EBH Booklets

6

The Hungarian Equal Treatment Authority's work and case-law in the area of discrimination in healthcare in healthcare

EGYENLŐ=
BÁNÁSMÓD HATÓSÁG

EBH Booklets 6

The Hungarian Equal Treatment Authority's work and case-law in the area of discrimination in healthcare in healthcare

Budapest
2019

EBH Booklets 6

The Hungarian Equal Treatment Authority's work and case-law in the area of discrimination in healthcare in healthcare

Published by Equal Treatment Authority

1013 Budapest, Krisztina krt. 39/B, Hungary

Responsible: Dr. Ágnes Honecz

Editor: Dr. Adél Lukovics

Series Editor: Dr. Katalin Gregor

Typography: Levente Kollár

Printed: Pauker Holding Kft.

HU ISSN 2498-5732 (print)

Egyenlő Bánásmód Hatóság
Equal Treatment Authority

www.egyenlobanasmod.hu | facebook.com/egyenlo.banasmod.hatosag

Tartalom

I. Introduction

In 2015 the Equal Treatment Authority (Egyenlő Bánásmód Hatóság (EBH) in Hungarian, hereinafter referred to as the Authority) decided to launch a series of specialised publications entitled EBH Booklets. The first booklet in the series focused on workplace harassment; the second concerned harassment at school; the third discussed the protected characteristic known as "other situation"; the fourth summarised the Authority's experience with respect to discrimination in education; and the fifth reviewed the Authority's case-law involving incidents of multiple discrimination. These publications are available on the Authority's website at egyenlobanasmod.hu.

Ever since its creation, the Authority has received petitions concerning healthcare, that is concerning either the denial of some healthcare services or their improper provision; harassment that the petitioners experience while they avail themselves of such services; problems with the physical accessibility of healthcare buildings; or complaints regarding a healthcare institution's decision not to hire someone. Furthermore, there have been cases involving healthcare services or institutions when the Authority initiated ex officio proceedings. Thus, in the past years the Authority has investigated numerous cases in this area, and as a result we have amassed substantial experience in handling cases involving discrimination in healthcare specifically. This provides us with a special assortment of experience and knowledge on this subject, which is unique both in form and substance. Consequently, we find it vital to share this experience to help the victims of discrimination – that is persons who wish to assert their rights – as well as the legal subjects who are obliged to comply with the principle of equal treatment and those institutions that apply the law. These are our reasons for the choice of discrimination in healthcare as the topic of the present publication.

Although our previous publications have already presented the most important information about the Authority and the concept of discrimination, before turning to the topic of the present publication, we would like to preface the discussion with a brief review of the relevant terms and concepts, especially with respect to the range of protected characteristics. We should also note in this context that the present publication will not include a discussion of the concept referred to as "other situation" as a protected characteristic or its interpretation in the Authority's case-law[1] since we already addressed this issue in the third booklet of the series.

1 For example in the discussion of cases Nos. EBH/28/2011 and EBH/89/2015.

About the Authority

In Hungary, the Equal Treatment Authority is responsible for monitoring the implementation of the principle of equal treatment, and its jurisdiction extends across Hungary. The Authority is an independent and autonomous administrative body that was created in 2004. It is only subject to the law and is bound by outside instructions concerning the performance of its responsibilities. It performs its responsibilities separately from other bodies and free of outside influence. All its responsibilities must be laid out in law. The President of the Equal Treatment Authority is nominated by the Prime Minister and appointed by the President of the Republic for a term of nine years.

The Authority's primary responsibility and main activity is to investigate complaints and reports filed concerning cases involving alleged discrimination. Its work in this area is helped by a nationwide network of equal treatment consultants. The Authority conducts its investigations in the framework of public administration procedures.

The legal framework for the activities of the Equal Treatment Authority is set out in Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (hereinafter referred to as the Ebktv pursuant to the Hungarian abbreviation).

Detailed information about the Equal Treatment Authority is available on the Authority's website.

The EBH seat: 1013 Budapest, Krisztina krt. 39/B
Telephone number: +36 1 795-2975, +36 80 203-939
Fax number: +36 1 795-0760
Website: egyenlobanasmod.hu
Facebook page: facebook.com/egyenlo.banasmod.hatosag

Discrimination

Discrimination is a violation of the principle of equal treatment. According to the Ebktv, the principle of equal treatment is violated – in other words discrimination occurs – when an individual or a group of individuals are subjected to a disadvantage because of one or more protected characteristic he/she/they possess.

The protected characteristics

Protected characteristics are the characteristics and personal features enumerated in the Ebktv, which may not be used as grounds for adverse differential treatment since that would constitute a violation of the principle of equal treatment, in other words discrimination.

The protected characteristics listed in the Ebktv are the following:

a) gender,
b) racial origin,
c) skin colour,
d) nationality,
e) belonging to a national or ethnic minority,
f) mother tongue,
g) disability,
h) health condition,
i) religion and belief,
j) political or other opinion,
k) family status,
l) motherhood (pregnancy) or fatherhood,
m) sexual orientation,
n) gender identity,
o) age,
p) social origin,
q) financial status,
r) limited term or part time employment or other form of work contract,
s) membership in a trade union,
t) other situation, characteristic or attributes

As is apparent, the Ebktv tends to extend protections to innate characteristics that are either permanent, immutable or difficult to change. In line with international practice, the Ebktv typically protects characteristics that are essential features of a person's character, lend themselves to group formation, may give rise to prejudice and are associated with some form of underprivilege.

The issues covered by the present booklet

In order to provide the reader with an overview of the ***legal foundations*** of the underlying issue, we briefly review the essence of the legal regulations concerning discrimination in healthcare. In the next step, we highlight a few examples from the Authority's ***case-law*** to present the EBH's application of the law in this area. Our review of the Authority's application of the law centres around three major issues: the institutions that provide healthcare services (or their controlling institutions) may act in a capacity as *employers;* they may interact with us *in the performance of healthcare services they provide;* or – when certain statutory conditions apply – *they may be subject to a legal requirement of ensuring equal access to their services, in other words they must make provisions for physical accessibility, too.*

II. Anti-discrimination regulations concerning healthcare

As we already noted in the previous chapter, we talk about discrimination when someone is subject to a disadvantage in connection with one or more protected characteristic expressly designated as such by law. The personal scope of the Ebktv – that is the range of persons who may not be treated disadvantageously in connection with their protected characteristics and the range of persons or entities that must comply with the principle of equal treatment with respect to the aforementioned persons whom they enter into legal relations with – is defined by Sections 4 and 5 of the law. ***According to Section 4 of the Ebktv, the persons or institutions obliged to comply with the principle of equal treatment must do so during the process of entering into legal relationships, in the process of maintaining their legal relationships, in the performance of their procedures and the measures they take; that is in all their legal relationships. Section 4 (k) expressly specifies "healthcare service providers" as falling under the scope of the previously mentioned obligation.*** Section 3 (f) of *Act CLIV of 1997 on healthcare* (the Healthcare Act) defines healthcare providers as follows: "regardless of the ownership form and the maintaining entity, a legal entity, unincorporated organization, or a natural person delivering services in his own right, which are entitled to provide healthcare services on the basis of a license issued by the health authority." ***It follows from the aforementioned that all legal entities which qualify as healthcare providers are bound by the prohibition of discrimination in all their legal relations.*** Section 7(1) of the Healthcare Act, as the relevant sector-specific legislation, also mandates that all patients have the right – within the limitations set out by law – to the healthcare services that their health condition requires, which is appropriate with respect to said condition, continuously accessible and complies with the principle of equal treatment. It is also important to point out, however, that in addition to the healthcare service providers falling under Section 4 (k), the legal obligations of other institutions which are required to comply with the principle of equal treatment may also be implicated in cases involving healthcare, that is discrimination in health services. One example are municipal governments as the owners of healthcare service providers according to Section 4 (b) or public bodies under the state budget within the meaning of the Ebktv's section 4 (m), such as for example the national blood supply service in the cases

involving blood donations discussed in Chapter IV of the present booklet.[2]

With respect to the providers of healthcare services, one must at the same time also refer to the Ebktv's Section 5, which specifies the legal subjects that are only required to comply with the principle of equal treatment in the context of what the law defines as the "relevant" legal relationship. ***Pursuant to Section 5 (a) and (b), "those who make a proposal to persons not defined preliminarily to enter into contract or those who invite such persons to tender" and "those who provide services or sell goods at their premises which are open to customers" may not discriminate.*** As we saw above, having regard to the Health Act's Section 3 (f), the Ebktv's Section 4 (k) proffers an extraordinarily expansive view of the legal subjects who qualify as the providers of healthcare services; however, the applicability of the Ebktv's Section 5 (a) cannot be ruled out in the case of persons or institutions which either provide services that may involve healthcare but do not qualify as healthcare services "classically understood" or which unequivocally do not qualify as healthcare providers pursuant to Section 3 (f) of the Health Act. The Authority proceeded based on Section 5 (a) in the blood donation related cases discussed in Chapter 4 below, in which the petitioner complained about a commercial blood plasma producer and distribution company.[3]

Finally, with respect to the personal scope of the law, ***focusing still on Section 5, we must definitely also discuss its last subsection (d), which provides that "employers in respect of employment relationships, and persons entitled to give instructions in respect of other relationships[4] aimed at work and relationships directly related thereto" must also comply with the principle of equal treatment.*** Since hospitals, clinics and the institutions that own and operate them (for example the state or municipal governments) generally also tend to be employers, pursuant to the Ebktv's Section 5 (d) they are also required to comply with the prohibition of discrimination in their capacity as employers and as entities entitled to give instructions in respect of work relationships. What is relevant in this context is who – or rather which – body, institution, or company the petitioner is specifically in an employment relationship with (which body, institution or company concluded a contract with the petitioner that gave rise to a status of the latter as a public employee or, alternatively, which of these bodies concluded another employment contract within the scope of the Labour Code with the petitioner).

2 Cases No. EBH/499/2013, EBH/HJF/38/2019

3 Cases No EBH/434/2015, EBH/89/2015

4 What counts as an employment relationship or as another type of legal relationship aimed at the performance of work based on the Ebktv is defined in Section 3 (1) (a) and (b) of the law.

Continuing with the legal foundations, we must definitely also discuss Chapter III of the Ebktv. In that chapter the legislator expressly mentioned five areas[5] – reflecting the five special areas designated in the EU's anti-discrimination law, the Racial Equality Directive[6] – where special care must be taken to comply with the principle of equal treatment, which is why special detailed rules have been designed to regulate the specific needs that characterise these areas. ***In the domestic legal regulation, too, one of the five special areas is social security/healthcare; the detailed rules for healthcare are set out in the Ebktv's Section 25. Section 26 (1) enumerates those situations and cases that fall under the definition of the provision of healthcare services and in the performance of which compliance with the principle of equal treatment must be subject to special attention. Naturally, this does not imply that this is an exclusive list of situations and cases when healthcare providers are bound to comply with the principle of equal treatment. In discussing the Ebktv's Section 4 (k), for example, we saw that they are bound to do so in respect of all their legal relationships. The Ebktv's Section 25 (1) makes the prohibition of discrimination in the area of healthcare services more emphatic by referring specifically to participation in preventive programmes and screenings; preventive and healing medical care; the use of medical premises; and the satisfaction of dietary and other needs.*** We find that the situations and cases enumerated above cover the entire range of healthcare in the complex sense that discrimination is prohibited not only with respect to specific medical tests and medical or preventive treatments; if persons of Roma ethnicity may not be in the same waiting room as non-Roma persons, for example (e.g., Roma are segregated within the waiting room or are compelled to wait outside the clinic), then that also qualifies as discrimination even though it does not directly impact their treatment. Another instance of discrimination is when persons who are obviously in a less privileged financial or social situation have to wait conspicuously longer periods to receive their medical treatment compared to those patients who are in a comparatively better social or financial situation.

The Ebktv's Section 25 (2) provides for the possibility of preferential treatment in the area of social security and healthcare by stating the following: pursuant to or authorised by the law and based on health, disability or any other protected characteristic, a government decree may grant additional benefits to specified social groups within the

5 Employment, social security and healthcare, housing, education and training, the distribution of goods and the sale of services.

6 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

framework of the social and healthcare system. An illustrative example from the area of healthcare are the screening services regulated by Section 82 (3) of the Healthcare Act. According to this provision, "[s]creening is targeted when it is focused on specific at-risk segments of the population based on age, gender or certain risk factors, or when it is aimed at the detection of certain endemic diseases of public health importance." Before we proceed to review the Authority's application of the law and to discuss illustrative cases, we need to stress once more that the abovementioned catalogue of protected characteristics is dispositive with respect to discrimination in the area of healthcare as well. In other words, we can only talk of discrimination in the specific realm of healthcare when the aggrieved person has suffered a disadvantage in connection with one or more protected characteristic that they possess (e.g. their gender, their nationality, sexual orientation, gender identity, financial situation, etc.). Looking at the same issue from a different angle: ***In the area of healthcare, too, the Authority is limited to investigating cases of alleged discrimination, and it is only authorised to investigate a complaint if the petitioner renders probable the existence of both the disadvantage suffered and their protected characteristic, and if, moreover, they are convinced that they have suffered the disadvantage in question on account of the protected characteristic they possess. This means it is not in the Authority's remit to review petitions that complain generally about medical treatment; the infrastructural conditions at the institutions/hospitals which offer healthcare services; potentially excessive waiting times or waitlists; the lack of properly qualified professionals; or the behaviour or language/tone of healthcare personnel.*** In this context we also note that with respect to potential grievances suffered in connection with the abovementioned issues it is not sufficient for the petitioner to invoke the Ebktv's Section 8 (h) and cite their health condition as a protected characteristic, arguing that they turned to the healthcare provider in question to be treated for a health condition and that they suffered the grievance in question in that context (thus, for example, in a situation in which the petitioner alleges that they suffered from the unfavourable infrastructural conditions at the hospital or from bad food they had been given at the healthcare institution because they had been taken to the hospital with a ruptured appendix, and had to spend a few days there following the surgery, the underlying health condition does not in and of itself qualify as a protected characteristic). Although pursuant to the Ebktv's previously cited section health condition naturally qualifies as a protected characteristic, all the persons who avail themselves of healthcare services possess this characteristic, they are patients. In and of itself, this circumstance does not imply, however, that the given complainant has suffered any of the grievance listed as examples above – which are likely to

affect the majority of patients at the given hospital as they avail themselves of the medical services in question – in connection with their own health condition which had to them being treated differently from the other patients. Owing to the conceptual understanding of discrimination, we can only talk about discriminative treatment if a person who possesses a protected characteristic is treated unfavourably compared to persons who do not possess the same characteristic. Put more simply: General complaints about healthcare services and their providers do not involve discrimination, and the Authority is not the proper forum for addressing these. This also means that in the context of grievances suffered in the course of medical treatment and healthcare services, potential petitioners can only invoke their health condition as a protected characteristic in a fairly limited set of circumstances; nevertheless, such cases can and do of course occur in the Authority's practice. What these had in common as compared to the examples mentioned above was that the health condition invoked by the petitioner was not the one with respect to which they sought medical treatment; the health condition that was the protected characteristic was independent or markedly different from that of patients who were in a comparable position with the petitioner, i.e. the persons who sought to avail themselves of the same healthcare services as the petitioner and who did not possess the petitioner's protected characteristic.[7]

7 E.g. cases Nos. EBH/410/2018, EBH/10/2013, EBH/137/2016, EBH/HJF/17/2019

III. The Authority's case-law involving healthcare service providers as employers

Discrimination in the procedure leading up to an employment relationship, during the hiring process

According to the Ebktv's Section 21 (a) and (b), it is a particular violation of the principle of equal treatment when the employer discriminates against the employee with respect to access to employment, especially in public vacancy notices, in hiring, in specifying job requirements or in the selection process that precedes the entry into employment. Naturally, this legal provision also applies to the providers of healthcare services and their controlling institutions in situations when these select future employees in their capacity as employers, when they make decisions about hiring. In this context it is important to note that pursuant to the Ebktv, a legal relationship between the respective parties – that is the employer and the individual applying for the given position – is already being entered into during the hiring process, that is before an actual legal contract for employment is concluded, and that as part of this legal relationship the employer – in the case at hand the provider of healthcare services in its capacity as the employer – is obliged to comply with the principle of equal treatment.

In the **case No. EBH/419/2008** the petitioner turned to the Authority with the complaint that he had been discriminated against in connection with his male gender in the process of applying for a job. The petitioner responded by telephone to a vacancy notice advertising a position as patient admission administrator at a clinic. The petitioner was in possession of the relevant professional experience for the performance of this job. Nevertheless, upon his inquiry he was informed over the phone that the current female employees at the clinic's patient admissions desk did not wish to work with a male colleague. Moreover, the clinic's financial director – who took the petitioner's telephone call – had also been informed by the manager of the admissions desk that they sought a female employee for the position. The statement submitted by the clinic during the proceedings before the Authority confirmed this version of events. The Authority rejected the clinic's defence, which argued that it had not vio-

lated the principle of equal treatment with respect to the petitioner because the latter had failed to avail himself of the job interview opportunity that he had been offered, which was extended to him after he had been told twice over the phone that the clinic wished to fill the position at the admissions desk with a female applicant. *As a result, the Authority held that the clinic had violated the principle of equal treatment in connection with the petitioner's male gender (it had directly discriminated*[8] *against the petitioner) when it had failed to provide him with an equal opportunity in the procedure used to select an applicant for the position of admissions desk administrator that the clinic had advertised.* As a sanction, the Authority banned the clinic from future conduct of this kind and ordered the publication of its final and binding decision on the Authority's website for a period of 60 days.

The petitioner in the **case No. EBH/1023/2009** was also subject to a disadvantage in the course of a hiring procedure. The petitioner had previously worked for two years as a nurse at the hospital complained against. In the underlying case, she and her same-sex partner applied jointly as nurses for vacancies at the same hospital. The director of nursing offered them both a position in the hospital's intensive care unit, but when they openly revealed their romantic relationship during the preliminary consultations, the attitude of both the director of nursing and the unit's chief nurse turned hostile. The director of nursing made clear that she did not wish any further contact with them, while the chief nurse declared that they "would not be allowed to work in the same unit if they shared a home." Ultimately, the hospital employed the petitioner's partner but rejected the petitioner herself despite her adequate professional qualifications, even though the vacancy notice for the nursing position continued to be posted on the institution's website. In the proceedings before the Authority, the hospital argued that it had not rejected the petitioner's application because of her sexual orientation but because she had previously worked at the institution and during that time patients had often complained about her inappropriate conduct and tone. They submitted that she had been given to an oral notice by the employer on account of the aforementioned complaints. However, in its decision concluding the proceedings, the Authority held that the oral notice invoked by the hospital had not resulted in any further repercussions during the time when the petitioner had been employed at the

8 According to Section 8 of the Ebktv, direct discrimination is any disposition as a result of which a person or a group is treated or would be treated less favourably than another person or group in a comparable situation because of a protected characteristic that they actually possess or are presumed to possess.

hospital, she had decided to quit her position out of her own volition six months later, and that she had not been guilty of any serious employee misconduct. In fact, when she reapplied for a position at the hospital, no one had invoked that there had been any complaints about her previous performance, and until she revealed her sexual orientation the hospital's attitude towards her application was downright encouraging; this attitude only changed upon learning of her sexual orientation. It was further possible to ascertain that during the time when the petitioner was applying, as well as after her application was rejected, the hospital continued to search for trained nurses, and the petitioner had all the necessary qualifications for the position as well as five years of relevant work experience. Based on the statistical evidence procured during the proceedings, 15 of the 25 nurses that the hospital hired in the process had qualifications that exactly matched those of the petitioner, while the rest had comparable levels of qualification. At the same time, 18 of the 25 nurses had less relevant work experience than the petitioner, and of the 15 whose qualifications precisely matched those of the petitioner all had just completed their education and had no prior work experience as nurses. Based on the above, the Authority held that in its capacity as an employer, the hospital had failed to show that the petitioner was not qualified to hold the position advertised, and that it had also failed to show that the oral warning which they cited as the reason for rejecting her application played a vital role in informing the hiring decision. Furthermore, the overwhelming majority of the nurses hired at the time when the petitioner herself applied for a position had lower levels of qualifications and professional skills than the petitioner. The Authority further assessed that the review of the circumstances informing the hospital's decision to refuse to hire one of the two partners in the same-sex relationship involving the petitioner and her partner led to the conclusion that the decision was attributable to their appearance at the hospital as a same-sex couple, which was a factor that weighed against their joint hiring from the hospital's perspective, and hence the reason for excluding one of

them from the position in question was attributable to their situation stemming from their sexual orientation. *As a result, the Authority determined that when it had treated her less favourably than other applicants during the hiring process, the hospital had violated the principle of equal treatment (in the form of direct discrimination against her) with regard to the petitioner in connection with her sexual orientation.* As a legal sanction the Authority banned future conduct of this kind and also imposed a fine of 100,000 HUF. The hospital appealed the Authority's decision in court, but the latter dismissed the action and – in line with the Authority's own reasoning – it emphasised that the decision to employ the petitioner's partner does not in and of itself preclude the possibility that the hospital's discrimination of the petitioner was motivated by her sexual orientation. The fact that the hospital had expressly ruled out jointly employing them with reference to the romantic relationship between them was unequivocally linked to the same-sex relationship between them. In its decision, the court also pointed out that even though the hospital was correct in arguing that it had not been obliged to extend an employment offer to the petitioner, and that it was free to decide at its own discretion whom it found qualified for filling the vacancy in question, this right did not imply that it was exempt from compliance with the principle of equal treatment in the course of hiring and employment decisions.

The petitioner in **case No. EBH/458/2014** submitted that the hospital complained against had failed to employ her as a nursing assistant because of her Roma ethnicity. The petitioner had personally visited the hospital on four occasions with the request that she be employed as a nursing assistant, and she further submitted that during her last visit a chief assistant of the hospital's nursing division told her and her partner (who had accompanied her to the interview) that "Gypsies are unreliable and bad workers, they do not turn up at work and I won't give this Gypsy the right [to work here]." In addition to its categorical rejection of the charge of having discriminated against the petitioner, the hospital also invoked during the proceedings before the Authority that roughly a year before turning to the Authority, the petitioner had already started to work at the hospital, a status that she herself had terminated during the probation period. The facts of the case showed that the petitioner's Roma ethnicity had not come up at any time during her previous employment at the hospital, neither at the time when she began working there nor at the eventual termination of her employment, and the petitioner's previous employment at the hospital buttressed the claim that this factor did not play a role in the way her reapplication to the same institution gad been handled. Contrary to the petitioner's claim, it was further not possible

to verify that any hospital employee had proffered the petitioner a promise to employ her or had informed her that there was a vacancy for the position of assistant nurse at the internal medicine long-term care unit. With respect to the statement attributed to the senior assistant by the petitioner and her partner, who were both heard as witnesses during the proceedings, and the reference to the petitioner's Roma ethnicity as part of the alleged statement, the Authority considered that neither the petitioner nor her partner were able to exactly recall the statement they referred to, nor was it possible to accurately reconstruct the circumstances in which they had been allegedly uttered. Furthermore, the Authority also determined that it seemed unrealistic that the statement referred to by the petitioner was uttered in the form and under the circumstances alleged by the petitioner and her partner, and there was also an internal contradiction in the petitioner's claim that even upon hearing this statement she left the site with the expectation that the senior assistant would call her with a positive decision informing her when she would be able to start working. Based on the above, the Authority determined that the petitioner's Roma ethnicity had not come up as a consideration during her application for the position of nursing assistant, also having regard to the fact that the petitioner had applied for a position that had not been advertised and that in fact no nursing assistant had been hired at the internal medicine long-term care unit around the time when the petitioner had applied for a position there. *Since therefore it was not possible to ascertain a causal link between the disadvantage suffered by the petitioner (the hospital's failure to employ her as an assistant nurse) and her protected characteristic (her Roma ethnicity), the Authority rejected the petition.*

Discrimination in the determination and payment of salaries and in working conditions

The employer – and hence the healthcare provider in its potential capacity as an employer – is of course not only obliged to comply with the principle of equal treatment before employment begins or during the hiring procedure; it is also obliged to respect the principle of equal treatment with regard to its employees in the course of their employment. Among other provisions, such a requirement is also laid down in the Ebktv's Subsections 21 (e) and 21 (f), for example; these posit that actions an employer which discriminate against an employee in the context of the working conditions that apply to them, or with respect to the various benefits that the given employee is entit-

led to based on the underlying employment relationship – thus especially with regard to the determination of their salaries – constitutes an especially severe violation of the principle of equal treatment.

The petitioner in **case No. EBH/HJF/11/2019** cited her female gender, health condition (she underwent two knee surgeries and several knuckle surgeries during the time of her employment) as well as her age (58 years) as her protected characteristics in her petition concerning the healthcare provider complained against, which had employed her in the position of specialist psychologist. The petitioner complained that when she wanted to return to work following her sick leave, the healthcare institution no longer allowed her to take her shifts in a block and instead readjusted her service hours to reflect those of "new" and healthy employees. She further complained that the salaries of male employees who had the same educational qualifications and were assigned to the same employee category exceeded those of their female counterparts who were in a comparable position – thus including the petitioner – and that "new" employees were being hired at salary levels that were disproportionately high when compared to what longstanding employees were making. In its concluding decision, the Authority stressed that in assessing whether the principle of equal treatment had been violated, it is not sufficient for someone to have been subjected to adverse treatment, but it is also necessary to show that the treatment in question was also disadvantageous when compared to the treatment of persons in a comparable position. In other words, there must be a person as compared to whom the aggrieved party has been treated unfavourably. The Authority also pointed out that a situation in which the petitioner was subject to a less favourable treatment than she had been subject to previously does not qualify as a disadvantage in this context. In establishing the facts of the case, it emerged that with respect to the possibility to perform the working hours in a single shift or the salary, there was no individual or group who were in

a comparable position with the petitioner since she was the only person employed by the institution complained against in the position of specialist psychologist. Based on the above, *the Authority concluded that the petitioner had not been subject to a disadvantage and rejected the petition*. With reference to the petitioner's argument that "new" employees are remunerated more generously than "old" employees, the Authority's decision noted that a status as a "new" or "old" employee does not qualify as a protected characteristic since it is neither the same nor practically identical to biological age, which is a protected characteristic based on the Ebktv's Section 8 (o), nor does it qualify as an "other situation" protected under Section 8 (t).

Discrimination in the termination of employment

In the above we have shown that the employer is obliged to comply with the principle of equal treatment already before of an actual employment relationship begins and during the hiring procedure, as well as in the course of an employee's employment. The same applies to the termination of an employment relationship: The Ebktv's Section 21 (c) expressly provides that discrimination in the course of terminating an employment relationship constitutes a particular form of violating the principle of equal treatment. In the following we will review illustrative examples of the latter situation.

In **case No. EBH/309/2018** the petitioner was employed as a public employee at the hospital complained against in the position of kitchen assistant. In the document certifying the petitioner's appointment to her position, the hospital stipulated a probationary period, during which the petitioner became pregnant. On the day after learning about her pregnancy, the petitioner informed her immediate superior, the hospital's nutrition manager, about this. A few days later the petitioner went on sick leave because of a flu. A week later the hospital informed her that her employment status had been terminated with immediate effect during the probationary period. Upon presenting her the documents certifying the termination of her employment, the nutrition manager indicated that the petitioner's employment had been terminated because of her pregnancy. The hospital complained against argued that the during the probationary period either party is entitled to terminate the employment with immediate effect and without cause. Thus, according to the hospital's reasoning, the termination was based on the employer's discretionary decision. It further denied that it had provided any information to the petitioner indicating that her status as

a public employee had been terminated because of her pregnancy. The nutrition manager was heard as a witness during the proceedings, and she indicated that there had been no problems with the petitioner's work performance, indeed, there had been plans to assign her more responsibilities. She further submitted that she had initiated the termination of the petitioner's employment status during the probationary period because during said period the petitioner had been placed on sick leave/assigned a status of unable to perform work on two occasions – once in connection with her own sickness and once because her child had been sick – and that the employment of any employee who is unable to perform work on two occasions during the probationary period is terminated with immediate effect. Based on the above, the educational institution complained against had failed to show that there was no causal link between the protected characteristic that applied to the petitioner and the disadvantage that she had been subject to, and hence *the Authority determined that in its capacity as the employer the hospital had violated the principle of equal treatment (it had directly discriminated against the petitioner) in connection with the petitioner's motherhood and health condition when it had decided to terminate her status as a public employee during the probationary period.* As a sanction the Authority banned the hospital from future conduct of this kind and ordered the publication of its final and binding decision on the respective websites of the hospital and the Authority. It further imposed a fine of 500,000 forints. The case above is also an example showing that – pursuant to the special evidentiary rules laid down in the Ebktv's Section 19 (1) and (2)[9] – in the cases before the Authority it is up to the employer complained against to show that it had not discriminated against the petitioner – in practice this refers to its reasons for terminating the employment relationship – when terminating an employee's work relationship during the probationary period.

The petitioner in **case No. EBH/166/2014** worked as an X-ray assistant at the limited liability non-profit healthcare company. During the two-year period when the petitioner was employed by the company, her contract had been extended on a dozen occasions even though during this time the petitioner was not substituting for another

9 Based on the concept of the shared burden of proof laid down in the Ebktv's Section 19, in order for the Authority to launch proceedings, it is sufficient for the petitioner to render probable that they possess a protected characteristic and that they have suffered a grievance. Insofar as the petitioner meets this requirement, it is incumbent on the party complained against (the subject of the procedure) to show that the circumstances rendered probable by the petitioner did not in fact apply or that it has complied with the principle of equal treatment or was not obliged to comply with this requirement in the framework of the underlying legal relationship between the petitioner and them.

employee who was on leave. As of 1 August there was a change in the legal persona of her employer, and as a result her employment status transitioned – with her assent – into that of a public employee at a hospital. In the course of this transition and the change in the legal persona of the employer; those employees with a fixed or part-time contract were offered the possibility of an appointment as public employees in the same status, that is with a matching fixed or part-time contract. The same had applied to the petitioner. The petitioner informed her superior about her pregnancy in September, and upon the expiry of her then effective contract on 31 December, the new employer, that is the hospital – where she was now employed as a public employee – opted not to renew the contract. The Authority conducted its proceedings against the petitioner's previous employer, namely the limited liability non-profit healthcare company, which had employed the petitioner until 31 July of the year in question, and it considered the petitioner's fixed-term contract as the underlying protected characteristic. Having regard to the fact that the petitioner had initiated a labour law action against the hospital that had employed her as a public employee in connection with the hospital's failure to renew her employment contract because of her pregnancy, the Authority was not allowed to consider this matter among the issues it investigated in the context of this case. *In the proceedings, the Authority assessed that the disadvantage suffered by the petitioner in this case was that as compared to all the other employees that her previous employer – that is the limited liability non-profit healthcare company – had*

employed with indefinite employment contracts and who had been officially transferred to the hospital (470.25 employees in total, compared to 9.75 persons with a fixed-term contract), the petitioner had been offered a fixed-term contract by the hospital, in line with her previous employment contract status. If, therefore, the petitioner's previous employment status would have involved an indefinite employment, she would not have been subject to the disadvantage that her position as a public employee ended with the 31 December deadline set out in her fixed-term contract. Hence, the Authority – having also regard to the fact that the limited liability non-profit healthcare company had failed to provide compelling grounds for its decision to employ the petitioner with a series of fixed-term contracts over a period of two years – *ultimately determined that by subjecting her to the disadvantage outlined above, her previous employed had violated the principle of equal treatment (had directly discriminated against the petitioner) in connection with her fixed-term employment*. The Authority thus banned the limited liability non-profit healthcare company from future conduct of this kind and imposed a fine of HUF 1,000,000 on the employer. The employer appealed the Authority's decision in court, but the judicial body dismissed the action.

The Authority examined both direct discrimination and victimisation in the case **No. EBH/32/2017,** in which the petitioner's representative (in this case, the company owned by the physician who submitted the petition qualified as the petitioner), who was the president of the regional/county organisation of the Hungarian Medical Chamber, had worked for years at the orthopaedic division of the hospital complained against. Legally speaking, he performed his medical services as part of a cooperation agreement between his company (the petitioner in this case) and the hospital. Six months before turning to the Authority, in his capacity as a representative of the Medical Chamber, he found himself in a position that pitted him against the hospital management because he had talked to the press about the situation at the hospital, its employees and patients, trying to alert leading politicians to the problematic conditions at the hospital, while at the same time filing a police report against persons unknown in this context. He complained that the hospital had terminated the cooperation agreement with his company on the grounds that it was a sham contract. He submitted that this "termination" was a consequence of his activity as a member of the Medical Chamber, an advocacy group, since neither professional nor personal complaints had been raised in connection with the performance of his work. He further submitted that upon the termination of his contract, he had sat down to consult with the director about the potential renewal of his employment, whereupon the director

informed him that he would not be allowed to work there again until he withdrew the petition that underlaid the proceedings in the case at hand. In the context of its assessment whether direct discrimination had occurred in this case, the Authority did not accept the hospital's attempt at justifying its actions in line with the Ebktv's Section 22 (1) (a).[10] The hospital argued that it had terminated the petitioner's contract because it was a sham contract designed to conceal a position involving full-time employment. Although the hospital claimed that it had terminated all sham contracts, the Authority actually found that among the twelve companies and entrepreneurs that were in a comparable position with the petitioner, only two had seen the underlying agreements terminated. And even in the two latter cases the termination had not occurred by way of the hospital's unilateral legal notice to this effect, but instead by way of mutual agreement between the parties. Moreover, the subject of those contracts was not the performance of work responsibilities that effectively matched full-time work responsibilities. Furthermore, their eventual termination occurred only two months after the hospital learned about the initiation of a procedure before the Equal Treatment Authority, hence subsequent to the filing of the petition. Another consideration that the Authority saw as weighing against the hospital's reasoning was that the latter subsequently entered into other legal relationships with the persons who had performed work responsibilities in the context of the two abovementioned terminated contracts. In other words, unlike the physician representing the petitioner, they had been "re-employed." *Based on the above, it was possible to determine that by terminating the cooperation agreement with the company in question, the hospital had directly discriminated against the representative of the petitioner in connection with his capacity as the representative of an advocacy organization.* With respect to the issue of victimisation,[11] the Authority examined whether the petitioner had been subject to a violation of his rights because of his decision to complain about and initiate proceedings in connection with the violation of the principle of equal treatment. Specifically, the Authority sought to ascertain whether there was a causal link between the fact that the petitioner had turned to the Authority alleging a violation of the principle of equal treatment and the

10 According to the Ebktv's Section 22(1) a), discrimination shall not constitute a violation of the requirement of equal treatment if it is justified, at the time of hiring, by the nature of the work or working conditions, is based on actual and fundamental professional requirements, and serves" qand is proportionate to a lawful purpose.

11 According to the Ebktv's Section 10 (3), "[v]ictimisation is a conduct that causes infringement, is aimed at infringement, or threatens with infringement, against the person making a complaint or initiating procedures because of a violation of the principle of equal treatment, or against a person assisting in such a procedure, in relation to these acts."

hospital's decision not to enter into a new legal relationship with him for the performance of the medical responsibilities that he had previously discharged in the context of the terminated cooperation agreement between his company and the hospital. In its decision concluding the proceedings, the Authority determined that the hospital would have continued to employ the physician in some capacity if his company had withdrawn its petition before the Authority. *The only obstacle in the way of entering into such a legal relationship had been the complaint filed by the petitioner's representative with the Authority, in other words – based on the hospital's statement on the subject – if the petitioner's representative would have withdrawn the petition, there would have been no obstacle in the way of his "reemployment." In other words, victimisation had been realised.* As a sanction, the Authority banned the hospital from future conduct of this kind and ordered the publication of its decision on the respective websites of the Authority and the hospital for a period of 30 days, and it also imposed a fine of 500,000 HUF on the hospital.

IV. Examples from the Authority's case-law involving the provision of healthcare and healthcare services

Complaints received by the Authority concerning healthcare services are extremely diverse and varied. The Authority regularly receives many petitions that have no comparable precedents in its previous case-law, and which are hence impossible to assign to a distinct class of former cases. Nevertheless, there are also problem areas in the provision of healthcare and healthcare services which have given rise to a series of cases in which the Authority had to examine several similar incidents over the years, and these can be grouped into distinct categories. Their joint analysis also allows us to draw some general conclusions. We will proceed along the lines of this logic to present the Authority's application of the law in this area, and at the end we will also devote a separate section to a discussion of cases involving harassment in healthcare.

Case No. EBH/455/2018 is an especially good example to show that – as we have already pointed out above – the special evidentiary rules laid down in the Ebktv's Section 19 (1) and (2), what is known as the shared burden of proof, mean that in the event that the petitioner has succeeded in showing that a protected characteristic applies to them and if they render it probable that a disadvantage they have suffered is causally linked to said characteristic, then it is incumbent on the party complained against (the subject of the procedure) to provide counterevidence, in other words to show that they have not violated the principle of equal treatment in their treatment of the petitioner. With respect to healthcare providers, this also implies that in a situation when they fail to submit a statement during the proceedings, in other words when they fail to argue for their position and submit no evidence whatsoever to show that they did not discriminate against the petitioner at the time and place indicated in the petition, then in reaching its own conclusions, the Authority is bound in principle to accept the facts of the case as they were presented by the petitioner. In the case at hand, the petitioner was a person of colour and of Cameroonian descent and citizenship, whose mother tongue was English. According to the petition, he visited the medical services operated by the private company complained against late at night, asking to be treated as a patient. The petitioner informed the physician on call that his mother tongue was not Hungarian and that he did not speak Hungarian well, but he

presented his medical complaint in Hungarian. Thereafter he inquired whether the attending physician spoke English. The latter informed the petitioner that the official language in Hungary is Hungarian and added that if the petitioner wished to be examined by him, then he would need to bring an interpreter along. In stressing the latter point, the physician repeatedly and loudly shouted the word "translator." The petitioner told the physician – in English – that his wife is Hungarian and is at home with their one-and-half year old child, which is why she had not been able to accompany him on his visit to the medical centre. The physician responded – also in English – that he would not treat the petitioner unless his wife joined him on site. Finally, the petitioner asked the physician – first in Hungarian, and then in English – to give him his name, which the doctor refused to do. The petitioner then left the premises. Based on the submissions in the petition, the Authority informed the healthcare provider about the proceedings it had launched in the case, and at the same time it called on the latter to submit a statement in response to the petitioner's complaint. The service provider formally took receipt of the Authority's notice but failed to submit a statement by the deadline provided. As a result, the Authority imposed a 50,000-forint procedural fine and issued another call to the company asking it to submit a statement. Although the service provider paid the fine, it once again failed to respond to the Authority's request to submit a statement. Thus, the Authority – while issuing another notice asking the service provider to submit a statement – imposed a 200,000-forint procedural fine. As previously, the healthcare provider took formal receipt of the Authority's notice but failed to respond by the deadline provided – nor did it comment at any point thereafter before the Authority concluded the case. Consequently, the Authority had to rely on the petitioner's submissions in construing the facts of the case, that is it saw it as given that the events had transpired as described by the petitioner in the complaint. As a result, the Authority found that the physician on call had refused to treat the petitioner because his mother

tongue was English and because of his skin colour. In his petition, the petitioner had attributed statements to the physician regarding the petitioner's mother tongue, as well as his lacking knowledge of Hungarian. Furthermore, the Authority also deemed it realistic that the petitioner's skin colour (the petitioner's dark skin colour had been obviously apparent to the physician) had also motivated the physician's refusal to treat him; the Authority also viewed this as an established fact in light of the special evidentiary rules that apply to such proceedings. At the same time, the Authority determined that it was not possible to establish a causal link between the petitioner's Cameroonian descent and citizenship and the disadvantage he had suffered since it was not clear from the petitioner's statement whether the physician was even aware that the petitioner had Cameroonian citizenship. *In its concluding decision, the Authority held that in failing to extend medical treatment to the petitioner, the healthcare provider had directly discriminated against the petitioner in connection with the latter's skin colour and mother tongue.* That is why the Authority banned the healthcare provider from future conduct of this kind and also imposed a fine of 500,000 forints on the provider.

Another case involving a denial of medical treatment was **case No. EBH/783/2011**, in which the petitioner was a person with multiple disabilities, intellectual disability and hearing impairment. The petition was filed by the petitioner's legal guardian and it submitted that the healthcare institution complained against had refused to implant the hearing aid which the petitioner had long anticipated without even performing an examination by the institution's physician. Its refusal was grounded merely in a brief review of the patient's medical records. The institution referred to the petitioner's mental state and his other conditions in justifying the decision. With respect to its failure to examine the petitioner, the health institution submitted during the proceedings that the examination referred to by the petitioner's legal guardian was not an audiometric test but an assessment of whether the patient was fit for an implant, which is always performed based on the medical documentation available. Furthermore, it primarily invoked medical reasons for refusing to perform the implant, arguing that it would have triggered a life-threatening situation for the patient in light of the fact that the child was prone to manifestations of self-harm – he would often forcefully bang his head against the wall – and an implant in his head would be especially hazardous in a situation when the head is being subject to a blow or a bump. *The Authority accepted the reasoning proffered by the healthcare institution and held that – in*

ine with the Ebktv's Section 7 (2) (b)[12] *– the institution had provided a reasonable justification for the behaviour which the petitioner had complained about. In other words, even though the reason for its refusal to implant the hearing aid had in fact been linked to the petitioner's disability, there was a reasonable justification for it, namely that the denial of the specific care in question was motivated by a desire to safeguard the petitioner's physical health and well-being. Correspondingly, the Authority rejected the petition.* The petitioner's legal guardian appealed the decision in court, but the latter agreed with the Authority's reasoning and rejected the claim.

Case No. EBH/410/2018 was an example for a situation in which the health condition cited by the petitioner as a protected characteristic was completely different from the medical problem in connection with which she sought to avail herself of healthcare services in that situation. Furthermore, the case also illustrates that discrimination can also be realised in connection with protected characteristics that the party complained against only presumes to apply even though in reality the petitioner does not actually possess them or does not possess them in the form presumed by the other party.[13] The petitioner in this case turned to the hospital complained against in connection with allergy symptoms that manifested themselves following a wasp sting on her middle finger. While she was being treated, she informed the attending physician that she takes tranquilizers to manage her anxiety. From that moment on the physician's tone, demeanour and his treatment of the patient became offensive. The patient was held down during her stay at the institution, she was told to undress and the physician forced her to undergo a psychiatric evaluation. The petitioner submitted that this treatment owed to her presumed health condition, in other words her presumed psychological illness. The hospital did not dispute the facts presented by the petitioner, but at the same time it invoked that based on the petitioner's complaint filed with the Office of the Parliamentary Commissioner for Fundamental Rights, the latter had conducted a comprehensive review which had disclosed a number of professional and ethics violations on the part of the physician who had treated the petitioner, and it noted that the doctor in question had been served with a written reprimand as a result of the above. Furthermore, the hospital emphatically alerted the employees working at the

12 According to the Ebktv's Section 7 (2) (b), "[u]nless this Act specifically provides otherwise, the principle of equal treatment is not violated by such conduct, measures, conditions, omissions, instructions or practices (hereinafter called collectively: dispositions) which are found based on objective consideration to have a reasonable explanation directly related to the underlying legal relationship."

13 According to Section of the Ebktv, which defines direct discrimination, the latter occurs when a given individual or group are subject to a disadvantage in connection with a protected characteristic that they *actually do or are presumed* to possess.

hospital unit in question to this incident in order to forestall the potential future recurrence of such situations and to ensure that patients' rights would be respected to the fullest extent. The Authority attempted to mediate a settlement between the parties during the proceedings, and while the hospital evinced an openness to concluding one, the petitioner ultimately found the institution's settlement offer unsatisfactory, and hence ultimately no settlement was concluded. *As a result, the Authority had to conclude the case with a decision on the merits, in which it held that that through the attending physician's decision to have the petitioner held down, undress and undergo a psychiatric evaluation, the hospital had not proceeded in line with the relevant legal and ethical norms, and that it had discriminated against the petitioner in connection with the latter's presumed health condition.* As a legal consequence, the Authority banned the hospital from future conduct of this kind but it did not deem it necessary to apply other sanctions in light of the fact that the hospital had already performed an internal review, had issued the attending physician a warning as a result and had evinced an openness to conclude a settlement during the Authority's proceedings.

By reviewing **case No. EBH/45/2005,** we wish to call attention to the fact – also reminding our readers to the definition of the concept of discrimination and the range of protected characteristics outlined in the introductory chapter of the present booklet – that one can only talk about discrimination in situations when the complainant was subject to a disadvantage in connection with some protected characteristic. This means, therefore, that someone may be confronted with deeply unlawful conduct or behaviour that violates their human dignity, or they may be subject to measures of this kind, but if these are not connected to some protected characteristic they possess, then the underlying complaint and the case in question do not involve discrimination. This is not to deny that the measure in question could be nevertheless seriously injurious to the individual, and it may even be unlawful – but in the absence of a protected characteristic it still does not constitute discrimination. To put it as succinctly as possible, discrimination always infringes on human dignity, but not every conduct or measure that violates human dignity constitutes discrimination (discrimination is involved in those instances only when the given person experiences such conduct in connection with one or more protected characteristics). In the case in question, a resident of a small rural municipality complained that during his medical treatment at the county hospital the neurological specialist repeatedly referred to him as a "druggie" despite the fact that he had never in fact consumed drugs. To verify the latter claim, the petitioner attached the results of a drug test to his application, which he had had administered at his own expense. *In this case, the Authority held that the petitioner did not possess any of the protected characteristics enumerated in the Ebktv's Section 8, and*

thus there was no protected characteristic on his part that could have served as the basis for discrimination. Thus, the Authority had to reject the petition. At the same time, the Authority pointed out to the petitioner that – at his own discretion – he is entitled to file a lawsuit in civil court for a violation of his personality rights.

The Authority investigated whether indirect discrimination[14] had been realised in the **case No. EBH/571/2009** with respect to the actions of a hospital owned by a municipal government. The impugned practice was that the hospital charged a uniform fee to all admitted patients at the beginning of each month that they spent at the hospital – regardless of whether they had been referred to the hospital by a physician or in some other manner which departed from the formal order of patient referral – and that the given hospital unit's services were also only available in exchange for a daily fee, which was also uniformly charged to all patients. In this case, the Authority launched ex officio proceedings against the municipal government which owned and operated the hospital since the fees applied by the hospital's nursing unit had been determined by a regulation which was originally adopted by the municipality's health, social affairs and equal opportunity committee. The proceedings revealed that the fees that the patients had to pay were not in compliance with the – then effective – *Government Decree No. 284/1997 (XII. 23) on the fees that may be charged for healthcare services that [patients] can avail themselves of in exchange for payment*, because the hospital charged even those patients who came with a regular referral from physicians and, moreover, they had to pay a fee that exceeded the amount of the potential fee set out in the abovementioned decree by several orders of magnitude. The hospital justified this on the grounds that all patients were provided with a level of care that is superior to the quality of standard care. In assessing whether discrimination– indirect discrimination in the given context – had occurred, the Authority had to start from the fact that the hospital applied uniform fees to all patients regardless of whether they had been officially referred there or had arrived in some manner that deviated from the standard referral process. However, this practice was not in compliance with those provisions of *Act LXXXIII of 1997 on the services provided by the mandatory health insurance scheme (Ebktv)* which stipulate that even though insured persons are entitled to avail themselves – at their own discretion – of services which are different from and complementary of the regular services, and that they me be asked to pay a fee for such services, this is only permissi-

14 According to the Ebktv's Section 9, indirect discrimination involves any provision that is not considered direct discrimination and seemingly complies with the principle of equal treatment but nevertheless put persons or groups which possess the characteristics defined in Section 8 at a substantial disadvantage compared to other persons or groups who are or could be in a similar situation.

ble in situations when they could also avail themselves of the regular underlying service without the additional service elements for which the fee is being charged. In the case at hand, however, the patients did not have the option of choosing treatment at the nursing unit while paying only the fee specified by the relevant government decree – based only on the referral by another physician and without the additional services that the hospital charged them for. *Hence, by approving the hospital's fee scheme, the municipal government had realised indirect discrimination in connection with patients' financial situation. The hospital's practice with regard to the fees charged by the nursing unit was ostensibly in compliance with the principle of equal treatment – after all, although it charged a higher fee, it made the same level of service available to all the patients in the nursing unit –, but in reality, as compared to patients who were better situated financially, the fee policy had a disproportionately deleterious impact on those patients who were in an underprivileged financial situation and sought to avail themselves of the hospital's services by way of the regular order of referral.* In light of the fact that the municipal government terminated the infringing practice already while the Authority's proceedings were ongoing, the Authority found it sufficient to ban the municipal government from future conduct of this kind and to order the publication of its decision for a period of 30 days. The municipal government appealed the Authority's decision in court but the court dismissed the action.

Another case, **No. EBH/28/2011,** also concerned the fees charged in exchange for health services. *The petitioner in this case complained that the price list published on a private clinic's website featured a substantial consultation fee that was only applicable to foreign patients.* In this context, the petitioner also submitted that the private clinic had failed to respond to his inquiry whether the fee would have to be paid even if the patient spoke Hungarian well. The Authority recognized the petitioner's non-Hungarian citizenship as a protected characteristic based on the Ebktv's Section 8 (t) (any other status, characteristic or atribute).[15] In the proceedings before the Authority, the private clinic submitted that the institution does not make undue distinctions between its patients. The consultation fee has to be paid by those who do not speak Hungarian well enough to enable an unimpeded communication between the doctor and the patient, since in their case the clinic is called upon to ensure that the doctors and the nurses speak a foreign language at a level which ensures a smooth communication between the staff and the patient, and to this end they must also translate the medical documents generated in the process of the patient's

15 With respect to the definition of "other status" in the Ebktv, the Authority tends to include citizenship among the characteristics covered by this concept as a feature that qualifies as a protected characteristic. For more details, see EBH Booklet No. 3, 2007, p. 14.

treatment by the clinic. Moreover, the clinic also uses the impugned fee to offset the marketing costs associated with targeting potential foreign patients (e.g. its presence at professional events). *The procedure was ultimately concluded by a settlement which the authority approved. As part of the settlement, the clinic undertook to improve its efforts to fully apprise patients about its fees and conditions, in the interest of ensuring that the latter are properly informed about their pricing policy – which is in compliance with the principle of equal treatment – so that the patients have all the necessary information to decide whether to avail themselves of the clinic's services. To this end, the clinic also pledged to update and improve the accuracy of the information on its website.*

Cases related to blood and plasma donations

Persons with various protected characteristics have turned to the Authority over the years with the complaint that they had sought to donate blood or blood plasma but were barred from doing so because of a protected characteristic they possess. In the cases when the Authority made a decision on the merits, it had to examine whether – in line with the Ebktv's Section 7 (2) –the denial of blood donation or blood plasma donation had an objective and reasonable justification that was related to the underlying legal relationship. In all these cases, the connection between the protected characteristic (for example homelessness or sexual orientation, specifically male-to-male sexual acts) and the disadvantage (the petitioners had been denied the possibility of donating blood or blood plasma) was unequivocally ascertainable right at the outset, hence the further examination of the case had to be directed at determining whether the differential treatment based on the protected characteristic could be justified, that is whether there was reasonable justification for the differential treatment that the petitioners had experienced. If namely there were reasonable grounds to justify the differential treatment (e.g. medical, public health or blood security reasons in the present context), then the denial of the possibility to donate blood/blood plasma would not qualify as discrimination.

The Authority ultimately did not have to make a decision on the merits of **case No. EBH/499/2013** because the parties concluded a settlement which the Authority approved. In this case, the petitioners, who had been living in a monogamous lesbian relationship with each other for eight years at the time, turned to the Authority because on the occasion of the blood donation organised in the municipality where they reside, the physician who performed the preliminary examinations made offensive remarks about their sexual orien-

tation and their relationship. Moreover, since the physician also classified the relationship between them as a "risky sexual relationship" on the so-called blood donor certificate, they were ultimately barred from donating blood. *At the hearing held in the case, the petitioners and the institution complained against (the transfusion service responsible for coordinating the national blood supply), came to an agreement, as part of which the tranfusion service apologised to the petitioners for the fact that they had been barred from donating blood at the place and time indicated in the complaint after they revealed that they are in a lesbian relationship. The petitioners accepted the apology. The transfusion service also undertook to publish the text of the settlement – for a period of 60 days following its official delivery– on its website under the link "information for blood donors" to help ensure that such cases would not recur in the future. It further undertook to include the following text in its information for blood donors can be found on its website: "[A] relationship based on a life partnership in which two women engage in a sexual relationship while they live together does not qualify as risky sexual behaviour."*

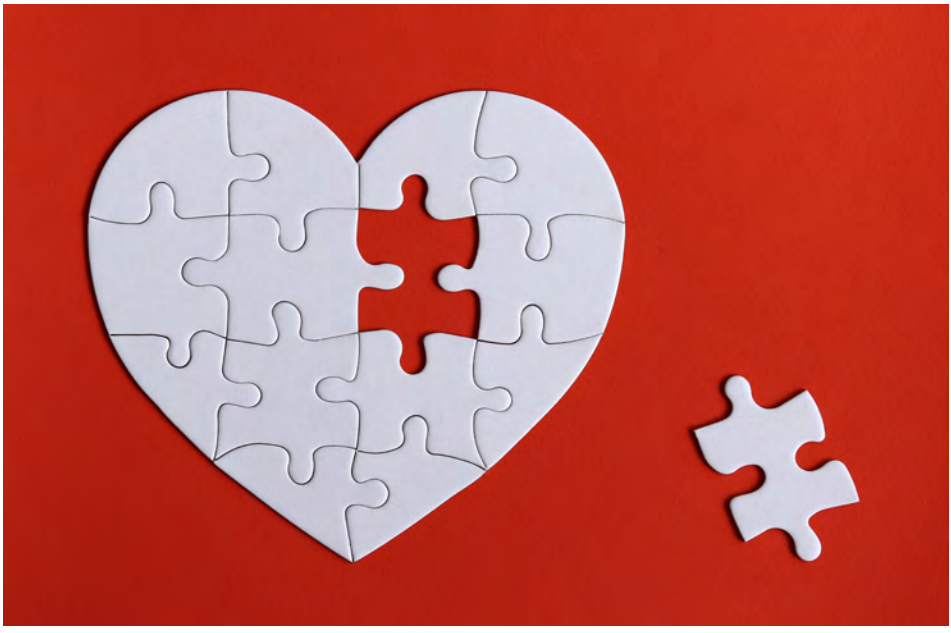
The petitioner in **case No. EBH/434/2015** also cited his sexual orientation, allegging that he had been excluded from donating blood plasma by the private plasma production company complained against because after filling out the questionnaire that preceded the blood donation, he had answered in the affirmative to the question asking 'Have you ever had a homosexual relationship?" In its statement submitted in the course of the procedure, the company acknowledged that men who have had sexual relations with other men are not allowed to donate plasma at the plasmapheresis stations operated by the company; men who belong to the MSM population[16] are therefore indefinitely excluded from donating. That is why the petitioner had been barred from donating. It was possible to ascertain, therefore, that the petitioner had been subject to a disadvantage – he was not allowed to donate blood plasma at the plasma centre of the company complained against – because of his sexual orientation, specifically because he previously had sexual relations with a man. Having established the causal link, the Authority had to examine – pursuant to Section 7 (2) (b) of the Ebktv – whether based on an objective consideration there was any reasonable explanation directly related to the underlying legal relationship for the company's decision to indefinitely exclude men who previously had sexual relations with other men from plasma donation without a consideration of their individual circumstances. In examining whether there was a reasonable justification, the Authority concluded – based on the findings of a research mapping HIV/AIDS-related risks among homosexual and bisexual men and other statistical information – that with respect to men who had entered into sexual

16 MSM: "male-to-male sexual acts"

relations with other men, in Hungary the risks of serious infections that can be transmitted by blood – especially HIV/AIDS – is high. In the second stage of investigating whether the company had a reasonable justification for its actions, the Authority needed to establish whether there were any effective methods for analysing the collected blood plasma which could ensure with full certainty that the collected blood plasma is not infected, and, correspondingly, the plasma could be used to produce a fully safe medication for patients in need. The company stated that despite the fact that it uses the most modern tests and technologies known today in testing the donors' blood, all pathogens have a latency period when the presence of a virus and of a concomitant infection cannot be detected. Furthermore, there is also no method of testing that could help detect the presence of a virus at the moment of infection. That is why the tests performed on the plasma collected by the company do not – and in fact cannot – provide hundred percent certainty, owing to the particularities of viral infections. Hence, full viral security cannot be based on these tests alone. In addition to the above, the Authority also took into consideration the company's statement that – as compared to full blood donations – plasma may be donated far more often, as often as every three days (72 hours need to go by between two plasma donations), which is why a donor suffering from an infection that can be transmitted by blood can donate plasma several times until their blood first begins to manifest signs of the infection. Thus, there is also a possibility that by the time that an infection can be detected, the plasma donated by the donor has been used to produce medication, potentially on more than one occasion. Furthermore, the Authority also concluded that because of the aforementioned risks even the preliminary questionnaire which potential donors are required to fill out before donating or the subsequent personal consultation with a physician cannot fully guarantee that risky sexual behaviour or the potential presence of an infection can be identified, also considering that – as the study of risky sexual behaviours has shown – a significant portion of men in the MSM population do not have adequate levels of information to appreciate the fact that the sexual behaviours they engage in may be risky in terms of the increased probability of infections that may be transmitted by blood (especially HIV/AIDS). *Based on the above, the Authority held in its decision that the indefinite exclusion without individual consideration of their circumstances of men who have engaged in sexual relations with other men – the petitioner included – was justified by a view towards public health/epidemiological considerations, the interests of patients who receive medication made out of blood plasma, as well as blood security and blood quality assurance requirements. In other words, the company complained against had provided a reasonable justification that was directly related to the underlying legal relationship. This means that the company had not*

violated the principle of equal treatment in connection with the exclusion of the petitioner from donating plasma. Thus, the Authority rejected the petition.

The male petitioner in **case No. EBH/HJF/38/2019** also invoked his sexual orientation as a protected characteristic, but in this case he complained about his exclusion from general blood donation. According to his statement, while filling out the preliminary questionnaire, he had "slightly misunderstood" the question – which only men were asked to respond to – whether he ever had sexual relations with other men. The petitioner thought that it actually referred to his sexual orientation. He noted in this context that this had not been a problem during previous blood donations, because at the time he did not feel that he was gay "at all, in any respect." However, he said, recently "he had started to feel that he has gay desires" and that was what led to his confusion in answering the question above. At the same time, he also stressed that "these were just thoughts," in reality he never had sexual relations with a man and he could never imagine that this might change. Nevertheless, during the medical examination by a physician upon completing the questionnaire, he once again responded in the affirmative to the question above, and then went on to sign the so-called blood donor certificate, which excluded him from blood donation. The petitioner turned to the Authority because he felt he had been "unfairly" excluded from donating blood. In this case, too, it was possible to determine that the reason for the petitioner's exclusion from donating blood was that he had been previously sexually intimate with another man. In assessing the arguments submitted by the institution complained



against (the national blood transfusion service) in order to prove that it had not violated the principle of equal treatment, the Authority was mindful – similarly to the previous case No. EBH/434/2015 – of the provision in the *Ministry of Health's Decree No. 3/2005 (II. 10) on the quality and safety provisions concerning the collection, testing, processing, storing and distribution of human blood and blood components, as well as the technical requirements related thereto*, which indefinitely excludes persons from blood donation whose sexual behaviour (habits) result in a high risk of blood-borne diseases. In light of the fact that sexual relations between men constitute a high-risk factor in terms of transmitting blood-borne infections, *in this case, too, the Authority accepted the blood service's argument that this risk constitutes a reasonable justification directly related to the underlying legal relationship for excluding the petitioner from donating blood. The Authority assessed that the blood service had been justified in the conclusions it had drawn regarding the petitioner's risky sexual behaviour since said conclusions were based on a statement submitted as part of the* Blood donor statement and questionnaire*, which the petitioner had himself signed and in which he had asserted that he had had sexual relations with other men. Furthermore, he neither withdrew no modified this assertion during his conversation with the examining physician, and then went on to confirm the above with his signature on the* Blood Donor Certificate, *indicating that he had filled out the questionnaire accurately. In its decision concluding the procedure, the Authority also noted that the question in the* Blood donor statement and questionnaire *was clear and was not liable to give rise to a misunderstanding;* its wording was unequivocal in the sense that the question was clearly not inquiring about the aspiring male donor's sexual orientation but instead sought to ascertain whether he had ever had sexual relations with another man. The Authority found the petitioner's claim that the question had been liable to be misunderstood unrealistic, especially since the petitioner is – according to his own statement – a regular blood donor and hence he had already encountered the questionnaire at issue on several occasions prior to the case complained about in the procedure. Moreover, the Authority also noted that following his completion of the questionnaire, the physician on-site also returned to this question during their consultation. *In light of the above, the blood transfusion service objectively and reasonably justified its action against the petitioner based on the Ebktv's Section 7 (2) (b), and hence the Authority rejected the petition.*

In **case No. EBH/89/2015** the petitioner turned to the Authority because he had been deemed unfit to donate plasma – even before he could actually register – on the grounds that the address card of his official identity document featured the name of a homeless shelter. In this case, based on the Ebktv's Section 8 (t), the Authority considered the petitioner's homelessness as a protected characteristic in the context of which it examined

whether discrimination had occured.[17] The private company, which collects and sells blood plasma, submitted in the course of the proceedings that as of 1 January 2014 persons whose official address is registered at a mass homeless shelter cannot be donors at the plasmapheresis stations operated by the company. A list with the addresses of these homeless shelters is included in the documentation detailing donor selection, and the address of the homeless shelter indicated on the petitioner's ID card was on this list. It was therefore unequivocally ascertainable that the petitioner had been barred from donating blood plasma because of his status as a homeless person. As the next step, the Authority had to examine whether there were any reasonable grounds for justifying the exclusion of the petitioner from plasma donation in the situation at issue. In this case, too, the Authority accepted the company's argument that in performing its activities it must be mindful of the protection of both, the patients awaiting medicinal products derived from blood and other healthy low-risk donors, which is why it strives to reduce and prevent potential complications and risks. The quality of the final medicinal products is influenced by every step of the production process, thus including blood or plasma collection, which is why the quality assurance system must also extend to this stage of the production. Having regard to this, the Authority found it reasonable and acceptable that in its efforts to secure safe plasma quality, the company had joined a quality assurance system that was based on educating and filtering donors. One of the conditions for obtaining and holding on to this quality assurance certification was to satisfy the relevant strict quality requirements, which included the stipulation that persons whose address was a homeless shelter would not be allowed to donate plasma. The specific plasmapheresis station operated by the company where the petitioner had sought to donate blood had been awarded the relevant certification three years ago. Based on the above, it was acceptable in this case to exclude persons who were potential carriers of health risks from the potential range of donors already before they began the process of plasma donations, since even the strict tests administered on the collected blood plasma do not always make it possible to detect the presence of those pathogens that can subsequently lead to illnesses of the persons who received plasma-based products. *Thus, in this case, too, it was possible to ascertain that the petitioner's exclusion from blood plasma donation on the ground of his status as a homeless person had been based on public health/epidemiological considerations, the interests of patients who receive medication*

17 With respect to the definition of "other status" in the Ebktv, the Authority tends to include homelessness or the fact that individuals do not have a registered address under this definition. For more details see EBH Booklet No. 3, 2007, p. 14.

made out of blood plasma, as well as blood security and quality assurance requirements. In other words, the company complained against had provided a reasonable justification directly related to the underlying legal relationship in line with the Ebktv's Section 7 (2) (b). This means that the company had not violated the principle of equal treatment in connection with the exclusion of the petitioner from donating plasma. Thus, the company complained against had not discriminated against the petitioner and the Authority correspondingly rejected the petition. The petitioner submitted a request for review against the Authority' decision to the competent court, but the court dismissed the action.

Dental care related cases from the Authority's case-law

In recent years the Authority has received several complaints concerning either the denial of dental care of patients with HIV/AIDS or their differential treatment compared to other patients. These examples are also more generally illustrative of situations when the patients cite a denial of medical care or insufficient care in a case in which they refer to state of health as their protected characteristic. In these cases, however – harking back to our discussion at the end of Chapter II – the issue at the heart of the complaint was not the medical treatment of the HIV/AIDS patients but another medical (dental) treatment that was not directly related to their protected characteristic. We will review these cases below.

In **case No. EBH/10/2013** a non-governmental organisation [18] turned to the Authority as a petitioner within actio popularis arguing that the institution complained against – which provides dental care – and the Hungarian State had violated the principle of equal treatment in the context of the medical care of HIV/AIDS patients with respect to healthcare services that were unrelated to their infection. The healthcare institution complained against directed patients who were aware that they were infected with HIV or had AIDS but had turned to the institution in question for healthcare treatment unrelated to this condition – specifically dental care – to another hospital. There were neither legal nor pro-

18 According to the Ebktv's Section 18 (3), if a violation of the principle of equal treatment or an immediate threat thereof occurs on the basis of any of the protected characteristics specified in Section 8, which concern essential features of an individual's personality, or if the violation of the law or an immediate threat thereof are directed against a larger group of persons who cannot be clearly defined, then a civil organisation or advocacy group may initiate proceedings with the Authority. The Ebktv's Section 3 (e) defines the range of organisations that qualify as civil organisation or advocacy groups according to the Ebktv.

fessional grounds for this measure, nor did the institute provide a medical justification for the decision. In the specific situation, referral to another institution meant that the healthcare institution posted a notice on the door of the dental office saying that the dental care of patients with HIV/AIDS would only be performed at the clinic indicated in the notice. *The organisation that filed the complaint as* a petitioner within actio popularis *and the ministry representing the Hungarian State on this issue concluded a settlement in the course of the procedure. The ministry committed itself to several ambitious undertakings as part of the settlement, including – among other things – the review of the statutory provisions regarding HIV infections and to improve the training, information and sensitivity of healthcare workers with regard to HIV infections.* As far as the healthcare institution is concerned, it acknowledged during the proceedings that the publication of the notice saying that the dental care of HIV/AIDS patients would only be performed at the clinic of the designated hospital had been posted in violation of the principle of equal treatment and it had the notice removed once the proceedings were launched. At the same time, however, the institution's director general said at the hearing that when it comes to patients who inform the institution about their infectious disease, they deem it necessary to set up a separate treatment room and to treat them there. *By applying the Ebktv'sSection 7 (2) (b), the Authority concluded that the healthcare institution's specific action (the abovementioned notice) with respect to patients who reveal their HIV infection or AIDS disease, as well as their treatment at a separated treatment room, does not satisfy the requirement of objective and reasonable justification. Correspondingly, the Authority held that the complained healthcare institution providing dental care had directly discriminated against patients with HIV/IDS in the context of medical treatment that was not related to their state of health.* The Authority ordered the unlawful situation to be ended and at the same time it also prohibit the unlawful conduct for the future. Furthermore, the Authority ordered the publication of its final and binding decision for a period of 30 days on the respective websites of the EBH and of the healthcare institution. The institution submitted a request for review against the Authority' decision to the competent court, but the action was dismissed by the court. Subsequently, the Hungarian supreme court, the Curia, also dismissed the institution's action.

Case No. EBH/137/2016 also concerned the dental treatment of AIDS patients. A key difference to the aforementioned was that in this case the issue was not that AIDS patients has been denied treatment and referred to another dental clinic, nor that they had been treated at separate facilities on the same site. The AIDS patient who turned to the Authority complained that after he had indicated that he had AIDS, the physician on duty at the dental service provider where he had been previously treated without any problems told

him to come back at the end of the surgery. In other words, the physician was only willing to treat him at the end of the surgery, once all the other patients had gone. The Authority assessed that by asking the petitioner to come back at the end of the surgery, the institution had not refused to treat the petitioner, in other words he had not been excluded from dental care. Nevertheless, by informing him upon his arrival that they would not treat him in the order in which he had arrived but only at the end of the surgery (that is at the end of the morning shift), it had caused a disadvantage to the petitioner. The disadvantage in question was connected to his AIDS disease, in other words his state of health . That is why as the next step the Authority had to examine – on the basis of the Ebktv's Section 7 (2) (b), just as in the previous cases – whether based on an objective consideration, the differential treatment had any reasonable justification that was directly related to the underlying legal relationship. In investigating this, the Authority found that in its own procedures aimed at preventing infections during dental treatments, the dental institution relies on the relevant Recommendation and Methodological Letters published by the National Centre for Epidemiology. The Authority further held that these documents do contain instructions saying that since invasive dental treatments can result in bleeding, in the case of patients who are carriers of known pathogens the treatment must be performed at the end of the regular surgery, potentially in a separate treatment room. It was also relevant in this context that pursuant to the relevant provisions of *Decree No. 20/2009 (VI. 18.) of the Ministry of Health on preventing infections stemming from the provision of healthcare services, and the applicable professional minimum requirements and supervision of said activities,* the healthcare service provider must perform its infection prevention efforts in compliance with the Methodological Letters issued by the National Centre for Epidemiology on the topic of preventing infections stemming from medical treatments. In other words, the healthcare institution is subject to a statutory obligation to follow the relevant Methodological Letters and the Recommendation issued by the National Centre for Epidemiology. Moreover, investigating whether there was a reasonable justification for the institution's impugned actions, the Authority also had to be mindful of the consideration that the prevention of infections during dental treatments is a complex problem. Both during and after the dental treatment, the physician treating the patient who poses a risk, as well as other persons involved in the treatment and the persons who perform the disinfection following the treatment, along with the other patients and the patient being treated, must all be safeguarded from potential infections. It is a fact that during the provision of dental care all patients need to be treated as potentially infectious, but as far as the general population is concerned, the statistical chances of an infection are much lower than in the case of a patient who suffers

from a communicable disease. And with respect the patient in question, who is infected with the previously mentioned pathogen, it was known with 100% certainty that the risk of an infection is high, which is why invasive treatments involving bleeding (this includes almost all dental treatments), are performed at the end of the surgery, because that is the point when the more thorough final disinfection of the instruments is being performed, which takes longer than the normal interval between two patients allows. As the medical specialist/epidemiologist who was heard as a witness explained, the application of some special measures in the case of patients who are carriers of known pathogens is also justified on the basis that even with the utmost effort, the risk of transmitting infections can only be minimised, it cannot be reduced to zero with any degree of certainty. *Thus, the decision to only offer to perform the petitioner's dental treatment at the end of the surgery time had a medical foundation, in other words it had am objective and reasonable justification. Thus, the dental care institution had not violated the principle of equal treatment, and as a result the Authority rejected the petition.*

The petitioner in **case No. EBH/HJF/17/2019** came to Hungary from abroad for a dental implant surgery. He had previously consulted with the healthcare service provider – which was, unlike the providers in the previous cases, a private clinic – about the procedures that needed to be performed. An X-ray was taken at the clinic in Hungary and a surgery plan was drawn up on the basis of the X-ray image. Then the petitioner was asked to provide his patient history. He mentioned, among other things, that he is HIV positive and takes medi-

cation because of this condition, but he also noted that he was asymptomatic. The patient was nevertheless prepped for surgery and even administered the pre-surgery anaesthetic, when the dentist informed the petitioner that she could not perform the surgery because of the patient's HIV status. According to the petitioner, the physician invoked at that point that the medical provider did not have the necessary disposable instruments available, and that she lacked the requisite information about the petitioner's medication, which was relevant because of ossification. During the proceedings, the attending dentist who was heard as a witness stated that she had only found out about the petitioner's HIV infection just before she was expected to begin his treatment. At that point, however, this implied not only an organisational challenge given the implications stemming from the risks associated with communicable diseases, but as an additional problem she also had to contend with the fact that she herself had too little medically substantiated information about the patient's actual HIV-related condition, which would be crucial for the implant procedure. She offered the petitioner to use a dental bridge instead of an implant because the latter would be less invasive, and when they parted the petitioner said he would consider this alternative. The petitioner disputed that he had been offered an alternative solution, but at the same time he indicated his willingness to conclude a settlement. *The parties concluded an agreement in the procedure as part of which they agreed on the conditions under which the healthcare provider would perform the petitioner's dental treatment and on the additional services it would provide in that context. They further stipulated that – as far as this was objectively possible – the treatment would be performed by the same dentist who had been originally designated to treat the petitioner. The Authority approved the settlement by a decision.*

The last case involving dental care, **case No. EBH/651/2009**, involved an underage petitioner who did not have HIV/AIDS but had been denied treatment by the dental specialist who performed dental services at his school because of his childhood autism and pervasive developmental disorder. *The parties concluded a settlement in the course of the proceedings, and as part of the latter the dental specialist expressed his regrets for the incident, apologised for having failed to perform the child's dental care because of the difficulties stemming from the latter's disability and for failing to follow-up with alternative suggestions or attempts. He further undertook to comply with the principle of equal treatment with respect to children with disabilities in the future performance of his dentistry work, and he also pledged to receive the underage petitioner at his practice for the purposes of a dental exam and care, and to perform the necessary dental treatments. The petitioner accepted the dentist's apology and the latter's undertakings in the settlement. The Authority approved the settlement by a decision.*

The Authority's case-law on harassment in healthcare

Harassment as defined in the Ebktv's Section 10 (1) is one of the five types of discrimination[19] defined by the law – and in the EU directives as well. We speak of harassment when someone is subject to a conduct, of a sexual or other nature, that violates human dignity in connection with the relevant person's protected characteristic or characteristics, with the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment around that person. It is obvious that harassment can occur in numerous walks of life, including the areas specifically mentioned in the Ebktv's Chapter III. We found it vital to devote a separate section to cases of harassment in healthcare because the latter is an area where the underlying asymmetry in the relations between the parties is especially poignant. For all intents and purposes, the relationship between the persons who avail themselves of health services and those who provide said services is one of subordination on the part of the former. The patient on the one hand, and the physician and the healthcare institution on the other, are often in a relationship with one another in which the patient feels highly vulnerable and exposed, and as a result in this context it is especially vital to be mindful to act in a way that respects the patients' human dignity. With respect to the investigation of instances of alleged harassment by the Authority, we emphasise that – as we have already pointed out in Chapter II – the legal subject which is obliged to comply with the principle of equal treatment in this context is the provider of healthcare services (the hospital, general practitioner's or specialist's medical office, private clinic), which means that the institution providing such services is liable for any measures, behaviour or comments by its healthcare staff that infringe on human dignity. In practice, this means that the Authority's procedure is directed at the provider of healthcare services rather than the specific person whom the complainant may attribute comments to which they perceived as harassment in connection with their protected characteristic.

Referring back to the aforementioned notion of an asymmetrical relationship, a woman who has just given birth to her child is in an especially vulnerable and exposed situation. In **case No. EBH/349/2016** a woman who designated her ethnicity as Roma complained about the offensive treatment she had experienced at the maternity ward of the hospital complained against: She submitted that during the childbirth the attending physician had uttered the statement "You Gypsies only have children for the money anyway!" In its proceedings, the Authority first had to examine whether the statement complained about by

19 Direct discrimination, indirect discrimination, harassment, segregation, victimisation.

the petitioner had indeed been uttered, since the hospital denied the petitioner's allegation. The respective statements of the petitioner and of the witnesses heard were in contradiction on this issue. At the hearing held by the Authority, the members of the hospital staff who had been present at the delivery and were heard as witnesses (the obstetrician, the resident, two midwives and a cleaning lady) stated that the alleged remark complained about by the petitioner had not been uttered. However, the Authority assessed that the contradiction could be resolved. When prompted by the legal officer of the Authorityat the beginning of the hearing, the petitioner was capable of unequivocally recalling the events that had transpired during the delivery five months prior, and she quoted the statement "You Gypsies only have children for the money anyway!" verbatim. Furthermore, the petitioner was also able to distinguish between the witnesses, and she distinctly recalled which one of the persons present had made the quoted comment (she unequivocally identified the physician as the person who made the statement concerning her Roma origin) and she remembered whom she had had no problems with. Thus, she described one of the midwives as "nice and kind." Based on the above, the Authority concluded that the petitioner's statements were realistic and credible. With respect to its investigation of whether the statement complained about had been uttered, the Authority was also mindful of the circumstances surrounding the hospital's internal investigation of the petitioner's complaint. In this context, the Authority found it especially disconcerting that the medical director who was responsible for presenting the hospital's defence on the merits had shared the contents of the petitioner's complaint with the physician whose presence at the petitioner's delivery had been established with complete certainty. Moreover, the former provided the latter with a copy of the complaint. As a result, a person who had been present during the events in question (the obstetrician accompanying the delivery), and who was also considered to be likely the person at the centre of the petitioner's complaint and the source of the comment concerning her Roma ethnic origin, clearly played a vital role in the hospital's review of the incident. The Authority thus had to take into consideration the fact that the witnesses who testified had been previously apprised of the contents of the petition, that they had received copies thereof, and that – based on the statement submitted to the Authority by the hospital as an attachment to its defence on the merits – they had agreed on a coordinated joint position on the allegations in the petition already prior to the hearing and the witness examinations. In deciding this case, another important consideration was the impression of the legal officer of the Authoritythat an outside observer might readily share the impression that the petitioner is of Roma origin. That is why the argument presented by the hospital that it did not collect data about its patients' ethnic or other origins

– and hence they could not know or did not know that the petitioner was of Roma origin – was not credible. The Authority's assessment concerning the petitioner's skin colour was also important because as a result the Authority also treated said colour as a relevant protected characteristic in this case. *In light of the above, the Authority ultimately concluded that the statement "You Gypsies only have children for the money anyway!" had indeed been uttered while the petitioner was in labour.* In the next step, the Authority had to examine whether the behaviour that the petitioner had been subject to also met the criteria for harassment as defined above. *The statement "You Gypsies only have children for the money anyway!" was undoubtedly aimed at the petitioner's protected characteristic that is her Roma ethnicity. At the same time, the statement above was also liable to give rise to a hostile, intimidating and above all degrading and humiliating atmosphere surrounding the petitioner. And since several members of the hospital staff were present throughout the petitioner's delivery, this type of humiliating environment did indeed arise. Based on the above, the Authority determined that the hospital had engaged in the harassment of the petitioner with respect to her Roma origin and colour.* The Authority thus banned the hospital from future conduct of this kind and ordered the publication of its final and binding decision for a period of 60 days on the respective websites of the hospital and the Authority, and also imposed a fine of 500,000 forints on the hospital. The hospital did not appeal the Authority's decision in court.

The petitioner in **case No. EBH/1105/2010,** a mother of Roma ethnicity, also invoked her ethnic origin as a protected characteristic. She submitted that they had visited the on-call services of the paediatric hospital complained against at 6 in the morning because her 16-year-old son was choking, he had difficulty breathing. Upon their arrival at the hospital, the members of the reception staff inquired how much the child smokes; a little later, the petitioner and her child were called into the examination room. According to the mother, the attending physician said "You are all like that, you can't wait," which left the mother with the impression that the physician assumed that they had only turned to the on-call services to avoid having to wait in line at the given district's general practitioner's office. The physician also inquired about the child's smoking habits and – in the mother's assessment – his tone and manner were inappropriate. At first, he did not even want to examine the child. Subsequently, upon leaving the examination room, the mother became embroiled in a heated exchange with a member of the hospital's staff at the patient reception desk. The hospital employee voiced the opinion that Gypsies cost the public insurance scheme a lot of money and that they do not work, and then proceeded to hand her a mop, telling her that if she wants to work, she could start by wiping the floor. *The Authority held a hearing in the case, and subsequently the director of the hospital and the staff member who performs the*

patient admission apologised in writing to the mother and her child, who accepted the apology within a settlement. The Authority approved the settlement by a decision.

The alleged harassment of an underage child was also at issue in **case No. EBH/532/2014**. In this case, the petitioner, who was overweight as compared to the standard weight of his age, was subject to a check-up by a sports physician. The medical examination took place in the context of an event organised by the national sports medical network operated by a state-owned sports medical institute. The physician performed the examination in the presence of several other children and the petitioner's mother. In the process of performing the check-up and informing the petitioner's mother about his findings, he made offensive remarks about the underage child's body type – which differs from the average – and his excessive weight. He asked the mother, for example, whether she had noticed that "this child has breasts." The Authority assessed the child's weight and his non-average body type as an "other status," a protected characteristic according to Section 8 (t) of the Ebktv, and it further examined in this context whether harassment had been realised. At the hearing held in the case – during which the physician who had performed the check-up was also heard – the parties expressed their mutual desire for concluding a settlement, and thus *the proceedings were ultimately concluded by a settlement. As part of the latter, the sports hospital apologised to the underage petitioner and pledged that the physician who had performed the check-up in question would do so in writing within a very short deadline after the Authority's decision was rendered. It further promised to call on all county chief medical sports officers –*

and through them on all regionally competent sports physicians – to ensure that no one else be present at consultations during which they inform an athlete or an underage athlete's relative about the health condition of the athlete. Soon thereafter, the Authority received an electronic mail message from the sports hospital, in which the latter informed the EBH that all county officers of the national medical sports officer network had received the notice in accordance with the terms of the settlement. The information had been disseminated very quickly – in fact already before the Authority had officially approved the settlement. Also, in line with the settlement, the recipients of the message were asked to share its contents with all the sports physicians working in their respective regions. A copy of the e-mail confirming this was also submitted to the Authority. The sports hospital further stated that in order to prevent similar cases from recurring in the future, the issue would also be raised at the next scheduled national conference of the sports medical network.

The petitioner in case No. **EBH/36/2018** also complained about events that had transpired during a medical examination. The petitioner had turned to the urological consultation of the clinic complained against because she had sought an expert medical opinion which was a requirement for the processing of her gender and name change request. The transgendered woman, who had been born a man, wanted to undergo a sex reassignment surgery and, in connection with the latter, she wanted to have both her name and her gender officially changed. However, according to the petitioner, the physician who examined her refused to issue the requested medical opinion. At the same time, upon the conclusion of the urological examination of the petitioner he also made offensive comments about her gender identity. He said, for example, that he would be ashamed if his own son were to do something like this; pointing to his forearm, he said that the petitioner might "just as well have a hole made there" since the organ that would be created as a result of the surgery would be completely devoid of sensation. *The Authority held a hearing in the case during which it heard the physician who had examined the petitioner and the assistant who had been present at the urological examination. The parties (the clinic and the petitioner) concluded a settlement in the course of the hearing, as part of which the clinic apologised to the petitioner in the event that she felt she had been subjected to offensive treatment during her visit at the urological consultation and the examination by the physician. The clinic further undertook to place on its website – among the documents serving to inform healthcare workers – information material jointly drawn up by the parties, which would provide its staff with recommendations on treating transgendered patients and would also give urologists and other healthcare workers general guidelines on the appropriate treatment of transgendered persons in a way that respects their human dignity. The clinic further undertook to ask a specialised*

urological magazine designated in the settlement to publish the abovementioned information material (article) as soon as possible, ideally in its next issue. The clinic also promised to cover the costs for the publication of the article in the aforementioned magazine. The Authority approved the settlement in a decision.

Another case that yielded several highly pertinent insights was **case No. EBH/HJF/92/2019**- which required the Authority to look at both direct discrimination and harassment. The underlying issue in that case was a tragic event, the death of the petitioners' six-months old child after she been transported to another healthcare institution following her two-day stay at the hospital complained against. Since the petitioners also filed their complaint in the name of their child, this case is also an illustrative example to show that legal succession is not possible when it comes to asserting personality rights. *This means that – based on the law – the petitioning parents could not proceed as the legal successors of their deceased child in connection with the claim that the principle of equal treatment had been violated in the context of the healthcare services provided to the child (meaning the way the child had been treated during the medical service or how she potentially should have been treated otherwise).* It is important to point out in this context that the Authority is a public administration body and correspondingly its investigations are public administration rather than judicial procedures. *In the case of complaints, therefore, which raise the suspicion that a criminal offence has been committed (e.g. if there were deficiencies or medical failures in the treatment of the individual, and these were causally related to the individual's protected characteristic and ultimately resulted in their death), the Authority cannot proceed – because of the applicable legal limitations.* Nevertheless, in the case at hand the petitioners complained not only in the name of their late child but also in their own name – and the Authority did have a mandate to proceed with respect to the latter. The parents complained that they had not been adequately informed about their child's health condition because of their social origins (the mother is illiterate, the father had eight years of elementary school education, and they live in the area of their municipality known as the "Gypsy row") and their Roma ethnicity. The parents also said that the hospital staff ignored what they had told them about the child's condition. They also submitted that the hospital's staff had been "condescending" and "arrogant," had engaged in behaviour that violated their human dignity and made comments to such effect. In this context they complained, for example, that in response to the father's efforts to alert them to the fact that brown mucus was oozing from the child's nose, one member of the hospital staff had responded by saying: "How could I put this in a way that you'd understand? It's snot." Based on the submissions in the petition, therefore, the Authority had to investigate both whether direct discrimination had occurred and

whether harassment had been realised. Since the petition contained few details regarding the grievances that the parents had suffered, and since in cases such as this it is essential to hear the persons whom the petitioner or petitioners attribute the impugned behaviour or comments to, the Authority held a hearing. The hearing was personally attended by the petitioners, the medical specialists, the resident and the nurse who had most contact with the petitioners' late child during the latter's two-day stay at the hospital. However, not long after the hearing began – but before the witnesses were heard – the petitioners' representative asked for an adjournment. Acceding to this request, the Authority scheduled a new date and summoned the witnesses and the petitioners to appear in person. At the second hearing, however, only the petitioners' legal representative appeared, the petitioners themselves did not. Their representative stated that the petitioners did not wish to be examined in person during the proceedings. In rendering its decision, the Authority could not disregard the fact that the petition contained few specifics regarding the grievances alleged by the petitioners, and that their submissions were inconsistent on several points. Moreover, due to their failure to appear in person at the hearing, it was impossible to clarify these points. Given their absence, it was also impossible for them to rebut or contradict the statements made by the healthcare institution's staff at the hearing – their witness statements – or to discuss their own personal experience during their child's stay at the hospital. Nor was it possible to confront them with the witnesses. In light of the above, the Authority could not make an establishment that the medical staff at the hospital complained against had ignored the parents' notices during their child's stay at the hospital or that the petitioners had been subject to a disadvantage with respect to the information they had been given about their child's health condition. Nor did the Authority find that the healthcare personnel's attitude vis-à-vis the petitioners had been characterised by "carelessness" or arrogance that they had exhibited a behaviour or taken actions that had violated the petitioners' human dignity. With regard to the statements impugned by the petitioners, the Authority also found, however, that even if they had actually been uttered, they could not be construed as violations of human dignity. Hence, the Authority could not examine whether the other definitional elements of harassment had been met in this situation. With regard to the comment saying "[h]ow could I put this in a way that you'd understand? It's snot.", for example, the Authority assessed that in this form the comment had not been degrading or humiliating. The word "snot" was neither obscene nor foul, and, moreover, the comment as cited did not contain any references to the petitioners' protected characteristic. *In light of the above, the Authority was compelled to comprehensively reject the petition – because of the lack of an identifiable disadvantage suffered by the petitioners – both with respect to direct*

discrimination as well as harassment. Moreover, in light of the above, this case was also illustrative of the fact that based on the rules of proof laid down in the Ebktv's Section 19 (1) and (2), we speak of a so-called shared burden of proof rather than a reversed burden of proof.[20] *This means that in order to launch proceedings, it is of course sufficient for the petitioner to render a relationship between the protected characteristic and the disadvantage suffered probable, which is a lighter burden than the obligation to provide proof. Nevertheless, the petitioner needs to be involved in the proceedings to allow the Authority to determine whether the violation that they have rendered probable has actually occurred.* They need to share their personal experience and also have to react to the statements submitted by the institution complained against. Furthermore, if the nature of the complaint so requires, they must also confront the witnesses. It is also important to stress here that the overwhelming majority of discrimination complaints are of a nature that they require the petitioners' personal involvement and that they be heard in person, regardless of whether they proceed with the help of a legal representative or not. That is necessary because the complainant had been present when the events in question transpired, the impugned comments were directed at them and in their presence. Put more simply, they were the direct subjects of the treatment which they asked the Authority to examine, which is why no one but them could recount the underlying event or events (the lawyer or legal representative was obviously not present when the impugned events transpired).

20 We also discussed this in the context of case No. EBH/455/2018, in which we observed that the passive behaviour on the part of the healthcare service provider led to an establishment that it had violated the law. After the petitioner has rendered their protected characteristic and the disadvantage they have suffered probable – as we also explain in the context of the present case No. EBH/HJF/92/2019 – the procedure relies on the active involvement of both parties, insofar as the institution complained against wishes for the Authority to reject the petition while the petitioner would like for the Authority to determine that a violation has occurred.

V. The Authority's case-law on equal access to and accessibility of services provided by healthcare providers

In the last chapter of this booklet we offer our readers a brief overview of the obligation of healthcare providers and their owners/controlling institutions to provide equal access, and in the process we also discuss some of the Authority's relevant cases. For obvious reasons, a single booklet chapter does not allow for a general and comprehensive overview of the obligation to provide equal access – we will only look at the pertinent issues from the perspective of healthcare providers. Generally, it is important to stress that persons with disabilities must have equal access to healthcare services and their medical treatment must be provided for in a properly complex and fully accessible manner. This requirement – which is also enshrined in the relevant legal provisions – gives rise to an obligation on the part of healthcare service providers and their controlling institutions (such as for example the state or municipal governments) to ensure that persons with disabilities can avail themselves of the services they provide and the medical treatments they extendin the same way – with equal opportunity – as persons who do not have any sensory, communication, physical, mental or psycho-social impairments.

Legal framework

When it comes to cases involving equal access and accessibility, the Authority does not rely on the provisions of the Ebktv alone but also draws significantly on the rules laid down in *Act XXVI of 1998 on the rights and ensuring the equal opportunities of people with disabilities* (hereinafter referred to as the Fot, following the Hungarian abbreviation). A fundamental underlying principle here is that pursuant to the Ebktv's Section 8 (f), disability qualifies as a protected characteristic, and no one may be discriminated against on the ground of of their disability. At the same time, however, the regulations in the Fot fundamentally revolve around the issue of equal access. This means that the provisions of the Fot – at least the ones that are relevant for the issues discussed here –

require that certain additional measures be taken in order to ensure that persons with disabilities have the same chance to partake in social life as those without disabilities. In such cases it is not sufficient, therefore, that persons or institutions who interact with persons with disabilities only refrain from taking discriminatory actions. Equal opportunity also requires them to take pro-active measures to this effect: with respect to healthcare, it means that those who provide medical services or their controlling institutions are obliged to take certain additional measures (e.g. providing wheelchair access to the medical offices; helping those with visual impairments to orient themselves by installing Braille language signs; installing audio induction loops for persons with auditory impairments) so that anyone – in other words persons with disabilities as well – can avail themselves of the healthcare services they offer.

Pursuant to Section 7/A (1) of the Fot, persons with disabilities must be guaranteed equal opportunity access to public services. Section 4 (f) of the Fot enumerates the relevant public services. According to 4 (fc), any healthcare service provided by municipal and minority self-governments, or by institutions owned and controlled by local and minority self-governments, by non-state and ecclesiastical institutions or ecclesiastically maintained institutions that receive public funding, qualifies as a public service. According to Section 4 (fd) and (fe), the aforementioned are also augmented by the provision that any type of service activity performed based on a customer service system also qualifies as a public service, as do all publicly offered service activities meant to ensure the provision of public service in a municipality or a district thereof, performed on the basis of a license issued by the authorities or based on an official obligation; the use of such services may not be limited. *The cited list shows that the regulation does not identify the institutions which are subject to the aforementioned requirements to ensure equal opportunity in general, but instead defines the range of services in the context of which equal access must be ensured. Consequently, obviously all institutions – clinics, medical offices, as well as their state or municipal controlling institutions – which offer any of the services in the range defined above must ensure complex accessibility with regard to these services. In other words, the range of institutions which are subject to this requirement is identified based on the services they provide. At the same time, this also means that – based on the logic of the regulation – it is the service (the healthcare service in the present context) itself that needs to be equally accessible to all.* Thus, if the accessibility of general practitioner services can only be realised in a different medical office – if, for example, the technical features of the current medical office or its designation as a landmark make it impossible to install a ramp with the proper slope and width –

then equal access must be realised by relocating the services to a fully accessible place, in this case to a different medical office. The list above also reveals that the regulations proffer an expansive definition of public services, which makes it rather hard to imagine any type of health service or treatment that would not fall under the scope of the regulation. In other words, only a very narrow range of institutions providing healthcare services – or their controlling institutions – could be conceivably exempt from the requirement to ensure equal access. At the same time, we naturally need to stress that all of the cases investigated by the Authority are unique, and that each of these cases are individual in which the Authority must decide based on a thorough review of the relevant legal framework, whether the healthcare service provider or other institution complained against, or their controlling institution, are in fact obliged to ensure equal access.

In the above we have often used the terms equal access and accessibility, and we have also noted that the complex accessibility of public services – healthcare services in the present context – must be provided for to ensure the equal access for persons with disabilities. *Based on the provisions of the Fot, equal access is a broader concept, and the requirement of accessibility as a part of that comprehensive concept fundamentally applies to built environment.* According to Section 4 (ha) of the Fot, a service is equally accessible if its use is unimpeded, predictable, intelligible and perceptible to anyone, especially persons who are reduced in their mobility, sight, hearing, or in terms of their mental or communication abilities. It is readily apparent, therefore, that the concept of equal access is rather broad. Similarly, it is also apparent that in order for something to be regarded as genuinely equally accessible, it must be accessible in a *complex manner*, that is it must be perceptible, intelligible and usable for any person no matter what type of disability they have (be it limited mobility, visual or hearing impairment, or mental disorders). As far as built environment is concerned, Section 4 (hb) of the Fot sets out the definition of when a building is equally accessible. It posits that this is the case when those sections that are open to the public can be entered by anyone,

especially persons who are reduced in their mobility, sight, hearing, or in terms of their mental or communication abilities, and can be safely exited by anyone in an emergency, and if anyone can avail themselves of the use of the objects and installations in the building in accordance with their designated purpose. Finally, Section 4 (g) of the Fot defines accessibility as built environment that complies with the requirements set out in Section 2 (1) of *Act LXXVIII of 1997 on the design and protection of built environment*.

With regard to the obligation to ensure equal access and accessibility, we also need to emphasise that *as of 31 December 2013, the Fot no longer refers to any deadlines for ensuring equal access. The Authority's interpretation of the law and its consistent application thereof has been that from that point on the public services defined in the law must be provided in an equally accessible manner without any further "grace period" to arrange for their accessibility.* Correspondingly, those healthcare service providers (in the present context) or their controlling institutions that fail to provide their healthcare services or medical treatments in a manner that is equally accessible to persons with disabilities are in a constant breach of the relevant legal obligation since they have failed and continually to fail to comply with the pertinent legal requirements.

Cases involving equal access to healthcare in the Authority's case-law

The Authority investigated numerous cases involving equal access to healthcare and accessibility of healthcare facilities in 2011 and 2012. The cases in question were initiated by a non-governmental organization which represents the interests of persons with limited mobility. The organisation acted as a petitioner within action popularis.[21] The majority of the cases in question were concluded by a settlement – as it often happens in cases involving equal access and accessibility. In the **cases Nos. EBH/32/2011, EBH/54/2011, EBH/70/2011, EBH/127/2011, EBH/32/2012**, the petitioner NGO filed complaints against healthcare service providers, typically municipal governments that operated medical practices. The parties (the petitioner NGO and the municipal government complained against) concluded settlements in these cases. *In the settlements,*

21 We discussed the content of actio popularis in the context of case No. EBH/10/2013, cf. footnote No. 14.

which concluded the proceedings and were approved by the Authority, the municipal governments operating the medical specialist practices or healthcare centres undertook to perform the upgrades necessary for the complex accessibility of their healthcare facilities by the mutually agreed upon deadline. At the same time, two cases, **EBH/55/2011** and **EBH/132/2012**, were concluded by decisions which established that a violation had occurred. In these two cases the Authority found based on the petition of the NGO that a healthcare service provider operated by a municipal government and a paediatric dental service operated by another municipal government, respectively, had failed to comply with the legal requirement of complex equal accessibility. *Thus – in addition to an establishment that a violation of the principle of equal treatment had occurred – the Authority ordered the municipal governments to end the unlawful situation and within this, to ensure the complex accessibility of the healthcare services they operate.*

In **case No. EBH/451/2016** the Authority launched ex officio proceedings against a municipal government based on a public interest report. The person who filed the report – who did not wish to be involved in the case as a petitioner but was personally affected as a person with limited mobility – informed the Authority that the medical offices of the local general practitioners could only be accessed by way of a long flight of stairs leading up to the entryway, and that the building did not have an accessible restroom. The Authority performed an onsite inspection and looked at both general practitioner offices in the municipality. Based on the onsite inspection, the Authority determined that the general practitioner services in District I were not equally accessible to persons who use a wheelchair for mobility and hence such persons could not access the premises. The District II practitioner's office was basically accessible to persons with limited mobility but problems remained: the thresholds were liable to impede the mobility of persons moving about with a wheelchair (especially at the door of the physician's office), nor was the movement of persons with hearing or visual impairments supported by the proper signs, indicators or installations. The access of persons with limited mobility was further impeded by the fact that the key to the accessible door was not stored onsite but at the mayor's office. *Based on the above, the Authority established that with respect to the treatment of persons with disability, the municipal government had violated the principle of equal treatment in the context of the general practitioner's service as a basic healthcare service when it had failed to ensure that the services in question would be provided for in a fully accessible medical office.* In order to remedy these deficiencies – also considering that the municipal government undertook to perform the necessary measures – *the Authority ordered the unlawful situation*

to be ended but did not deem it necessary to apply further sanctions. *At the same time, the Authority drew the municipal government's attention to its obligation that until the necessary upgrades had been performed at the medical offices – especially the general practitioner's office in District I – it had to provide for the access of persons with disabilities – especially persons with limited mobility – to the general practitioner's services, also keeping in mind the patients' right to freely choose their physician.* In such situations the provision of services may be temporarily performed at the patient's home or at a different medical office – following consultation with the affected patient and in line with the relevant statutory provisions – or in other appropriate ways that do not produce additional costs for the patient in question and do not impose a disproportional burden on them. The Authority also obliged the municipal government to inform the EBH about the fulfilment of its undertaking to make the medical offices accessible, including the submission of the expert opinion of a rehabilitation engineer. The municipal government complied with the Authority's decision by the deadline set out in the latter.

In **case No. EBH/94/2016** an association, which initiated the Authority's proceedings within action popularis, complained that the glass door leading from the parking lot adjacent into the "C" building of the healthcare institution was locked to patients; for persons with limited mobility, getting to the other entrance was practically impossible unless they were accompanied by someone who could help them. *Ultimately, the parties concluded a settlement. As part of the settlement, the healthcare provider undertook to change the shape of the five parking spots it reserved for persons with limited mobility by expanding their size and reducing their number to three, thereby ensuring that persons with limited mobility would have sufficient space at their disposal upon leaving their car. It further undertook to design the ramp at the main entrance in compliance with the requirements laid down in the relevant government decree,[22] thereby ensuring that its*

22 Government Decree No. 253/1997 (XII. 20) on the nationally established criteria governing municipal planning and construction

width and slope and other parameters match the needs of accessibility. Finally, it undertook to create a further four parking spots for persons with limited mobility in the part of the courtyard nearest to the accessible patient entrance of building "C." The Authority approved the settlement in a decision and subsequently the healthcare institution complained against informed the EBH in writing that it had implemented the undertakings it had pledged as part of the settlement.