courts system

We recommend the development of a new a methodology which would allow all decisions and judgments in discrimination cases to be identified.

Chapter V. Annexes

(1) Case selection criteria

Whilst the number of cases concerning discrimination or the Equality Council itself dealt with by the domestic courts is small enough to allow every court case to be considered and analysed, the numbers of cases decided by Equality Council itself and not subsequently contested is not. Some selection of those latter cases, therefore, will be necessary. It proposed not to consider cases where the Equality Council has ruled that the case is not admissible unless that has been formally challenged or unless the case is considered to be important by one of the stakeholders who were consulted about this analysis.

The development of the case selection criteria has been subject to consultation with a number of key stakeholders and has developed organically and been reviewed to ensure that the cases selected can be analysed properly within the timetable and resources of the project.

There is some evidence that the Equality Council have become more sophisticated in its decision making since it was first established in 2013 and one factor in the selection of cases has been how recently the decision has been made.

The following cases were selected for further analysis:

(1) Contested decisions

- Any decision made by the Equality Council that has been contested in the courts;
- All court decisions which concern the decisions or actions of the Equality Council;
- Any decisions of the higher courts concerning discrimination or Law No. 121;
- Any decision of the Equality Council which was not supported unanimously by all members of the Equality Council;
- Any decision of the Equality Council or of the domestic courts on discrimination that has been criticised or questioned publicly by international organisations, NGOs or in the media;
- Any decision relating to Moldova concerning discrimination made by or pending in the European Court of Human Rights, the United Nations Treaty bodies systems (especially CERD, CEDAW or CRPD) or other similar institutions;

(2) Subject specific issues

- Any decision of the Equality Council or of the domestic courts on discrimination concerning hate speech or hate crime;
- Any decision of the Equality Council or of the domestic courts on discrimination which raised issues of freedom of expression or Article 10 of the European Convention of Human Rights;
- Any decision of the Equality Council or of the domestic courts on discrimination in which the argument concerned conflicts between equality principles and the freedom to supply good and services;
- Any decision of the Equality Council or of the domestic courts on discrimination where statistical evidence was used to try to prove discrimination or challenged systemic discrimination (for instance state failures to protect women subjected to domestic violence);
- Any decision of the Equality Council or of the domestic courts on discrimination which concerned the use of a particular language;
- Any decision of the Equality Council or of the domestic courts on discrimination relating to positive action to redress historical discrimination;
- Any decision of the Equality Council or of the domestic courts on discrimination concerning issues of procedure, sanctions or redress;

(2) Analysing the cases: methodology

Criteria for Assessment

Cases have been assessed to analyze the extent to which they comply with the following criteria:

- Preliminaries
- Clarity and logical structure
- National Law and procedure
- International law and principles
- Effective remedies and sanctions

In relation to each of these factors the following more detailed considerations have been used. However, and despite the detailed nature of these, requiring a careful critique of any decision, the overall objective of the project is to

identify the important and key issues and it will be those more fundamental issues which are reflected in the final report. It is not the object of this report to make pedantic and bureaucratic criticisms of decisions but to ensure that the Equality Council and the courts promote and protect equality and human rights, provide real remedies for those discriminated against unlawfully and act in ways to make the Republic of Moldova a fairer place to live and work.

In addition to these individual assessments any patterns have been identified and collated in order to make strategic and systemic recommendations.

Preliminaries

- Has any admissibility or other preliminary issues been resolved properly;
- Has the necessary evidence been gathered and presented so that a proper decision can be made;
- Was the relevant documentary evidence available and deployed appropriately;
- Has there been a process in advance (or at the start of the hearing) to narrow down the issues still in dispute;
- Has the Equality Council or court (especially if the complainant did not have a lawyer) acted in an appropriate but proactive manner to ascertain the key issues and evidence necessary to make a decision;

Clarity and Structure

- Does the case report proceed in a logical way;
- Does it deal with preliminary issues;
- Relevant evidence considered and findings based on the evidence, weighing this appropriately when necessary;
- Were the relevant arguments of the opposing parties set out clearly and did the Equality Council or court set out its conclusions clearly and with reasons;
- Overall is the decision clearly set out so that the parties understand why they won (or lost) and would an ordinary but intelligent member of the public understand the decision and why it was made as it was;

National Law and Procedure

- National law that is relevant set out and applied to the facts;
- Presumptions and burdens stated and used correctly;
- National law and rules of procedure followed;

International law and principles

- Relevant international law and principles set out clearly;
- Applied to the facts;
- Conflicts between national and international law resolved clearly;

Effective Remedies and sanctions

- If there are systemic issues of discrimination that go beyond the particular case have they been identified and are the sanctions, remedies and redress designed to deal with these;
- Is the remedy and sanction proportionate, appropriate to the specific case and designed to eliminate future possible discrimination;
- Is the remedy lawful and likely to be upheld if challenged;

(3) Cases reviewed

Equality Council

2013

Case numbers: 1, 2, 4, 9, 28, 30, 34

2014

Case numbers: 47, 52, 54, 56, 90, 105, 108, 111, 122, 139, 155, 157, 168, 180, 192, 198, 203, 206

2015

Case numbers: 203, 215, 217, 235, 239, 241, 254 (including amendment and dissent), 258, 264, 265, 265, 268, 271, 282, 284, 286, 310 (including dissent), 349, 359

2016

Case numbers: 349, 359, 371, 379, 386

Civil Courts

2012

Case number: 2ra-1502/12

2013

Case numbers: 2ra-3745/13, 2ra-2966/13

2014

Case numbers: 2ra – 731/14, 2ra-3016/14, 3ra-318/14, 2rh-241/14, 3ra-1019/14, 3ra-633/14

2015

Case number: 2ra-1448/15, 2ra-2038/15, 2ra-2822/15,

2016

Case numbers: 2r-426/16, 2rac-36/16

Administrative offence cases

2014

Case numbers: 14-4-6070-20062014-9547, 14-4-10415-20102014-9992

2015

Case numbers: 14-4-331-16012015-8542, 14-4-621-26012015-7836, 14-4-1313-16022015-7950, 14-4-1319-16022015-8588, 14-4-1397-17022015-8701, 14-4-4106-28042015-7586, 14-4-7671-07072015-6007

(4) Questions guide for consultations

Those attending consultations or interviews were told about the objectives of the research:

> "A comprehensive legal analysis of the decisions of the Equality Council on substance and procedures, as well as of the decisions issued by the courts on discrimination cases. The purpose of this

analysis is to identify the existing gaps, both from a legal perspective in order to develop recommendations for the improvement and further harmonization of the national mechanism on combating discrimination in the Republic of Moldova."

The key questions asked were:

"We are interested in any views you have about:

1. Any cases on discrimination dealt with by the national courts including the Supreme and Constitutional Courts or has been dealt with or is pending before an international treaty body;

2. Cases dealt with by the Equality Council which:

- has been contested in the courts;
- court decisions which concern the decisions or actions of the Equality Council;
- has been criticised or questioned publicly by international organisations, NGOs or in the media."

Chisinau, 2016