Additional Submissions

A. Violation of article 9 (freedom of conscience and religion)

1. Article 9 of the Convention expressly protects freedom of conscience, religion and belief. In the case of *Bayatyan v Armenia*[1], the Grand Chamber upheld the right to conscientious objection and stated that, '*opposition to military service, where it is motivated by a serious and insurmountable conflict between the obligation to serve in the army and a person's conscience or his deeply and genuinely held religious or other beliefs, constitutes a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9'.*[2] The Court has established this principle in its subsequent case law (see e.g. *Bukharatyan v Armenia*[3] § 48, *Papavasilakis v Greece*,[4] § 66). Accordingly, for a statement or action to be considered an expression of a belief which is protected under the article 9 it is required that the statement or action is linked with the belief. For example, a religious expression or statement would attract the protection of Article 9. This Court has held that the existence of a sufficiently close link between the action and the underlying belief must be examined on the facts of each case.

2. In the leading case of *Eweida and Others v UK*[5] the Court directly dealt with the issue of religious expression in the workplace: *"Given the importance in a democratic society of freedom of religion, the Court considers that, where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate."* [6] Through this, the Court held that the ability to resign from a job does not mean that there is no interference with article 9. While the state argued that the religious manifestation had to be a mandatory requirement of the religion in question the Court held that there was no requirement on the applicant to establish that he or she acted in fulfillment of a duty mandated by the religion in question in order for freedom of religion to have been interfered with.

3. In the case of *Jakobski v Poland*[7] the Court reiterated the importance of recognizing the particular manifestation of an applicant's religious beliefs (in this case a Buddhist refusing to eat meat). Similarly, in *Vartic v Romania (No. 2)*[8], the Court found a violation of a Moldovan prisoner's right of conscience for refusing to serve him a vegetarian diet in accordance with his Buddhist religious convictions.

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[1] *Bayatan v. Armenia*, Application no. 23459/03 [GC] 7 July 2011.
[2] Ibid, § 110.
[3] *Bukharatyan v Armenia*, Application no. 37819/03, 10 January 2012.
[4] *Papavasilakis v Greece*, Application no. 66899/14, 15 September 2016.
[5] *Eweida and Others v UK,* Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10, 27 May 2015.
[6] Ibid § 83.
[7] *Jakóbski v Poland,* Application no. 18429/06, 7 December 2010, §§ 44-47.
[8] *Vartic v Romania* (No. 2) , Application no. 14150/08, 17 December 2013.

The Applicants beliefs

4. The Applicant holds the belief that human life begins at the moment of conception. Many Christians, sharing the faith which the Applicant professes, hold that human life begins at conception and has human dignity at every stage of its development. This is a widely held belief within the Christian Church worldwide and is not a marginal or unusual conviction within Christianity. This is also a commonly held understanding of human development among other major religions, and is also held by those who are non-religious. The Applicant, cannot perform abortion procedures or any other procedure that she believes intentionally ends a human life. However, the Applicant believes that the life of a mother should be protected where a pregnancy becomes life threatening. Against this background, it is clear that the applicant's objection to performing abortions is motivated by her conscience and her religious beliefs, which are genuinely held and are in serious and insurmountable conflict with the abortion requirements as currently mandated by the Swedish authorities for midwives.

Freedom of conscience and medical professionals

5. The Applicant submits that conscience rights apply to medical professionals and their medical practice. In the case of *R.R. v. Poland*[9] the Court made the following noteworthy observation: "*In so far as the Government referred in their submissions to the right of physicians to refuse certain services on grounds of conscience and referred to Article 9 of the Convention, the Court reiterates that the word "practice" used in Article 9 § 1 does not denote each and every act or form of behavior motivated or inspired by a religion or a belief. For the Court, States are obliged to organize the health services system in such a way as to ensure that an effective exercise of the freedom of conscience of health professionals ... does not prevent patients from obtaining access to services to which they are entitled under the applicable legislation.*"[10] The Court accepted the government's submission that medical professionals had a right to refuse to participate in certain services on the grounds of conscience, and that this could be an act that is protected under Article 9 of the Convention. Likewise, in *Eweida and Others v UK*[11], the Court held that interference with manifestation of religion for a health professional (Ms Chaplin) fell within the Convention."[12]

Has there been an interference under Article 9 (conscience/religion)?

6. The Applicant was encouraged by the hospital authorities to study to become a midwife, to alleviate the midwife shortage within the County. She received a written contract with the agreement that she would work for at least two years within the County as a midwife, and receive a salary during the study period. The employment contract was however terminated by the employer when the Applicant objected to being required to assist in late term abortions which were performed at the delivery ward. The Applicant informed her employer that she could not perform these

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[9] *R.R. v. Poland*, Application no. 27617/04, 26 May 2011.

[10] Ibid § 206.

[11] *Eweida and Others v UK,* Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10, 27 May 2015.

[12] Ibid § 97.

abortions due to her religious beliefs and her conscientious objection to abortion. It was then made clear by the County Council Organization (SKL) that the Applicant cannot be offered any employment in any clinic or local health center. In essence, this means that the Applicant, is not allowed to practice her profession as midwife within the Swedish health care system. This de facto ban on employment of the Applicant has resulted from the introduction of a new policy which has the direct effect of restricting those with a conscientious objection from working as midwives.

Was the interference justified?

Was the interference prescribed by law?

7. The Swedish Abortion Act (1974: 595) 5 § 1 section states that *'(O)nly a person authorized to practice medicine (Swe. certified Physicians) can perform abortion or terminate pregnancy under § 6'.* According to the National Board of Health and Welfare (Socialstyrelsen), this authorization cannot be delegated. The Board has confirmed that it is not possible to delegate tasks that are specifically reserved a certain profession. When it comes to health care in general, specific professional groups are normally not appointed by law for a certain task. However, the Abortion Act is an exception and it specifically states that physicians alone are to perform abortions and the task cannot be delegated. The clear wording of the provision thus explicitly prohibits the Applicant from performing abortions. It is not possible to interpret a provision contrary to the unambiguous and semantic meaning of the words therein.

8. The preparatory works of the Abortion Act state the following: *'The question of the healthcare staff's obligation to participate in abortion has been raised by several referral agencies, who emphasize the importance of taking into account the wishes of the staff, not to participate in the abortion procedures. According to 13-15§§ of the Medical Decree (1972: 676), the responsibility for the distribution of the healthcare staff's work depends on the clinicians and block managers. Of course, in this area of health care, as well as in working life, as far as possible, consideration must be given to the employees' interests and prerequisites in different abilities. Therefore, when it comes to abortions, one should avoid confining it to such personnel who, for example, for moral or religious reasons find it difficult to accept such work. This applies also in consideration to the abortion-seeking woman'* (prop. 1974: 70, pp 76-77, document 28).

9. This has been confirmed on several occasions in subsequent years (see, for example, SOU 1983/84: soU3, document 29). It should be noted that the Abortion Act is applicable to all abortions, medical, surgical as well as late-term abortions.

10. According to the competence description for midwives, a legally non-binding document issued by the National Board of Health and Welfare, midwives should be able to *apply knowledge* concerning abortions as part of their competence. However, in line with the previously mentioned Abortion Act and its preparatory works, the wording does not state that midwives have to 'perform' abortions, but "apply knowledge" about abortion, this wording stands in contrast to the wording used for almost all other midwife tasks. The competence description also refers to the International Code of Ethics for Midwives, issued by the International Confederation of Midwives (ICM). The ethical code specifically allows for conscientious objection: '*Midwives may decide not to participate in activities for which they hold deep moral opposition, however, the emphasis on individual conscience should not deprive women of essential health services'* (III.c) and further *'Midwives with conscientious*

objection to a given service request will refer the woman to another provider where such a service can be provided'(III.d.), (document 31). It should also be noted that the National Board of Health and welfare cannot issue regulations or binding documents that are in violation of law, e.g. the Abortion Act. The Applicant fulfills the requirements of the National Board of Health and Welfare competence description for midwives, and accordingly the authorities issued her with a midwife's license .

11. According to basic principles of labor management, managers have the freedom to lead and distribute work. However, an employer cannot, through its labor management process, require a midwife to perform duties, which by law are reserved for physicians, moreover the law makes it clear that the duty cannot be delegated. Technological and medical developments which increase the number of medical abortions occurring each year, cannot change the fact that there is no legal basis to restrict the Applicant's right to freedom of conscience and prevent her from working within her profession as a midwife. In addition, medical abortions are not performed in the delivery or maternity wards, where the Applicants has sought employment.

Arbitrary legal requirements

12. To fulfill the requirement of being 'prescribed by law', certain basic legal guarantees need to be fulfilled. Thus, the individual must be given adequate protection against arbitrary restrictions on their protected right. Accordingly, the law must indicate with sufficient clarity what right the health authority has to limit religious freedom. If no support is provided in any clear legal act, the measure is not deemed as 'prescribed by law'.[13].

13. The facts in the Applicant's case show that until her case was commenced, there has, to a large extent, been a great difference in how healthcare facilities in Sweden manage employees asserting their freedom of conscience. Individual hospitals and managers decide freely and without regulation regarding the appropriate manner to deal with the individual health care professional's freedom of conscience and religion. There has thus been a great measure of discretion in relation to the hospitals' ability to restrict the freedom of conscience and religion of health care professionals in Sweden. This is particularly worth noting in view of the well-developed legislation that exists in the majority of European countries that protect the right to freedom of conscience for health care professionals.

14. In practice, the lack of clear regulations means that one individual, such as the Applicant, may suffer from a professional ban, while another, equally qualified, midwife who objects to performing abortions, may have had a long professional career, depending simply on the arbitrary decisions of his/her manager(s). The lack of clear legislative regulations means that hospitals lack a supporting framework of legislation containing fundamental legal guarantees when they seek to manage their employees with the result that some hospitals restrict freedom of religion in a manner Contrary to the rights contained in Article 9 of the Convention. Therefore, the requirement that a restriction be 'prescribed by law' is not fulfilled, and thus the Applicant's Convention rights have been infringed without any firm legal basis. The new policy of the County Council Organization has been articulated primarily through media articles and statements in the media by County representatives, which cannot satisfy the requirement of legality (and, notably, conflict with the provisions of the Abortion Act itself).

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[13] Van Dijk et al., Theory and Practice of the European Convention on Human Rights, 4 U, 769.

Does the interference pursue a legitimate aim?

15. An interference with a Convention right shall be necessary "with regard to public security or public order, health or moral protection or the protection of the rights and freedoms of other persons" (Article 9 (2) and 10 (2)). This means that the restriction must have a legitimate aim.

16. The legitimate aim has, in domestic court rulings, been stated in terms of the County's duty to provide abortions in accordance with law and the patient's right to receive professional treatment, which the Applicant approves. However, the conscientious objection of the Applicant to her participation in abortion has no effect on the availability of abortion in Sweden. Swedish authorities have not provided any clear, compelling or substantive evidence in support of the assertion that abortion care would be affected, nor that it fulfills the aim of good and safe maternity and delivery care to deny the Applicant the ability to work within her profession. The national authorities have a duty to provide health services in a manner that does not involve removing the Convention rights of the Applicant. It is incumbent on the national authorities to explore administrative solutions which could have reasonably accommodated the Applicant.

17. Considering the majority of European countries, including the neighboring countries Norway and Denmark, apply freedom of conscience through their constitutions, law and/or practice, the claim that it is necessary to deny every midwife freedom of conscience and religion is not tenable. The necessity assessment should not be crudely made between the availability of abortion and the prohibition of employment for midwives with an objection to performing abortions. In practice such measures occur every day at women's clinics, for a variety of different reasons. The fact that it is possible to organize services in such a way that freedom of conscience is protected is evident from the fact that it has taken place in several health care establishments across Sweden. While there were several witness statements from individuals who had worked in the County and other Counties with freedom of conscience, including witness Emelie Steen, the sister in law of Linda Steen, there was no mentioning of this in the reasoning of the domestic courts. This is despite the fact that this was one of the strongest arguments against the position held by the County that such employment arrangements were unfeasible within its organization.

Was the interference necessary in a democratic society and proportionate?

18. The interference in the Applicant's freedom of conscience and religion, is not necessary in a democratic society. In order for a measure taken under Article 9(2) of the Convention to be considered necessary in a democratic society, an assessment should be made of the severity of the impact on the rights of the individual concerned. The overall requirements for predictability and legal certainty are not only relevant in relation to the legality requirement but also in the proportionality assessment (see *Beyeler v Italy*,[14]).

19. The policy of the Organization of Swedish County Council (SKL) amounts to a *de facto* (*and de jure*) ban. To *de facto* ban all midwives with religious or other conscientious views on abortion cannot be justified under the Convention, and is not, when considering the circumstances, justified in this case. In the case of *Hirst v*

[14] *Beyeler v Italy*, Application no. 33202/96, 5 January 2005, § 108-110.

United Kingdom[15] the Court criticized measures which were not proportionate and in essence constituted a blanket ban.

20. Considering the fact that a majority of European countries protect the right of conscientious objection for health care workers, and that even Swedish health care workers have been afforded this right up until recently, it cannot be considered necessary in a democratic society to limit the Applicant's human rights. Accordingly, there is no substantive need to interfere with the Applicant's rights or prohibit her from practicing her profession in Sweden.

The possibility of less invasive measures

21. The applicant has, due to the professional ban in Sweden, been traveling to Norway to work as a midwife. In Norway health care professional have the right to conscientiously object against practices they find objectionable. This right is protected in the Norwegian health system, where hospital and clinic managers work with the individual claiming a conscientious objection to make all arrangements necessary to ensure that access to procedures can be provided and conscientious convictions respected. A large majority of European countries are able to protect freedom of conscience for health care professionals without difficulty, furthermore no country other than Sweden has a professional ban on conscientious objection. As the Applicant's employment at the Nyköping hospital shows, there is clearly the possibility to accommodate midwives with conscientious objections.

Margin of appreciation

22. In the Council of Europe region freedom of conscience for medical practitioners is protected in nearly all member states.

- With the exception of Sweden, every EU member state has either a general law protecting freedom of conscience, or a specific law protecting medical practitioners' rights of conscience. The majority of States have both a general provision and a specific law.
- Number of EU member states with general clause(s) guaranteeing freedom of conscience: 22 out of 28 (Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Latvia, Lithuania, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, Spain).
- Number of EU member states with specific laws protecting medical practitioners' rights of conscience: 21 out of 28 (Austria, Belgium, Croatia, Cyprus, Denmark, France, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, United Kingdom).

23. According to an article in a respected scientific journal from 2013[16], there are only three EU countries within the EU, excluding Sweden, which do not allow

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[15] *Hirst v. United Kingdom* (no 2), Application no. 74025/01, [GC] 6 October 2005.

conscience-based exceptions in healthcare either in law or practice: Finland, Bulgaria and the Czech Republic. However, the Czech Republic has an ethical code for doctors which includes a conscience clause[17] and, in 2011, a legal provision was enacted in the Healthcare Services Act which protects the right to freedom of conscience for health care professionals[18]. Concerning Finland, while there is no specific legislation on the right to freedom of conscience for healthcare professionals, the right to freedom of conscience is protected in the Constitution. Healthcare professionals are allowed to invoke conscience and are still to some extent granted this in individual workplaces. As many as 21 of 28 Member States in the EU (Austria, Belgium, Croatia, Denmark, France, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, Malta[19], Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, United Kingdom, Czech Republic) thus has specific legislation that protects medical professionals right to conscience.

24. In addition, a number of Council of Europe member states protect the right to freedom of conscience. Norway and Switzerland, who are not members of the EU, have legal provisions protecting the right to freedom of conscience for healthcare professionals. Albania, Russia, Turkey and Bosnia and Hercegovina also protect the right to freedom of conscience of medical professionals. General protection for freedom of conscience is found in Albania, Armenia, Azerbadjan, Bosnia and Hercegovina, Lichtenstein, Moldova, Montenegro, Russia, Serbia, Macedonia and Ukraine.

25. The abovementioned consensus is a reflection of the fundamental nature of the right to freedom of conscience generally, and within the medical profession in particular. Against this background the domestic court ignored the extensive evidence regarding the current European standard and the effects this has on the margin of appreciation for the Swedish authorities. The margin afforded to states is significantly narrowed given the fundamental nature of the right at stake, which in the Applicant's case means that the margin afforded states should be very narrow. In comparison, the Court held in *Evans v the United Kingdom*[20] that a wide margin should be afforded states on moral issues touching areas where there is no clear common ground among the member States (in that case IVF treatments). However, in the Applicants case there is clear common ground both in Europe and internationally that health care professionals should be granted the right to conscientious objection. Therefore, to be able to justify an interference, a state must advance convincing and compelling reasons corresponding to a "pressing social need" (See *Bayatyan v Armenia*[21],). However, the facts in the Applicant's case make it clear that there is no "pressing social need" to force all midwives to participate in abortions or to ban the Applicant and likeminded midwives from their work in women's clinics, quite the opposite.

26. As mentioned above the Applicant and all midwives have only one day of student training concerning abortions and during that day, the Applicant was never asked to assist in performing an abortion. In comparison, all midwives have 15-16

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[16] The European Journal of Contraception & Reproductive Health Care, Volume 18, Issue 4, 2013, Conscientious objection and induced abortion in Europe, Anna Heino, Mika Gisslera, Dan Apterb & Christian Fialac, p 231-233, published online: 15 July 2013.

[17] Code of Ethics of the Czech Medical Chamber, 2 § para 5. "a doctor cannot be forced to take medical performance or participation on him, which is contrary to his conscience."

[18] Section 50(2) of the Act 372/2011 Coll of the Act of the Healthcare Services

[19] Abortion is prohibited on Malta.

[20] *Evans v. United Kingdom*, Application no. 6339/05, 10 April 2007.

[21] *Bayatan v. Armenia*, Application no. 23459/03 [GC] 7 July 2011, § 123.

weeks of delivery care and have to assist in 50-60 deliveries of babies. Statistically only one percent of abortions are late term abortions after week 18 and 93 percent are medical abortions that, to a large extent are performed in the home. It is recommended that midwives rotate between two wards within the women's clinics. It is therefore possible for a midwife to rotate between the delivery ward and post-natal ward. The Applicant has no objection to taking care of women who are planning to have abortions or who have had an abortion. It is clear from the facts that performing abortions are not an integral part of the work at every department of the women's clinics, but the County made unfounded assertions to the contrary.

27. Furthermore, if a state provides for abortion, the state has the responsibility to organize its health service to allow abortion to be provided, but also to protect the conscience rights of e.g. midwives. In the case of *P and S v Poland*[22] in particular the Court held that a state has the duty to organize its health services to ensure access and at the same time accommodate conscience: *'In this connection, the Court notes that Polish law has acknowledged the need to ensure that doctors are not obliged to carry out services to which they object, and put in place a mechanism by which such a refusal can be expressed. This mechanism also includes elements allowing the right to conscientious objection to be reconciled with the patient's interests, by making it mandatory for such refusals to be made in writing and included in the patient's medical record and, above all, by imposing on the doctor an obligation to refer the patient to another physician competent to carry out the same service. However, it has not been shown that these procedural requirements were complied with in the present case or that the applicable laws governing the exercise of medical professions were duly respected'.*

Comparative International provisions

Court of Justice of the European Union

28. This Court is not isolated in recognizing the importance of conscientious objection and development of the law in this area. In two cases before the Court of Justice of the European Union ("CJEU"), *Federal Republic of Germany v. Y and Federal Republic of Germany v Z*[23], the Advocate General of the Court gave his opinion on the correct application of Article 9 of the Convention in the context of a case taken under the law of the Treaties of the European Union. The Advocate General stated that if the so-called "core area" of religious belief comprised only of "private conscience", it would render any protections for "the external manifestation of that freedom" effectively "meaningless". In its final ruling the CJEU held that the right to act upon sincerely held religious or moral beliefs must include public manifestations of those beliefs.[24]

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[22] *P and S. v. Poland*, Application no. 57375/08, 30 January 2013 § 107.

[23] *Federal Republic of Germany v Y* (Case C-71/11) and *Federal Republic of Germany v Z* (Case C-99/11), Court of Justice of the European Union.

[24] See Advocate General opinion at § 46

The Parliamentary Assembly

29. The Parliamentary Assembly of the Council of Europe has adopted resolution 1763 (2010), *The right to conscientious objection in lawful medical care*[25] in which the right to conscientious objection is clearly laid down:

> *1. No person, hospital or institution shall be coerced, held liable or discriminated against in any manner because of a refusal to perform, accommodate, assist or submit to an abortion, the performance of a human miscarriage, or euthanasia or any act which could cause the death of a human foetus or embryo, for any reason.*
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> *2. The Parliamentary Assembly emphasises the need to affirm the right of conscientious objection together with the responsibility of the state to ensure that patients are able to access lawful medical care in a timely manner. The Assembly is concerned that the unregulated use of conscientious objection may disproportionately affect women, notably those having low incomes or living in rural areas.*
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> *3. In the vast majority of Council of Europe member states, the practice of conscientious objection is adequately regulated. There is a comprehensive and clear legal and policy framework governing the practice of conscientious objection by healthcare providers ensuring that the interests and rights of individuals seeking legal medical services are respected, protected and fulfilled.*
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> *4. In view of member states' obligation to ensure access to lawful medical care and to protect the right to health, as well as the obligation to ensure respect for the right of freedom of thought, conscience and religion of healthcare providers, the Assembly invites Council of Europe member states to develop comprehensive and clear regulations that define and regulate conscientious objection with regard to health and medical services, which:*
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> *4.1. guarantee the right to conscientious objection in relation to participation in the procedure in question;*
>
> *4.2. ensure that patients are informed of any objection in a timely manner and referred to another healthcare provider;*
>
> *4.3. ensure that patients receive appropriate treatment, in particular in cases of emergency.*

30. The Parliamentary Assembly of the Council of Europe has subsequently adopted resolution 1928 (2013), *Safeguarding human rights in relation to religion and belief, and protecting religious communities from violence*. The resolution lays down that member states are to '*ensure the right to well-defined conscientious objection in relation to morally sensitive matters, such as military service or other services related to health care and education, in line also with various recommendations already adopted by the Assembly, provided that the rights of others to be free from discrimination are respected and that the access to lawful services is* guaranteed' (9.10).

United Nations

31. The UN Human Rights Council (HRC) has recognized the importance of rights of conscience as a seminal component of freedom of thought, conscience and religion.

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[25] Adopted by the Parliamentary Assembly on 7 October 2010 (35th Sitting)

Stating in General Comment 22 the Committee[26] notes that while *"...the Covenant does not explicitly refer to a right to conscientious objection, but the Committee believes that such a right can be derived from article 18..."* Accordingly, the Committee held in *Frédéric Foin v France*[27] that the applicant had been discriminated on the basis of his conscience. Additionally, the HRC found violations of article 18 of the ICCPR in two subsequent Korean cases also dealing with conscientious objection, *Yoon and Choi v Republic of Korea*[28].

International ethical codes

32. International consensus is further demonstrated in international ethical codes applicable to medical professionals all over the world. The right to freedom of conscience for healthcare professionals is protected by the International Code of Ethics for Midwives from ICM (International Confederation of Midwives), (document 31), the WHO (document 32) and FIGO, the International Federation of Gynecologists (document 33). These lay down the right to conscientious objection for medical professionals who for moral or religious reasons do not wish to participate in a certain procedure, e.g. abortions. The International Code of Ethics for Midwives could, and still can, be found on the website of the Swedish Midwife Union. When the Applicant's case became known through media, however, a meeting was held where it was decided that part of the conscience clause was to be removed from the Swedish translation of the International Ethical Code for Midwives.[29]

33. Applying the abovementioned principles, one can conclude that there has been an interference of the Applicant's right to freedom of conscience and religion. The interference is not justified; it is not prescribed by law, in fact the relevant domestic law speaks in the Applicant's favor. There were and are far less invasive measures available that would have balanced the Applicant's Convention rights with any legitimate interests claimed by the national authorities.

Article 9 (thought) and article 10 (opinion)

Freedom of thought

34. Article 9 protects, in addition to the right to manifest one's religion, the right to hold a religious belief. The Court has held that one of the main rights protected under Article 9 is that of freedom of thought. In practice, this means that representatives of the government or a government agency cannot determine what a person should think or believe. Nor should the state take steps to try to make individuals change their thoughts/beliefs. Only manifestations of freedom of thought can be limited and the right to hold a belief is thereby absolute and cannot be limited. The Court has had the opportunity to clarify the requirements regarding the freedom of thought in the case of *Ivanova v. Bulgaria*[30]. The case concerned a school employee belonging to an

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[26] General Comment no 22: The Right to freedom of thought, conscience and religion (Art 18), 30 July 1993, § 11.

[27] *Frédéric Foin v France,* Communications no. 666/1995, 9 November 1999, § 10.3.

[28] *Yoon v Republic of Korea and Choi v Republic of Korea,* Communications 1321/2004 and 1322/2004, UN Doc. CCPR/C/88/D1321-1322/2004, 23 January 2007.

[29] Midwife Union website, link to ICM International Code of Ethics and Swedish translation: http://www.barnmorskeforbundet.se/barnmorskan/

[30] *Ivanova v. Bulgaria*, application no 52435/99, 12 April 2007.

evangelical movement, who was terminated from her employment. The individual had been terminated after the school had put new demands on the applicant's employment, which she did not meet. In the case, two government officials at one time had clarified that the complainant could retain her job if she renounced her religious beliefs. The Court found that there was a clear violation of her rights under article 9 (§§ 79, 84).

Freedom of opinion

35. Freedom of expression is protected under Article 10 of the Convention and includes the right to hold and express opinions and to not be pressured to change his/her opinion. This means that a person may not be punished or sanctioned or subjected to other negative consequences because he/she does not share certain opinions.[31] In *Vogt v. Germany*[32], the Court dealt with the question of a publicly employed teacher at a primary school who had been terminated because of a political commitment outside her workplace. The complainant had not made any targeted statements but her involvement in the political organization was sufficient to terminate her employment when it was found that the organization engaged in political activity contrary to the values of the German government.

36. In this case there was legal support to impose requirements on public employees concerning which values they should share. The Court was clear that Article 10 protects both the publicly accepted ideas and such views which seem to be shocking to some, or which some find offensive. This is one of the fundamental requirements of pluralism, tolerance and openness, and its existence is a prerequisite for a democratic society (§ 52, *Vogt v. Germany*).

37. In *Vogt v. Germany*, the European Court of Human Rights considered in its assessment that the mere fact that someone has an opinion not shared by a majority does not necessarily mean that the person will share these views in his/her work.
The Court found that - even with a certain margin of appreciation - there had been a violation of Article 10 when the complainant lost her employment.

Has there been an interference under Article 9 (thought) and 10 (opinion)?

38. There has been an interference with the Applicant's right to freedom of thought and opinion as protected under article 9 and 10 of the convention. When denying the Applicant employment, the County introduced new and entirely unregulated requirements for the position as a midwife. Not only were midwives required to perform abortions, it was made clear that midwives were not allowed to hold dissenting opinions regarding abortion. On 5 May 2015, Marianne Orrheim Blomberg, head of health care at the childbirth/delivery section in Nyköping, sent an e-mail to the Applicant, in which she wrote: *"We would have welcomed you, but since you expressed opinions that we cannot support, it is not possible for you to work here. Good Luck"*. As the Applicant did not share the opinions of the County regarding abortion, she was not considered to fulfil the requirements necessary for a position as a midwife at the clinic.

39. During the oral hearings at the District Court, the Head of Operations of the Women´s Clinic at Nyköping hospital, Gabriel Edström, was asked to comment on

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[31] Macovei, Council of Europe, A Guide to the implementation of Article 10 of the European Convention on Human Rights, 2 ed. p. 8

[32] *Vogt v. Germany*, Application no 17851/91, 26 September 1995

the several tasks connected to abortion in which the Applicant could assist, namely; providing aftercare, pain relief when showering and changing clothes, and referencing the patient to another person and/or department if necessary". Gabriel Edström responded by stating: *"Yes... which means she is taking a stance against the choice of the woman, the woman's needs and her legal right. She is dissociating herself. One may wonder what empathy she has for a woman that has contributed to extinguishing a life, as is written in the documents we received"*. When questioned on his position on the empathy level of the Applicant, Gabriel Edström commented that: "*I cannot employ anyone when I highly suspect that her empathy level will be very low for the woman who wants to perform the abortion she has a legal right to*".

40. When asked whether or not there was a need for the Applicant at the delivery ward, Gabriel Edström answered: "*There is of course always a need for personnel, but if they have opinions on what they can or can not do because of religious reasons, it feels as though the position is in unsafe hands*". As the citations clarify, the unwillingness of Gabriel Edström to employ the Applicant was not primarily based on what tasks she could or could not perform, but rather her views on abortions and the effect they supposedly had on her capability to feel empathy and act professionally. The views of the County representatives can be summarized as follows; to be employed as a midwife, one cannot hold a dissenting opinion with regards to abortion. The reason for this, as made clear by Gabriel Edström, is the assumption that an individual with such views lacks empathy and the professionalism necessary for the position. Therefore, the fact that the Applicant holds an opinion of abortion, that is not in line with that of the authorities, is held to be a reason disqualifying her from an employment as a midwife.

41. It is to be noted that the Applicant never expressed any intent to divulge or impose her views on a patient. No reason was given by the authorities to support their contention that the Applicant would be more likely to inform patients of her personal views. The requirement that all midwives should share the views on abortion held by the State authorities, is a clear violation of the Applicant's right to freedom of thought and opinion as protected under article 9 and 10 of the convention. Furthermore, the prejudicial view that the Applicants religious belief would undermine her professionalism and empathy is, as discussed below, wholly discriminatory.

Was the interference justified?

Was the interference prescribed by law?

42. The requirement, to refrain from holding a negative opinion on abortion, lacks justification and is without any legal basis. No communicated policy concerning accepted views on abortion was ever articulated by the authorities until the proceedings in the District Court, and there is still no clear policy from the County on this issue.

Does the interference pursue a legitimate aim?

43. The legitimate aim has, in domestic court rulings, been stated in terms of the County's duty to provide abortions in accordance with law and the patient's right to receive professional treatment. The Applicant does not dispute that these are legitimate aims.. However, Swedish authorities have not provided any clear, compelling or substantive evidence in support of the assertion that abortion care would be affected by the Applicant's views on abortion or her conscientious

objection. The national authorities have a duty to provide health services in a manner that does not involve removing the Convention rights of the Applicant. It is incumbent on the national authorities to explore administrative solutions which could have reasonably accommodated the Applicant.

Was the interference necessary in a democratic society and proportionate?

44. As the question concerns Article 10, the margin of appreciation should be narrow, and any restriction of the right must therefore have a very good reason (*Vogt v Germany*[33] § 52). In reference to the information provided concerning the European standard when it comes to freedom of conscience, it can be seen that almost all European countries protect the right to freedom of conscience within the health care profession. This undoubtedly involves taking into account that such individuals will obviously hold a negative opinion of the matter they are objecting to, e.g. areas such as abortion and euthanasia. Health care professionals are trusted to be able to hold an opinion and still treat patients in a professional manner. There is nothing to suggest the Applicant would have done anything other than this.

45. The conflicting interests to be considered in the present case are the Applicant's interest in pursuing her career choice against the hospital's interest in removing an employee who does not share the views of the County on a specific medical issue (abortion). The authorities assert that no one who holds a negative position on abortion can have professional contact with patients. However, this blanket ban is not based on any facts or studies, but is based on an unfounded negative assumption regarding professionalism of individuals with the same opinion/belief as the applicant. The facts of the case show that many midwives and doctors have been exempted from performing abortions in Sweden previously and that there have been no known problems or discussions concerning health care professionals who previoulsy have exerciced freedom of conscience. On the contrary, two witnesses testifying on behalf of the Applicant have worked for 30-40 years in women's clinics, including gynecology wards (Margaretha Berggren and Ingrid Karlsson) and the witness Emelie Steen is still working within the same County as a nurse with freedom of conscience regarding abortion. To ban all midwives with a different stance on abortion would furthermore cause a negative impact on the pluralism of the democratic society of the respondent state as safeguarded by the convention. The Swedish authorities position entails the exclusion of certain religious groups from working within public health care as midwives or doctors. Clearly such far-reaching consequences are out of step with the rights and freedoms protected in the Convention.

46. There has been a significant interference with the Applicants freedom of opinion by the Swedish authorities. The Applicant has not sought to impose her opinions or religious beliefs on anyone. On the contrary, she has clearly stated that she intends to participate in all activities undertaken in connection with supporting and caring for women who have an abortion, she has at all times indicated that she has no intention of attempting to persuade people to share her views. It is also clear that no such complaints have been made from patients, either during her practice at the relevant hospitals or during her work in Norway.

47. It should also be borne in mind that the hospital has not made any efforts in evaluating how far the Applicant's conscience extends in relation to any opposing interests. Accepting such a far-reaching restriction on the right to freedom of opinion would, in a wider perspective, provide a very narrow space for people with different

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[33] Ibid § 52.

beliefs and opinions to work in the public sector. In this respect, it should be noted that the Convention is interpreted so that the right to freedom of opinion becomes practical and effective, not just theoretical and illusory. Consequently, the limitation of the Applicant's freedom of opinion has been manifestly disproportionate.

Article 14 in conjunction with article 9

48. In order for an issue to arise under Article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations. [34] Such a difference of treatment between persons in relevantly similar positions is discriminatory if it has no objective and reasonable justification; if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized.

Direct discrimination

49. The District Court of Nyköping found that the County had requirements for employment which - when applied in the situation of the Applicant – led to her being found ineligible for the position of midwife. The requirements were however non-existent until the County was required to make a decision on the employment of the Applicant. The first requirement that the County employed was that all midwives have to perform abortions, without exceptions. Given that – as was shown by witnesses – individuals had previously been employed with exemption from duties to perform abortion – the decision to not employ the Applicant with reference to this requirement cannot be considered neutral and applied equally to all employees.

50. The second requirement that the County applied is the prohibition on any midwife from sharing and expressing a certain opinion regarding abortions. This latter requirement had not been communicated previously, and appears to have been constructed as a response to the situation concerning the Applicant. The Applicant was treated differently from other midwives who could have been employed simply because of her protected belief. This difference in treatment is not justifiable.

51. As has been previously clarified, the employment of the Applicant would *not* – interfere with the ability of Swedish women to access abortion. Access to abortion is not in any way limited by a small number of healthcare professionals asking for an exemption from participation in abortion procedures because of their conscience. This has clearly been proven in the County before - through the previous employment of individuals who claimed freedom of conscience within their contracts - and also in the regulations concerning freedom of conscience in neighboring countries Norway and Denmark, as well as the clear majority of other member states within the Council of Europe. Furthermore, the difference in treatment was in part based on an assumption that any individual with the beliefs/opinions of the Applicant could not act professionally towards patients, and that he/she would force their views onto patients. This assumption held by representatives of the County is completely unfounded. Treating an individual differently due to a prejudicial assumption concerning their views on abortions necessarily means that the individual is stigmatized as not being capable of acting professionally, which is not justifiable.

52. It is therefore clear that there was no objective and reasonable justification, nor was there a reasonable relationship of proportionality between the means employed

[34] *Burden v the United Kingdom*, Application no. 13378/05, 29 April 2008, § 60

and the aim sought to be realized in this case. The Applicant was treated less favorably because of protected characteristic of her opinions and beliefs, thus she has been subjected to direct discrimination under article 14.

Indirect discrimination

53. Alternatively, the requirements concocted to restrict her employment resulted in less favorable treatment due entirely to her conscientious objection and religious beliefs, which constitutes indirect discrimination under the same article. It is inescapable that the effect of the policy of prohibiting the employment of midwives who will not participate in the performance of an abortion will disproportionately impact on those individuals who hold religious beliefs such as the Applicant in this case. The new policy that was applied by the County has been imposed to stop this Applicant from taking up employment based on actual mala fides manifesting itself as a particular dislike of her Convention protected beliefs.

54. One of the leading cases on indirect discrimination under article 14 is *Zarb Adami v Malta*[35] where the Court first recalled that a policy or a measure which has disproportionate effects on a group of people may be considered discriminatory even if it is not specifically aimed at that group, and that "very weighty reasons" would need to be put forward for a difference in treatment to be compatible with the Convention. Thus, indirect discrimination, is prohibited even where the impugned policy was not designed to have a discriminatory impact. The policy adopted by the Swedish health care authorities is disproportionally burdensome on Christian midwives such as the Applicant, and the Swedish authorities have not put forward such "very weighty reasons" to justify a policy that indirectly discriminates against Christian midwives and in a blanket manner excludes them from employment in the Swedish healthcare system.

Margin of appreciation

55. In the case of *Thlimmenos v. Greece*[36], the Court placed the State under a positive obligation to avoid discrimination by accommodating different situations. The judgment stated: "The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different."[37] No attempt to protect the Applicant's rights have been made by the County in this case.

56. It has been settled that Article 14 is a subsidiary provision which cannot be invoked independently, but only 'in conjunction' with other Convention rights. It should be noted that the application of Article 14 does not presuppose a breach of one of the substantive provisions but requires only that the facts at issue fall 'within the ambit' of one or more of the Convention provisions. In this case the facts are clearly within the Ambit of article 9, as set out above. In this respect see *Abdulaziz, Cabales and Balkandali v United Kingdom*[38] where the Court held: "*Although the application of Article 14 does not necessarily presuppose a breach [of the substantive provisions of the Convention and its Protocols] – and to this extent it is autonomous – there can*

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[35] *Zarb Adami v. Malta*, Application no. 17209/02, 20 June 2006.
[36] *Thlimmenos v. Greece* [GC], Application no. 34369/97, 6 April 2000.
[37] Ibid § 44.
[38] *Abdulaziz, Cabales and Balkandali v United Kingdom*, Application nos. 9214/80; 9473/81;. 9474/81

be no room for its application unless the facts at issue fall within the ambit of one or more of the rights and freedoms".[39]

57. Very weighty reasons for any discrimination are required when the grounds appear to be related to the religion of the applicant. In this respect the Court has stated in *Vojnity v. Hungary*[40] *"[The Court] considers that, in the light of the importance of the rights enshrined in Article 9 of the Convention in guaranteeing the individual's self-fulfillment, such a treatment will only be compatible with the Convention if very weighty reasons exist.*

58. As mentioned, an analysis of the law and practice relating to freedom of conscience for health care workers across the Council of Europe Contracting States demonstrates that in the majority of States, freedom of conscience is protected. A ban on all midwives with a certain conviction from working within their profession, even within delivery care or with postnatal care, is not practiced in any other country in Europe. On the contrary, in the other Scandinavian countries, Norway and Denmark, the right to freedom of conscience regarding abortion is expressly prescribed by law and very well respected.

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[39] *See Abdulaziz, Cabales and Balkandali v United Kingdom*, Application nos. 9214/80; 9473/81; 9474/81, 28 May 1985 § 71.

[40] *Vojnity v Hungary*, Application no. 29617/07, 12 February 2013, § 36.