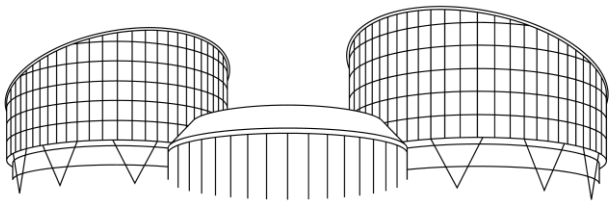

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF GENDERDOC-M v. MOLDOVA

(Application no. 9106/06)

JUDGMENT

STRASBOURG

12 June 2012

FINAL

12/09/2012

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Genderdoc-M v. Moldova,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Josep Casadevall, *President,*
Alvina Gyulumyan,
Egbert Myjer,
Ján Šikuta,
Ineta Ziemele,
Luis López Guerra,
Kristina Pardalos, *judges,*
and Santiago Quesada, *Section Registrar,*

Having deliberated in private on 10 May 2012,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 9106/06) against the Republic of Moldova lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Moldovan non-governmental organisation, Genderdoc-M ("the applicant association"), on 7 March 2006.

2. The applicant association was represented by Ms Natalia Mardari, a lawyer practising in Chisinau. The Moldovan Government ("the Government") were represented by their Agent, Mr Vladimir Grosu.

3. As Mr Mihai Poalelungi, the judge elected in respect of Moldova, had withdrawn from the case (Rule 28 of the Rules of Court), the President of the Chamber appointed Mr Ján Šikuta to sit as an *ad hoc* judge (Article 26 § 4 of the Convention and Rule 29 § 1 of the Rules of Court).

4. On 23 May 2008 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

5. Third-party comments were received from the International Commission of Jurists, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant, Genderdoc-M, is a non-governmental organisation based in Moldova whose object is to provide information and to assist the LGBT community.

7. On 7 April 2005 the applicant association applied to Chişinău Municipal Council for authorisation to hold a peaceful demonstration in front of the Parliament on 27 May 2005, to encourage the adoption of laws to protect sexual minorities from discrimination.

8. On 27 April 2005 the Chişinău Municipal Council rejected the application on the ground that the applicant association's demonstration was baseless, since a law on the protection of national minorities had already been adopted.

9. On 6 May 2005 the Mayor's Office also refused permission for the proposed demonstration, on the grounds that there was a law on the protection of national minorities already in place and that there were legal provisions which dictated which individuals had the power of legislative initiative required to promote laws.

10. The applicant association contested the decision of the Chişinău Mayor's Office of 6 May 2005. It argued that the ban on their demonstration was illegal and discriminatory.

11. On 2 June 2005 the Chişinău Court of Appeal allowed the applicant association's action and declared the Chişinău Mayor's Office decision of 6 May 2005 void. Chişinău Court of Appeal found the following:

> "...The court considers legally ungrounded the arguments relied on by the defendant to justify its refusal to authorise the assembly, as the law does not provide such grounds for the non-authorisation of an assembly. The decision as to whether to authorise or not to authorise an assembly should not be made conditional either on the nature of the problems the participants intend to bring to society's attention, or on the status of those problems.
>
> Under these circumstances the court concludes that the decision of the Mayor's Office dated 6 May 2005 was issued contrary to the provisions of Article 26 (1) of the Law regarding administrative complaints, and was thus illegal and void. As to the plaintiff's other complaints, including the Mayor's Office's non-compliance with the time-limit of forty-eight hours for notification of the refusal of authorisation for the assembly required under section 14 of the Law regarding the organisation and conduct of assemblies, the court declares them ill-founded."

12. The Chişinău Mayor's Office appealed against the decision of the Chişinău Court of Appeal of 2 June 2005. The Mayor's Office argued that they had received many requests from individuals and associations which were vehemently against the authorisation of the demonstration, and who

opposed the adoption of any law legalising homosexual partnerships. The requests had laid emphasis on various legal provisions that concerned the protection of marriage and the family.

13. On 7 September 2005 the Supreme Court of Justice allowed the appeal lodged by the Mayor's Office, quashed the Chişinău Court of Appeal decision of 2 June 2005 and decided to send the case to the Court of Appeal for re-examination.

14. In their submissions to the Court of Appeal, the Mayor's Office argued that the holding of an assembly for the promotion of the rights of sexual minorities would endanger public order and social morality and, moreover, that the organisers had not assumed any responsibility as regards the demonstration's good management.

15. The applicant association argued that the ban was illegal and discriminatory.

16. On 14 June 2006 the Court of Appeal found against the applicant association. The applicant association appealed against this decision.

17. On 18 October 2006 the Supreme Court of Justice upheld the decision of the Court of Appeal of 14 June 2006. It found that the applicant association had failed to give undertakings as regards a number of obligations required by the law in respect of assemblies, such as: to respect the law; to designate a person or persons in charge of the conduct of the demonstration; to create together with the police a group of people responsible for the maintenance of public order; to mark the site of the demonstration with special signs; to pay the Municipal Council any fees related to the arrangement of the site of the demonstration; to establish the route to and from the site of the demonstration; to provide the police with unfettered access to the site of the demonstration; and to forbid the participation of certain persons. Moreover, the court considered that there was a risk that the demonstration would cause a breach of public order.

II. RELEVANT DOMESTIC LAW

18. Law no. 560-XIII of 21 July 1995 regarding the organisation and conduct of assemblies provides, as relevant, the following:

"Section 5 – Notification of Assemblies

Assemblies may be held only after the organisers have duly notified the urban mayor's (municipal) or rural offices.

Section 11 – Preliminary notification

(1) The organiser of an assembly must lodge a notification with the mayor's office at least fifteen days before the chosen date, according to the model provided in the appendix which is part of the present law.

(2) The preliminary notification should indicate:

(a) the name of the organiser, the aim of the assembly;

(b) the date and time the assembly is to begin and end;

(c) where the assembly will take place and the routes to and from the place;

(d) the form the assembly will take;

(e) the approximate number of participants;

(f) those appointed to ensure the good conduct of the assembly and to be responsible for it;

(g) the services the organisers require from the mayor's office.

(3) The Mayor's Office may in justified cases modify, with the organiser's consent, elements of the preliminary notification.

Section 13

After examining the preliminary declaration, the Mayor's Office shall issue one of the following decisions and inform the organiser about it:

(a) grant permission;

(b) refuse permission under section 12 (6).

Section 15

(1) The organiser can contest the refuse to authorise an assembly.

(2) The relevant judicial body shall decide upon the organiser's contestation within 5 days from its lodging."

19. Section 34 of Law no. 123 of 18 March 2003 regarding local public administration provides that:

"(1) ... the Mayor undertakes the following functions over... administered territory:

1. in the field of legal order:

...

(f) Undertakes legal measures regarding the conduct of public assemblies: ...

(g) Undertakes measures forbidding or suspending shows, presentations and other public demonstrations which contradict legal order and morals."

20. The Moldovan Constitution contains the following relevant provisions:

> "Article 54 - Restricting the Exercise of Certain Rights or Freedoms
>
> (1) The exercise of certain rights or freedoms may be restricted only under the law and only as required for: the defence of national security, of public order, health or morals, of citizens' rights and freedoms, the carrying out of investigations in criminal cases, the prevention of the consequences of a natural calamity or of a technological disaster.
>
> (2) The restrictions enforced must be in proportion to the situation that caused them, and may not affect the existence of that right or liberty."

21. The Moldovan Civil Code stipulates in Article 184:

> "An association is a non-commercial organisation established voluntarily by associated individuals and legal entities under provisions of the law on the basis of community of interests, which are consistent with public order and good morals, for the purpose of meeting various non-material needs."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 11 OF THE CONVENTION

22. The applicant association complained of a violation of its right to peaceful assembly. It claimed that the ban imposed on it on holding a demonstration had not been in accordance with the law, had not pursued any legitimate aim and had not been necessary in a democratic society. It relied on Article 11 of the Convention, which reads as follows:

> "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

23. In their observations lodged on 15 September 2008 the Government agreed that there was an interference with the applicant's right to freedom of assembly, but argued that this interference was justified so as it had a legitimate aim, was prescribed by law and pursued a legitimate aim. The

Government pointed out that 98% of the Moldovan population was Christian Orthodox, religion that does not tolerate of sexual relations or marriage between people of the same gender. The Government attached requests sent by the Moldovan population to the Chişinău Mayor's Office asking for the ban of the assembly at issue.

24. On 1 April 2010 the Government lodged a new set of observations in which it agreed that there had been a violation of Article 11 of the Convention.

A. Admissibility

25. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

26. The Government have admitted that there has been a violation of Article 11 of the Convention.

27. In the circumstances of the case, the Court finds no reason to hold otherwise. There has, accordingly, been a violation of this Article.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 11

28. The applicant complained under Article 13 in conjunction with Article 11 of the Convention that they did not have an effective remedy against the alleged violation of their freedom of assembly. They complained that there was no effective procedure which would have allowed them to obtain a final decision prior to the date of the planned demonstrations. Article 13 of the Convention reads:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

29. The Government contested this allegation, claiming that the applicant had had the opportunity to bring judicial proceedings and had availed themselves of it.

A. Admissibility

30. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that

it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The Government

31. The Government argues that the applicant association had the benefit of Article 192 of the Civil Procedure Code, which provides for judicial priority treatment. In addition, the judgement of the Plenum of the Supreme Court of Justice no. 17 of 19 June 2000 held that in the event of lack of an effective remedy concerning the violation of a right provided by the Convention, the Supreme Court of Justice is called upon to make use of the principle of direct applicability of the Convention. The Government argued that the applicant association had failed to cite those arguments in front of the domestic courts.

(b) The applicant association

32. The applicant association complained that Article 13 of the Convention had been breached because it did not have at their disposal a procedure that would have allowed it to obtain a final decision before the date of the planned assembly, and that the provisions of Law no. 560-XIII of 21 July 1995 were not clear and foreseeable.

The applicant association argued that the Moldovan authorities took longer than necessary to deal with their case and that they had never offered a coherent reason as to why they had banned the assembly.

2. The Court's assessment

33. The Court reiterates that the effect of Article 13 is to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they comply with their obligations under this provision (see, among others, *Chahal v. the United Kingdom*, judgment of 15 November 1996, *Reports* 1996-V, pp. 1869-70, § 145).

34. In the present case the Court found that the applicants' rights under Article 11 had been infringed (see paragraph 30 above). Therefore, they had an arguable claim within the meaning of the Court's case-law and were thus entitled to a remedy satisfying the requirements of Article 13.

35. The Court has previously held that applicants have been denied an effective domestic remedy in respect of their complaint concerning a breach

of their freedom of assembly in a case where the authorities were not obliged by any legally binding time-frame to give their final decisions before the planned date of the demonstration**.** The Court was not persuaded that the remedies available to the applicants, all of them being of a *post-hoc* character, could provide adequate redress in respect of Article 11 of the Convention. Instead, the Court found that the notion of an effective remedy implies the possibility of obtaining a ruling concerning the authorisation of the event before the time at which it is intended to take place (see *Bączkowski and Others v. Poland*, no. 1543/06, ECHR 2007-VI, §§ 79-84, and *Alekseyev v. Russia*, nos. 4916/07, 25924/08 and 14599/09, judgement of 21 October 2010, §§ 97-100).

36. Turning to the facts of the case, the Court observes that Moldovan legislation provides for time-limits for trials involving the right of assembly. More precisely, section 11 of Law no. 560-XIII requires the organiser of an assembly to lodge their request with the Mayor at the latest fifteen days before the proposed event.

Section 12 § 1 requires the administrative authorities to respond to requests concerning the right of assembly at the latest five days before the proposed event.

If the Mayor bans the proposed event, organisers can lodge a complaint against the ban. In this case, the competent judicial authority is required by Section 15 § 2 of the same law to provide a response within five days, without expressly mentioning that the response should be delivered before the proposed event.

37. The Court notes that in the present case, despite the 5 days time-line prescribed by Law no. 560-XIII, the applicant's request to hold a demonstration was finally replied to a year and a half after it had been lodged.

The Court is therefore not persuaded that the judicial remedy available to the applicant in this case, which was of a post-hoc character, could have provided adequate redress in respect of the alleged violations of the Convention (*Alekseyev v. Russia*, § 99).

38. Taking into account all the above-mentioned arguments, the Court finds that the applicant has been denied an effective domestic remedy in respect of the complaint concerning a breach of the right freedom of assembly and concludes that there has been a violation of Article 13 in conjunction with Article 11 of the Convention in the present case.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 11

39. The applicant association further complained that it had been discriminated against in comparison with other associations due to the fact that it promoted the interests of the gay community in Moldova. It relied on

Article 14 in conjunction with Article 11 of the Convention. These provisions are worded in the following way:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

> "1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state."

40. The Government contested that argument.

A. Admissibility

41. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The Government

42. The Government argued that the applicant association was not discriminated against in this case by the Moldovan authorities on the ground of sexual orientation. The Government contended that during 2002-2006 there was a general problem in Moldova concerning the right of assembly and a general intolerance towards demonstrations. The Government made reference to the cases of *Hyde Park 1, 2, 3, 4 v. Moldova, The Christian Democratic Popular Party v. Moldova* and *Roşca, Secăreanu and others v. Moldova,* in which the applicants' demonstrations, which had various aims, were banned.

(b) The applicant association

43. The applicant association argued that the assembly at issue was banned due to the fact that it promoted the interests of and was organised by the gay community. The applicant association alleged that, starting from 2005, all its demonstrations were banned and that it continued to experience difficulty in organising events.

44. The applicant association rejected the Government's argument that there was general intolerance towards the right of assembly in Moldova and argued instead that during the relevant time the Government had continued to authorise demonstrations. Thus, documents submitted by the applicant indicate that during 2004-06 the "Republican Organisation of Cheated and Stripped Investors", the "United Gagauzia Movement", the "Association for the Elimination of the Consequences of the Molotov-Ribbentrop Pact" and the "Association of the Former Deported People and Political Prisoners" were allowed to hold demonstrations in various locations. In each of these cases the Chisinău Mayor's Office guaranteed the participation and support of the General Police Department.

45. Lastly, the applicant association argued that the Government's argument about 98% of the Moldovan population being Christian Orthodox, about their moral and religious values and the petitions adduced as evidence (see above paragraph 24), indicates that the demonstration was banned because of the sexual orientation of the organisers and because the applicant association was promoting the rights of the LGBT community.

(c) Third-party intervention

46. The International Commission of Jurists and ILGA-Europe submitted that the protection of morals is not and can never be an objective and reasonable justification under Article 14 of the Convention.

47. They have argued that conceptions of what is moral are relative and change over time. Because it is so fluid, is a particularly difficult criterion for a court or legislature to apply. They have concluded that its characteristics militate against giving public morality an expansive effect.

2. The Court's assessment

48. The Court has repeatedly held that Article 14 is not autonomous but has effect only in relation to Convention rights. This provision complements the other substantive provisions of the Convention and the Protocols. It has no independent existence, since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one

or more of the latter (see, among other authorities, *Van Raalte v. the Netherlands*, 21 February 1997, § 33, *Reports* 1997-I, and *Gaygusuz v. Austria*, 16 September 1996, § 36, *Reports* 1996-IV).

49. It is common ground between the parties that the facts of the case fall within the scope of Article 11 of the Convention. Hence, Article 14 is applicable to the circumstances of the case.

50. The Court reiterates that a difference in treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify different treatment in law; the scope of this margin will vary according to the circumstances, the subject matter and its background (see *Inze v. Austria*, 28 October 1987, § 41, Series A no. 126, and *Genovese v. Malta*, no. 53124/09, §§ 43-44, 11 October 2011).

51. The Court reiterates that sexual orientation is a concept covered by Article 14 (see, among other cases, *Kozak v. Poland*, no. 13102/02, 2 March 2010).

Furthermore, when the distinction in question operates in this intimate and vulnerable sphere of an individual's private life, particularly weighty reasons need to be advanced before the Court to justify the measure complained of.

Where a difference of treatment is based on sex or sexual orientation the margin of appreciation afforded to the State is narrow, and in such situations the principle of proportionality does not merely require the measure chosen to be suitable in general for achievement of the aim sought; it must also be shown that it was necessary in the circumstances. Indeed, if the reasons advanced for a difference in treatment were based solely on the applicant's sexual orientation, this would amount to discrimination under the Convention (ibid., § 92).

52. The Court observes that in the present case the Government argued that the applicant association was not discriminated against on the basis of sexual orientation. Instead, the Government made the point that the applicant association's demonstration was banned due to the existence of a systemic problem as to the right of assembly in Moldova during the period 2004-2006. The Court cannot agree with the Government, for the following reasons.

53. First, the Court observes that the applicant adduced as evidence decisions of the Chisinău Mayor's Office allowing various assemblies and which had been adopted during the same period of time referred to by the Government (see above paragraph 44). The Government failed to offer an explanation as to this difference in treatment between the applicant association and the above-mentioned associations.

54. Second, the Court considers that the reason for the ban imposed on the event proposed by the applicant was the authorities' disapproval of demonstrations which they considered to promote homosexuality. In particular, the Court highlights that the Chişinău Mayor's Office – a decision-making body in the applicant's case – has insisted two times before the Court of Appeal that the applicant's assembly should be banned due to the opposition of many Moldovan citizens to homosexuality (see above paragraph 12).

Furthermore, the Court holds the view that when limiting the right of assembly, national authorities should offer clear reasons for so doing. However, as highlighted above, in the present case each authority which dealt with the applicant association's request to hold a demonstration rejected it for a different reason.

55. In view of the above, the Court holds the view that there has been a violation of Article 14 in conjunction with Article 11 of the Convention in the present case.

IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

56. Lastly, relying on the same account of the facts, the applicant association also alleged a violation of Articles 6 § 1 and 10 of the Convention.

57. Having examined the complaints, the Court notes that they have virtually the same factual basis as the complaints it has examined in previous sections of this judgment.

58. Consequently, it considers that no separate examination of the complaints under Articles 6 § 1 and 10 of the Convention is necessary.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

59. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

60. The applicant association claimed 860 euros (EUR) in respect of pecuniary damage, representing travel expenses and other costs related to organising the event that was banned.

61. The Government argued that these costs have no causal link with the alleged violation.

62. The Court, taking into account its case-law and the evidence submitted by the applicant association as to the pecuniary damage incurred, awards the applicant association EUR 860 in respect of pecuniary damage.

63. The applicant association also claimed EUR 7,250 in respect of non-pecuniary damage.

64. The Government argued that in recent cases where the Court found a violation of Article 11, it awarded EUR 3,000 in respect of non-pecuniary damage.

The Government argued that a critical approach should be exercised by the Court in these circumstances.

65. Having regard to the fact that the present case involved banning a demonstration in violation of Articles 11, 13 and 14 of the Convention, the Court, ruling on an equitable basis, awards the applicant association the requested amount, namely EUR 7,250 in respect of non-pecuniary damage.

B. Costs and expenses

66. The applicant association also claimed EUR 2,856 for the costs and expenses incurred before the domestic courts and for those incurred in the proceedings before the Court. They submitted itemised claims, bills and supporting documents.

67. The Government considered this part of the claims excessive.

68. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to the amount. The Court notes that the costs and expenses were incurred over a period of five years. The amounts incurred by the applicant association on account of legal fees do not appear excessive or disproportionate to the work performed.

Therefore, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the applicant association the amounts claimed in full. It makes an aggregate award of EUR 2,900, plus any tax that may be chargeable to the applicant association.

C. Default interest

69. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COUR

1. *Declares* the application admissible unanimously;

2. *Holds* unanimously that there has been a violation of Article 11 of the Convention;

3. *Holds* unanimously that there has been a violation of Article 13 in conjunction with Article 11 of the Convention;

4. *Holds* by five votes to two that there has been a violation of Article 14 in conjunction with Article 11 of the Convention;

5. *Holds* unanimously that there is no need to examine separately Article 6 § 1 and Article 10 of the Convention;

6. *Holds* by six votes to one
   (a) that the respondent State is to pay the applicant association, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Moldovan lei at the rate applicable on the date of settlement:
      (i) EUR 860 (eight hundred and sixty euros), plus any tax that may be chargeable, in respect of pecuniary damage;
      (ii) EUR 7,250 (seven thousand two hundred and fifty euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (iii) EUR 2,900 (two thousand nine hundred euros), plus any tax that may be chargeable to the applicant association, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English, and notified in writing on 12 June 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinions of Judges Myjer, Gyulumyan and Ziemele are annexed to this judgment.

J.C.M.
S.Q.

CONCURRING OPINION OF JUDGE MYJER

I voted with the majority in finding a violation of Article 14 in conjunction with Article 11.

Still, I am not convinced by the underlying reasoning laid down in the judgment.

What happened in this case? The applicant in 2005 applied for authorisation to hold a peaceful demonstration in front of the Parliament, to encourage the passing of laws to protect sexual minorities. The authorisation was not given. The official reason for this refusal was that the demonstration was baseless, since a law on national minorities had already been passed (see paragraphs 8 and 9 of the judgment).

Interestingly, later on, when the applicant appealed, all of a sudden other totally new reasons were put forward by the authorities:

- the Mayor's Office had received many requests from individuals and associations who were vehemently against the authorisation of the demonstration and who opposed the passing of any law legalising homosexual relationships (see paragraph 12);

- the holding of an assembly for the promotion of the rights of sexual minorities would endanger public order and social morality, and, moreover, the organisers had not assumed any responsibility as regards the demonstration's good management (see paragraph 14).

If the authorities had stuck to the initial reasons given and no other evidence had been available, it would have been hard for the Court to establish discrimination, provided that the authorities meant to include sexual minorities among national minorities. Owing to the fact that the authorities chose to invent and put forward new reasons, the authorities themselves provided the underlying material to enable the Court to establish a discriminatory intent. Looking at the different reasons and the sequence in which they were given, one can now safely deduce that the first reasons given were only designed to cover up the real reasoning behind the refusal. The same applies to the last reasons given: it would be totally unrealistic to accept that the permission was initially refused because the organisers had not assumed any responsibility as regards the demonstration's good management. Admittedly, the Supreme Court in its decision of 18 October 2006 paid much attention to this new line of reasoning. But if that had been the real reason behind the refusal, it should have been put forward right at the beginning. And again, if that had been the case, it would have been hard for the Court to establish an intent to discriminate.

That leaves us with the simple conclusion that the refusal must have had to do with a reason which the authorities did not dare to mention. And the only logical reason which is left is: they did not give authorisation because apparently they did not want a demonstration which had to do with the rights of sexual minorities/homosexuals. Is it fair to draw that conclusion?

Yes, in the circumstances of the case, this is possible. The first new line of reasoning, as referred to in paragraph 12, is sufficiently conclusive in this regard.

Maybe the authorities did in fact refuse the authorisation because of, as the majority put it, their "disapproval of demonstrations which they considered to promote homosexuality" (see paragraph 54 of the judgment). However, I wonder where the majority find any indication that a proposed demonstration to encourage the passing of laws to protect sexual minorities was also intended to promote homosexuality as such, or that the authorities considered that the demonstration would promote homosexuality.

JOINT DISSENTING OPINION OF JUDGES GYULUMYAN AND ZIEMELE

1. We do not share the view of the majority regarding the violation of Article 14 in conjunction with Article 11 as set out in their reasoning. The majority base their view on two main grounds. First, they find that the Government have not convincingly proved their allegation that there was a systemic problem concerning the exercise of freedom of assembly. The Government claimed that assemblies were not allowed in general, whereas the applicant association showed that some assemblies had in fact been allowed. The majority consider that this fact indicates a difference in treatment in relation to the applicant association. Second, the majority find that the arguments of the Chişinău Mayor's Office in the court proceedings were of a discriminatory character. The majority also state that all the relevant levels of authority provided different reasons.

This is one possible way of reading the arguments of the parties in the case. There is, however, another way of interpreting these arguments. For example, the statement by the Mayor's Office that it had received protest letters from numerous Moldovan citizens asking it to prohibit the gay parade is most likely true. The fact that the Mayor's Office brought this fact to the attention of the national courts *per se* does not confirm that it adopted a discriminatory attitude or, for that matter, that the national courts agreed or disagreed with its request. In the final instance the national courts mentioned two grounds for their decision to uphold the ban imposed by the Mayor's Office. The first ground was the danger to public order and morality and the second ground was that the organisers had not complied with the prescription of the law requiring them to accept responsibility for the event. These reasons in themselves are neither discriminatory nor unreasonable. The fact that two different compositions of the same court might disagree on the outcome of the case is not arbitrary in itself either.

2. What should have been the test to be applied in this case? The majority correctly refer to the principles developed in *Kozak v. Poland* (no. 13102/02, 2 March 2010), in which the Court said that where a difference in treatment was based solely on sexual orientation, it constituted a violation of the Convention. In view of this criterion, the majority should have assessed whether the applicant association's assembly was banned solely on this ground, as compared to the other bans of assemblies that the Government referred to, in relation to which the Court has had the opportunity to render several judgments regarding the same period of time. The Government argued that there was a general atmosphere of intolerance towards different views at the time in Moldova. It certainly cannot be said that the applicant association was the only group whose right to assembly was restricted (contrast *Oršuš and Others v. Croatia* [GC], no. 15766/03, § 155, ECHR 2010). There may indeed be some truth in what the

Government stated about the rather intolerant political situation in the country at the time.

3. The Court's case-law under Article 14 requires a detailed analysis of whether a difference in treatment is discriminatory if we assume that the applicant association was treated differently from others. Such a difference in treatment will amount to discrimination if "it has no objective and reasonable justification", that is, if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality" between the means employed and the aim sought to be realised (see, among many other authorities, *Larkos v. Cyprus* [GC], no. 29515/95, § 29, ECHR 1999-I; *Stec and Others v. the United Kingdom* [GC], no. 65731/01, § 51, ECHR 2006-VI; and *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 196, ECHR 2007-IV). Where the difference in treatment is based on race, colour or ethnic origin, the notion of objective and reasonable justification must be interpreted as strictly as possible (see *Sampanis and Others v. Greece*, no. 32526/05, § 69, 5 June 2008). We might add that in view of the *Kozak* case (cited above), sexual orientation should be added to this list.

4. As far as we can see, there were reasonable arguments submitted by the Government in explaining the actions of the authorities (see paragraph 17 of the judgment). The crux of the matter really lies in an assessment of the proportionality of the difference in treatment, as compared to other possible assemblies that were or were not allowed for the same reasons of public order. This analysis is missing. There is an all too easy assumption that the decisions of the national authorities were discriminatory. As we said, this might well be true but in a judicial decision, something more is needed to come to that conclusion.