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, to be considered an expression of a belief which is protected under the article 9 it is required that the manifestation is linked with the belief, for example in the form of a religious expression. 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 the right to 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 among non-believers. 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 become 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 mandated by the Swedish authorities for midwives.

5. The Swedish Discrimination Ombudsman found that the Applicant's conscientious position that she is unable to participate in abortions, constituted a manifestation of her religious, Christian belief protected by Article 9 of the European Convention (document 1). Similarly, the Swedish Labor court also found that the Applicant's inability to perform abortions, when manifested in a inability to carry out certain assigned work duties, should be regarded as an act of religious practice which is protected by Article 9 of the Convention, according to the Court's case law in *Eweida and Others v. UK*[9] (document 27).

Freedom of conscience and medical professionals

6. The Applicant submits that conscience rights apply to medical professionals and their medical practice. In the case of *R.R. v. Poland*[10] 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*.'[11] The Court accepted the government submission that the right of medical professionals to not participate in certain services on the grounds of conscience could be an act that is protected under Article 9 of the Convention. Likewise, in *Eweida and Others v UK*[12], the Court held that interference with manifestation of religion for a health professional (Ms Chaplin) fell within the Convention. *'*[13]

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

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

[11] Ibid § 206.

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

[13] Ibid § 97.

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

7. The Applicant was encouraged to study to become a midwife, due to the midwife shortage within Sweden. She received a study salary as evidence of such encouragement. There were reasons for the Applicant to believe that there would be a willingness to employ her even if she could not perform abortions and so she began her studies in good faith. While seeking employment (during her studies) she wished to be honest and clear about her convictions and therefore presented the situation to the hospital managers. This led to the withdrawal of her student salary for the last study semester. She was also denied employment at the Högland Hospital, at which she previously had been offered a job, and similarly at the Ryhov Hospital. Ultimately she was offered employment by Värnamo Hospital, and accepted the offer but her employment was subsequently terminated. It has been clear from the County Council Organisation (SKL) that she cannot be offered any job 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. In light of the introduction of a new policy by the government the restriction on her working as a midwife has now become absolute.

Was the interference justified?

Was the interference prescribed by law?

8. 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 specifically appoints physicians alone for this task 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 semantic meaning of the word.

9. 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 business. 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 31).

10. This has been confirmed on several occasions in subsequent years (see, for example, SOU 1983/84: soU3, document 32). It should be noted that the Abortion Act is applicable to all abortions, medical, surgical as well as late-term abortions.

11. 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, which is otherwise stated concerning almost all other midwife tasks, but to apply knowledge about abortions. 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 34). 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 the proof to this is that she received her midwife license.

12. According to basic principles of labor management, managers have the freedom to lead and distribute work. However, an employer cannot, through its labor management rights, require a midwife to perform duties, which by law are reserved for physicians. Administrating abortifacients is not like administering medication for medical purposes and the law makes it clear that it cannot be delegated. The technological and medical development increasing the number of medical abortions does not change the fact that there is no legal support to restrict the Applicant's right to freedom of conscience. In addition, medical abortions are not performed in the delivery or maternity wards, where the Applicants has sought employment.

Arbitrary legal requirements

13. 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'.[14].

14. The facts in the Applicant's case shows until her case was brought up, there has, to a large extent, been a great difference in how healthcare facilities in Sweden relate to employment with a conscience clause. Individual hospitals and managers decide freely and without regulation on 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 professionals in Sweden. This is particularly remarkable 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.

15. 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 with an objection to performing an abortion, might have had a long and professional career simply through the arbitrary decisions of his/her managers. The lack of clear legislative regulations means that hospitals lack supporting fundamental legal guarantees when restricting freedom of religion. Therefore the requirement that a

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

restriction be ‘prescribed by law’ is not fulfilled, which infringes the Applicant’s Convention rights. The new policy of the County Council Organization has been stated 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).

Does the interference pursue a legitimate aim?

16. 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.

17. 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 a midwife to participate 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 from working 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.

18. 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. 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. 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 conscience clauses there was no mentioning of this in the reasoning of the domestic courts, although this was one of the strongest arguments against the position held by the County that such employments were unfeasible within its organization.

Was the interference necessary in a democratic society and proportionate?

19. 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*,[15]).

20. 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 United Kingdom*[16] the Court criticized measures which were not proportionate and in essence constituted a blanket ban: '*The Court notes that the Chamber found that the measure lacked proportionality, essentially as it was an automatic blanket ban imposed on all convicted prisoners which was arbitrary in its effects and could no longer be said to serve the aim of punishing the applicant once his tariff (that period representing retribution and deterrence) had expired"(§ 76).*

21. 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

22. 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 Värnamo hospital shows, there is clearly a possibility to accommodate midwives with conscientious objections. The Applicant was in fact employed and there was no objection from the managers until the media reported about the employment.

Margin of appreciation

Comparative national law

23. In the Council of Europe region freedom of conscience for medical practitioners is almost universally protected. The Applicant has found that;

- 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.

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

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

- 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).

24. According to a scientific article from 2013[17], there are only three EU countries within the EU, excluding Sweden, which do not allow 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[18] 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[19]. 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[20], Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, United Kingdom, Czech Republic) thus has specific legislation that protects medical professionals right to conscience.

25. 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, while abortion is prohibited in Andorra, Lichtenstein, Monaco and San Marino. General protection for freedom of conscience is found in Albania, Armenia, Azerbadjan, Bosnia and Hercegovina, Lichtenstein, Moldova, Montenegro, Russia, Serbia, Macedonia and Ukraine.

26. 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 it was questionable that, although the Applicant presented highly relevant argumentation and extensive evidence regarding the current European standard and the effects this has on the margin of appreciation, this evidence was not even mentioned in the reasoning of the domestic courts. 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*[21] that a wide

[17] 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.

[18] 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."

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

[20] Abortion is prohibited on Malta.

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

margin should be afforded states on moral issues touching areas where there is no clear common ground among the member States (in this 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*[22],). However, the facts made out 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.

27. 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 weeks of delivery care and have to assist in 50-60 deliveries of babies. One of the clinics, in Värnamo, offered the Applicant a job despite her conscientious objection, and at a time at which it was aware of her objection, which shows that it is possible to organize work in such a way as to balance the Applicant's rights and patient's needs. 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. At Värnamo women's clinic 200 abortions are performed each year and 100 of these 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. In addition, contacts with and care taking of women in connection to their abortions is nothing that the Applicant objects to. It is clear from the facts that abortions are not an integral part of the work at women's clinics, but the County made unfounded assertions to the contrary.

28. 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*[23] 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

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

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

29. 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*[24], 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.[25]

The Parliamentary Assembly

30. The Parliamentary Assembly of the Council of Europe has adopted resolution 1763 (2010), *The right to conscientious objection in lawful medical care*[26] 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;*
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> *4.3. ensure that patients receive appropriate treatment, in particular in cases of emergency.*

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[24] *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.

[25] See Advocate General opinion at § 46

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

31. 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

32. 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. Stating in General Comment 22 the Committee[27] 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*[28] 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*[29].

International ethical codes

33. 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 34), the WHO (document 35) and FIGO, the International Federation of Gynecologists (document 36). 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.[30]

34. 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 interest and any interests of the national authorities.

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

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

[29] *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.

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

Article 9 (thought) and article 10 (opinion and expression)

Freedom of thought

35. 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*[31]. The case concerned a school employee belonging to an 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 an obvious violation of her rights under article 9 (§§ 79, 84).

Freedom of opinion

36. 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.[32] In *Vogt v. Germany*[33], there was 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.

37. 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).

38. 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)?

39. The Applicant's right to freedom of thought, opinion and expression has been violated through the actions of Swedish authorities (the County). The authorities have

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

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

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

invented a new and completely unregulated requirement that in order to be employed, *firstly*, midwives cannot hold negative opinions about abortion and, *secondly*, midwives are not allowed to speak publicly about their opinions.

Prohibition of holding negative position on abortion – Värnamo hospital

Article 9 (freedom of thought)

40. Representatives from the County / employer have pressured the Applicant to change her mind as a condition for employment. She has been offered counseling to be able to perform abortions against her convictions, and it has also been clear that in order to be employed, she must be willing to renounce her convictions against performing abortions. Such a restriction in her freedom of thought is incompatible with the right to have a religious or other conviction under Article 9 of the Convention. Consequently, since a restriction on freedom of thought is never compatible with Article 9, there has been an interference with that right. In this context it should be noted that the interference is far-reaching and comprehensive and that all persons who hold the same beliefs as the Applicant are now likely to be subjected to the same requirements and will need to reconsider their convictions if they wish to work or to continue to work within their profession.

Article 10 (freedom of opinion)

41. The Swedish authorities (the County) violated the Applicant´s rights under article 10 by subjecting her to negative consequences/sanctions (revocation of job offer) because she did not share a certain opinion on abortion and because she answered questions from the media. Her opinion became public when she was contacted by a journalist and interviewed about her complaint to the Discrimination Ombudsman in the local newspaper, Värnamo Nyheter, on January 23, 2014.

42. The facts of the case show that the Applicant would in all likelihood have commenced her employment at Värnamo Hospital if she had not answered the questions of the journalist of the local newspaper, Värnamo Nyheter. In the article she expressed gratitude to the hospital for hiring her, which also shows that she clearly had been offered the job and accepted. At the time of the termination of the employment, no other article had been published concerning the Applicant's case. The article of the Värnamo Nyheter was published on 23 January 2014 and the Applicant received the phone call from Edvinsson revoking the job, on the 27 January 2014. Edvinsson and Gunnervik, the managers who took the decision to revoke the job offer, during questioning in the District Court stated that they understood the newspaper article to describe the Applicant as actively anti-abortion. However, when examining the actual content of the article, no views are expressed other than those the Applicant had previously communicated to Edvinsson and Gunnervik during her job interview. This shows that there is a clear link between the article and the termination of employment. The Applicant has thus been subjected to retribution and victimization for speaking to the media.

43. In the written submissions to the District Court, the County clearly stated that the Applicant's opinion regarding abortion was a major part of the reasons for revoking and denying her the employment.

44. In the submission from the County received on 31 Aug 2015 the County Council states: "*The treatment of Ellinor Grimmark has to be seen in the light of the fact that she, not only has a belief that she follows, that she is opposed to abortions, but that she*

is clearly abstaining from abortion and is a public spokesperson for abortion resistance. Such an active exercise of freedom of religion clearly affects the human rights of other individuals and creates particular difficulties in organizing the work."

45. In its submission of 31 August 2015, the County stated: *"It has therefore not been possible to have Ellinor Grimmark employed at the hospital, because of the risk that abortion patients would need to be cared for by an active anti-abortionist in some part of the health care chain. Also, the trust of the objectivity and professionalism of the hospital must be maintained in relation to the public, which was not seen possible if Ellinor Grimmark would work there, not even a shorter time."* (p. 4)

46. The statements concerning the Applicant have no basis in fact, since the Applicant had never publicly spoken about abortion before the media interview. It was an contrived assertion concerning the Applicant's character to describe her as part of the "anti-abortion resistance". The Applicant did not contact media after the events but was approched . The claims are also contradicted by the fact that not only the Applicant, but all those who conscientiously object, are denied work.

47. The Manager at the Women´s Clinic at Värnamo hospital, Ing-Marie Karlsson, has in an oral statement at the District Court stated the following (document nr. 41) *"I met this Ellinor, who had only concerns about giving the tablets, but she could still provide good and safe care both before, during and after the patient aborted. It is a long process throughout the abortion process, it is not possible to set the start and end of it. When I read it in the newspaper, I realized that it was an anti-abortionist I had met. It was not Ellinor as I met like a very nice, cute girl, so I felt a little fooled by what I read in the newspaper. Then I got some reactions in the village from people saying: What are you really doing at Värnamo hospital? It was from the public that said we could not have a midwife as an anti-abortionist at our hospital".* Through this statement it becomes very clear that the primary reason behind that Ellinor Grimmark´s job in Värnamo was terminated, was because she expressed her opinion in the local newspaper and because of the reactions from the public regarding the article.

48. In addition to the quotes above, it was also found that the Applicant's views are unacceptable to the County during the course of the domestic hearings. For example, Lisbeth Edvinsson, healthcare manager at the obstetrics department and the BB department at Värnamo Hospital, during questioning at Jönköpings District court stated: *"I had offered a job for six months at the maternity ward to a midwife who could meet our patients with respect and warmth and provide good care. Now I just saw someone who was an actively anti-abortion. It felt like we would ... that I had a midwife in front of me who had a nametag "anti-abortion."* (document 40) Again, there is nothing in the article of Värnamo Nyheter that supports the assertion from Edvinsson.

49. Chief of Operations at Värnamo hospital, Christina Gunnervik, during her testimony was asked by the counsel of the County: *"How are the possibilities to have a person employed who holds these opinions?"*. Gunnervik: *Unthinkable, completely unthinkable!"*.

Was the interference justified?

Was the interference prescribed by law?

50. The requirement, to not hold a negative position on abortion, is not justified since there is no legal basis. There was never any communicated policy concerning accepted views on abortion 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?
51. 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, Swedish authorities have not provided any clear, compelling or substantive evidence in support of the assertion that abortion care would be affected. 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?
52. 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*[34] § 52). In reference to the information provided concerning the European standard when it comes to freedom of conscience, it is found that almost all European countries protect the right to freedom of conscience within the health care profession taking into account that such individuals 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.

53. The conflicting interests to be considered in the present case are the prohibition on the Applicant pursuing her career choice as 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 margin of appreciation is very narrow, and there has been a significant interference with the Applicants freedom of opinion. 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 the abortion and 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, neither during her practice at the relevant hospitals or during her work in Norway.

54. 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 beliefs and beliefs 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.

Freedom of expression

Prohibition of publicly taking a stand on abortion - Värnamo hospital

[34] Ibid § 52.

55. Through the District Court ruling, it is clear that there is a requirement on employees not to publicly take a stand on abortion (document 16).The fact is that the Applicant has never been a public spokesperson for her opinions on abortion; she was never involved in any organization regarding the issue and had never participated in any public event regarding the matter. At the time of the revocation of her employment at Värnamo hospital she had only been interviewed in the local newspaper and expressed her gratitude towards Värnamo Hospital for hiring her and granting her freedom of conscience. Nevertheless, the authorities subjected her to negative consequences because she spoke publicly about her opinion. The requirement made by the managers at Värnamo Hospital, that "no employee at the women´s clinic is allowed to publicly take a stand against abortions" (document 16, p 54), was a new requirement made after the managers had revoked the Applicant's job offer. The fact that the Applicant's case has sparked significant media attention *after* the revocation of her job and during the legal proceedings, was not the basis for the initial decisions of the decisions of Swedish authorities.

56. Against this background the Applicant's claim constitutes a Convention-protected right to freedom of opinion and freedom of expression. The negative actions by representatives of the authorities against the Applicant, the dismissal and revocation of the offer of employment due to her expressing her opinion clearly falls within the scope of thethe Convention guarantees in Article 10.

57. As the Court held in the leading case of *Handyside v UK*[35]: *"Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to § 2 of Article 10, it is applicable not only to "information" or "ideas", that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no democratic society".*

Was the interference justified?

Was the interference prescribed by law?

58. The impugned requirement had no legal foundation, and is in fact unlawful according to the Freedom of the Press Act (tryckfrihetsförordningen, TF) chapt. 1 section 3 and chapt. 3 section 4 second paragraph, which states that any form of negative action (including termination or denial of employment) by representatives of the general public against a person who made use of his freedom of expression in the media, is illegal. The Applicant referred to the violations of the Freedom of the Press Act to support its claim that the interference in the applicant's freedom of expression was not prescribed by law, but indeed in conflict with essential rules in Swedish constitutional law (document 28, p 18). The Labor Court however found that the Applicant *"was not employed because she had said, publicly or otherwise, that she would not carry out her work duties in full cannot be regarded as being in conflict with constitutional law*" (document 28, p 19). It is clearly shown in the facts of the case that the information given by the applicant to the reporter in no way differs from the information that had already been given to the representative of Värnamo hospital when applying for a job. In essence, the Labor Court disregarded serious claims put forward

[35] *Handyside v United Kingdom*, judgment of 7 December 1976, Series A, No.24, § 49.

by the Applicant concerning violations of article 10 and violations of the Freedom of the Press Act without commenting on the arguments presented. Swedish authorities have acted contrary to these provisions and the actions amount to a serious violation of Article 10 of the Convention. Because the restriction lacks support in law, and is in fact contrary to Swedish law, there has been a clear Convention violation. It is to be noted that the constitutionally protected freedom of expression, and in particular the prohibition against reprisals, is one of the most central provisions within the Swedish legal system.

Does the interference pursue a legitimate aim?

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, Swedish authorities have not provided any clear, compelling or substantive evidence in support of the assertion that abortion care would be affected in any way, nor that it fulfills the aim of good and safe maternity and delivery care to deny the Applicant from working within her profession and by requiring that "no employee at the women´s clinic is allowed to publicly take a stand against abortions". 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?

59. Even if the restriction could be considered prescribed by law, such a law can be subject to the scrutiny of the Court, according to the case *Open Door Counseling Ltd. and Dublin Well Woman Centre Ltd v Ireland*[36] , where the Court stated that a restriction on abortion information in Ireland, while prescribed by law and pursuing a legitimate aim, was still disproportionate and contrary to Article 10. Furthermore, the Grand Chamber in the case of *Wille v Liechtenstein*[37] stated: *"a reprimand for the previous exercise by the applicant of his right to freedom of expression and, moreover, had a chilling effect on the exercise by the applicant of his freedom of expression, as it was likely to discourage him from making statements of that kind in the future."* In the *Wille v Lichtenstein* case, a senior judge in the Judiciary of Liechtenstein was refused a post by the Prince of Liechtenstein due to a remark he made regarding constitutional interpretation in the course of a lecture to an audience regarding the law in Liechtenstein. The Grand Chamber noted that there was a legitimate aim in requiring members of the judiciary to be restrained in their expression of views, in particular on cases before the courts. However in this case they noted that the judge had not given a view on any ongoing case nor had he insulted the Prince or any other official in the Government of Liechtenstein. Therefore, the Grand Chamber concluded as above that a measure taken against him was an interference in the applicant's rights under Article 10 which was not necessary in a democratic society.

[36] Open Door Counseling Ltd. and Dublin Well Woman Centre Ltd v Ireland, judgment of 29 October 1992, Series A No. 246.
[37] *Wille v Liechtenstein* [GC], Application no. 28396/95 § 50.

60. The authorities hold 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 view of potential harm to patient rights. The facts of the case show that many midwives and doctors have been exempted from performing abortions in Sweden and that there have been no complaints whatsoever about their contacts with patients. 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). To ban all midwives with a negative stand on abortion would exclude and freeze any ethical debate and potentially cause a democratic deficit because certain religious groups would likely be excluded from working within tax-funded health care as e.g. midwives/doctors. Clearly such far-reaching consequences are out of step with the rights and freedoms of the Convention.

Article 14

61. 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.[38] 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 realised.

Direct discrimination

62. The District Court of Jönköping found that the County had requirements for employment which - when applied in the situation of the Applicant – led to her not being eligible for the position as a midwife. The requirements were however non-existent until the Region was 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. This was also made clear by Värnamo hospital, when the job position as a midwife, with freedom of conscience, was revoked when the Applicant participated in a local newspaper interview.

63. The second requirement that the County applied is the prohibition of any midwife from publicly taking a critical stand against abortion (document 16, page 54). 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 different from other midwives who would have been employed simply because of her protected belief. This difference in treatment is not justifiable.

64. The interest of Swedish women wanting to access abortion cannot be crudely counterpointed against the interest of the Applicant who claims freedom of conscience. Access to abortion is not in any way limited by a small number of healthcare professionals asking not to participate in abortion procedures because of their conscience. This has clearly been proven in the County before and also in the neighboring countries Norway and Denmark.

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

Indirect discrimination

65. Alternatively, the requirements were alleged to restrict her employability and resulted in less favorable treatment due entirely to her conscientious objection and religious beliefs, also 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.

66. It is therefore clear that there was no objective and reasonable justification and that there was not a reasonable relationship of proportionality between the means employed and the aim sought to be realized. 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.

67. One of the leading cases on indirect discrimination under article 14 is *Zarb Adami v Malta*[39] 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 on the basis of sex to be compatible with the Convention. Thus, indirect discrimination, in particular in situations involving the sex of persons, 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

68. In the case of *Thlimmenos v. Greece*[40], the Court placed the State under a positive obligation to accommodate different situations for the first time. 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."[41] No attempt to protect the Applicant's right has been made by the County Council.

69. It has been settled that Article 14 is a subsidiary provision which cannot be invoked independently, but only 'in conjunction' with other Convention rights. At the outset 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*[42] where the Court held: "*Although the application of Article 14 does not necessarily presuppose a breach [of the substantive provisions*

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

of the Convention and its Protocols] – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the rights and freedoms".[43]

70. 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*[44] *"[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.*

71. 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 with 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. This means that the room for margin of appreciation is very narrow.

[43] *See Abdulaziz, Cabales and Balkandali v United Kingdom*, Application nos. 9214/80; 9473/81; 9474/81, 28 May 1985 § 71.
[44] *Vojnity v Hungary*, Application no. 29617/07, 12 February 2013, § 36.