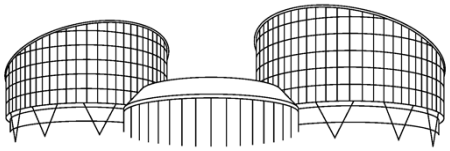

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF MORARU v. ROMANIA

(Application no. 64480/19)

JUDGMENT

Art 14 (+ Art 2 P1) • Discrimination • No objective and reasonable justification for refusal to allow a woman, whose height and weight were below the requisite limits for female candidates, to sit entrance examination to study military medicine • Selection criteria for military educational institutes within the purview of State authorities • Domestic courts' failure to provide any justification as to the connection between a candidate's size and his/her strength

STRASBOURG

8 November 2022

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Moraru v. Romania,

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

Gabriele Kucsko-Stadlmayer*, President*,
Faris Vehabović,
Iulia Antoanella Motoc,
Yonko Grozev,
Pere Pastor Vilanova,
Jolien Schukking,
Ana Maria Guerra Martins*, judges*,
and Ilse Freiwirth, *Deputy Section Registrar,*

Having regard to:

the application (no. 64480/19) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Romanian national, Ms Elena Moraru ("the applicant"), on 4 December 2019;

the decision to give notice of the application to the Romanian Government ("the Government");

the parties' observations;

Having deliberated in private on 31 May and 11 October 2022,

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

INTRODUCTION

1. The application concerns the authorities' refusal to allow the applicant to sit the entrance examination to study military medicine because her height and weight were below the thresholds set by an Order of the Ministry of National Defence ("the MND"), which was valid at the time in question. The Government were given notice of the application under Article 14 of the Convention read in conjunction with Article 2 of Protocol No. 1 to the Convention.

THE FACTS

2. The applicant was born in 1999 and lives in Geamăna, Argeş County. She was represented by Mr I.A. Graure, a lawyer practising in Piteşti.

3. The Government were represented by their Agent, Ms O.F. Ezer, of the Ministry of Foreign Affairs.

4. The facts of the case may be summarised as follows.

I. RECRUITMENT AND ADMISSION PROCESS

5. The applicant, who wished to study military medicine in one of the two State-run Universities offering such a programme, embarked upon the recruitment process to become eligible to sit the relevant entry exams (see paragraph 17 below). As required by law (see paragraphs 17 and 18 below), she underwent a medical examination at Piteşti Emergency Military Hospital ("the EMH").

6. In a report dated 12 February 2018, the EMH found the applicant unsuited to study military medicine because her weight (44 kg) and height (150 cm) were below the requirements set out by Order no. M.55/2014 of the MND (see paragraph 18 below).

7. On 20 March 2018, after re-evaluating the applicant, the Central Commission for Military Forensic Medicine upheld the findings of the above-mentioned report. It found no other medical condition that would render the applicant unsuited to sit the entrance examination for military medical school.

II. COURT PROCEEDINGS

8. On 27 April 2018 the applicant brought an action in the Piteşti Court of Appeal against the EMH and the MND; on 21 June 2018 she extended her initial action by naming the Central Commission for Military Forensic Medicine as an additional defendant. She relied on Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) ("Directive 2006/54/EC", see paragraph 23 below) and on the judgment of the Court of Justice of the European Union ("the CJEU") in *Kalliri* (see paragraph 24 below); she moreover challenged the lawfulness of Order no. M.55/2014, arguing that it was unjustifiable to set anthropometric restrictions on studying military medicine. In her view, no correlation could be established between, on the one hand, a person's height and weight and, on the other hand, the physical strength required for admission to a military academy. She noted that in the *Kalliri* judgment the CJEU had found that the domestic law under review placed women at a disadvantage and did not appear to be either appropriate or necessary to achieve the legitimate objective pursued. She pointed out that following the CJEU judgment in the *Kalliri* case, the Ministry of the Interior had abolished the height requirements for admission to Romania's police academies (see paragraph 19 below).

9. The MND explained that the reform of the Romanian military was aimed at creating a military force able to carry out all missions, thus increasing the interoperability of the military. It argued that, under the requirements of Article 8 § 2 of Law no. 80/1995 (see paragraph 20 below),

all military personnel, including physicians, had to be able to carry out military duties during all of their deployments. It explained that a soldier's standard equipment weighed approximately 57 kg.

10. In a decision of 20 December 2018 the Argeş County Court (to which the case was transferred, on 13 September 2018, by a decision of the Court of Appeal) dismissed the action, ruling that the restrictions at issue were justified, on the following grounds:

> "It is to be noted, in the light of the requirements of Law no. 80/1995, that activities carried out by ranked military personnel [*cadru militar*], be they physicians or not, require [the attainment of] specific anthropometric indices in order to render them fit to carry out [their] duties. In the present case, not only [the applicant]'s height but also her weight – well below the limits permitted by law – confirm that the setting of those limits, which are in fact reasonable, is objectively justified by a legitimate aim, and that the means used for achieving that aim are appropriate and necessary."

11. The court deemed that the fact that anthropometric requirements could be replaced by other criteria or tests did not render the former unjustified. It further acknowledged that the Ministry of the Interior had decided to cease to impose anthropometric restrictions during its recruitment process; however, it observed that it was not possible to extend that decision to encompass the MND, bearing in mind the differences in the activities carried out, on the one hand, by police officers and, on the other hand, by military officers. It further observed that in the *Kalliri* case the CJEU had examined a case of indirect discrimination against women who had been placed at a disadvantage compared to men because of the height requirements set by the domestic law. It also made reference to the findings of the National Council for Combating Discrimination ("the CNCD") in an action brought by the applicant concerning the same facts (see paragraph 15 below).

12. The applicant appealed, reiterating, notably, that Directive 2006/54/EC and the CJEU judgment in *Kalliri* (see paragraphs 23-24 below) prohibited not only discrimination between male and female candidates for the MDU, but also discrimination on account of the "conditions of access to work" (*condiţiile de access la încadrarea în muncă*) – including the criteria for selecting candidates in general.

13. In a final decision of 25 June 2019 the Piteşti Court of Appeal upheld the County Court's decision on the same grounds as those cited by the County Court. It further reiterated that in *Kalliri* the CJEU had examined solely an allegation of indirect discrimination against female candidates, which was not applicable to the present situation, in view of the fact that Order no. M55/2014 set separate anthropometric requirements for male candidates and for female candidates (see paragraph 18 below).

III. THE NATIONAL COUNCIL FOR COMBATING DISCRIMINATION

14. On 26 April 2018 the applicant lodged a complaint with the National Council for Combating Discrimination (*Consiliul Naţional pentru Combaterea Discriminării* – "the CNCD"), accusing the EMH of discriminatory practices.

15. In a decision of 19 September 2018 the CNCD found that the minimum height limits set by law were justified by the requirements of military service and the physical effort expected from a soldier during military action. It thus concluded that the height requirements for admission to a military medical institute did not constitute discrimination when it was justified by the nature of the work requirements and was proportionate to the aim sought to be achieved.

IV. OTHER DEVELOPMENTS

16. On 20 April 2021 the applicant applied to the school for non-commissioned officers. There is no indication that, following the abolition of the anthropometric limits set by Order no. 92/2020, she reapplied to take the tests that had to be passed in order to sit the examination for admission to study military medicine (see paragraph 18 below, *in fine*).

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW

17. Under the instructions issued by the MND (Order no. 30 of 21 March 2012, which was replaced by Order no. M. 217 of 22 November 2019), the admission process for military educational establishments consists of three stages: recruitment, selection, and an entrance exam. The recruitment process consists of the verification of several criteria concerning the person's age, medical condition, and background. The selection of candidates consists of three consecutive eliminatory tests: a psychological evaluation, physical tests and an interview; only those candidates who pass a medical examination are allowed to undergo the selection process. Candidates who pass the selection process are directed to the military educational establishments in charge of organising the admission exams.

18. The MND determines the medical criteria for admission to military educational institutes. At the time when the applicant wished to sit the admission examination, they were set by Order no. M.55/2014 and included anthropometric requirements, which differed for women and men. Those requirements were: a minimum height of 155 cm and a minimum weight of 47.03 kg for female candidates, and a minimum height of 165 cm and a minimum weight of 55.26 kg for male candidates (paragraph 309 of

Appendix 1 to Order no. M.55/2014). As of 14 May 2020 the anthropometric requirements for admission were removed by Order no. 92/2020 of the MND.

19. Article 6 of Order no. 140/2016 of the Ministry of the Interior concerning the management of human resources within the police force provided that male candidates for police academies had to have a minimum height of 1.70 m, and that female candidates had to have a minimum height of 1.65 m; it further provided that all candidates for the specialist marine-border police had to be at least 1.60 m tall. On 22 November 2017 those requirements were abolished by Order no. 144/2017 of the Ministry of the Interior.

20. Law 80/1995 on the status of military personnel states as follows:

Article 8

"(1) Military personnel have the following main duties:

(a) to be loyal and devoted to the Romanian State and its armed forces, to fight for the defence of Romania – if necessary at the sacrifice of [their] lives – [and] to respect and defend the values of constitutional democracy;

(b) to adhere to the military oath and the provisions of military regulations, to execute exactly and in a timely manner commanders' and superiors' orders, [and to be] answerable for the way in which they fulfil their missions. Military personnel cannot be ordered and are forbidden to execute acts contrary to the law, the customs of war and the international conventions to which Romania is a party; non-execution of such orders does not incur ... criminal or civil liability;

(c) to maintain the honour and glory of the Romanian army and of the branch of the service and the unit to which they belong, and the dignity of the rank [they hold] and the military uniform they wear;

(d) to perfect their professional training, [and] to ensure the training and education of their subordinates and to defend their rights;

(e) to perform regular maintenance on and [check the] operational capacity of [their] equipment and armaments in order to ensure their efficient use and administration;

(f) to conscientiously keep military, State, and service secrets, as well as the confidentiality of certain activities and documents.

(2) Active military personnel must participate in deployments abroad, as required by the [MND], in order to comply with the obligations undertaken by Romania through international conventions and treaties.

(3) Exceptions may be made, upon request, to the provisions of paragraph 2, for military personnel with special family difficulties ..."

21. Government Decision no. 585/1990 on the creation of the Military Medical Institute provides that the entrance examination to that educational facility is to be organised on the basis of criteria set by the Ministry of Education and the MND.

II. LAW AND PRACTICE OF THE EUROPEAN UNION

22. The Charter of Fundamental Rights of the European Union prohibits, in its Article 21, "any discrimination based on any ground such as ... sex, ... [or] genetic features ...".

23. In addition to Article 157 of the Treaty on the Functioning of the European Union, the matter of equality between men and women in employment related matters has been tackled in several directives issued by the Council of the European Union, such as: Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 39 p. 40 ("Directive 76/207/EEC"), and Directive 2006/54/EC (which repealed Directive 76/207/EEC; OJ L 204 p. 23**).**

24. In its judgment of 18 October 2017 in *Kalliri* (case no. C-409/16, EU:C:2017:767) the CJEU stated that Directive 76/207/EEC had to be interpreted as prevailing over a law of the member State in question (Greece) making candidates' admission to a competition for entry into a police academy of that member State subject, whatever their sex, to a requirement that they be of a physical height of at least 1.70 metres, since that law (i) worked to the disadvantage of a far greater number of women than men, and (ii) did not appear to be either appropriate or necessary to achieve the legitimate objective pursued (which it was for the national court to determine). The relevant parts read as follows:

> "36. It should be recalled that the [CJEU] has already held that the concern to ensure the operational capacity and proper functioning of the police services constitutes a legitimate objective (see, as regards Article 4(1) of Council Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16), the structure, provisions, and objective of which is largely comparable with those of Directive 76/207, the judgments of 13 November 2014, *Vital Pérez*, C-416/13, EU:C:2014:2371, paragraph 44, and 15 November 2016, *Salaberria Sorondo*, C-258/15, EU:C:2016:873, paragraph 38).
>
> 37. It must, however, be ascertained whether a minimum height requirement, such as provided for in the law at issue in the main proceedings, is suitable for securing the attainment of the objective pursued by that law and does not go beyond what is necessary in order to attain it.
>
> 38. In that regard, while it is true that the exercise of police functions involving the protection of persons and goods, the arrest and custody of offenders and the conduct of crime prevention patrols may require the use of physical force requiring a particular physical aptitude, the fact remains that certain police functions, such as providing assistance to citizens or traffic control, do not clearly require the use of significant physical force (see, to that effect, the judgment of 13 November 2014, *Vital Pérez*, C-416/13, EU:C:2014:2371, paragraphs 39 and 40).
>
> 39. Furthermore, even if all the functions carried out by the Greek police required a particular physical aptitude, it would not appear that such an aptitude is necessarily

connected with being of a certain minimum height and that shorter persons naturally lack that aptitude.

40. In that context, it may be taken into account that until 2003 the Greek law required, for the purposes of admission to the competition for entry to the Greek School for Police Officers and Policemen, different minimum heights for men and for women, since, regarding the latter, the minimum height was fixed at 1.65m, compared with 1.70m for men.

41. The facts referred to by Ms Kalliri that, as regards the Greek armed forces, port police and coast guard, different minimum heights are required for men and women and, for women, the minimum height is 1.60m, is also relevant.

42. In any event, the aim pursued by the law at issue in the main proceedings could be achieved by measures that are less disadvantageous to women, such as a preselection of candidates to the competition for entry into Schools for Police Officers and Policemen based on specific tests allowing their physical ability to be assessed.

43. It follows that, subject to the assessments that it is for the national court to carry out, the law in question is not justified.

44. In those circumstances, the answer to the question referred is that the provisions of Directive 76/207 must be interpreted as precluding a law of a Member State, such as that at issue in the main proceedings, which makes candidates' admission to the competition for entry to the police school of that Member State subject, whatever their sex, to a requirement that they are of a physical height of at least 1.70m, since that law works to the disadvantage of a far greater number of women compared with men and that law does not appear to be either appropriate or necessary to achieve the legitimate objective that it pursues, which it is for the national court to determine."

25. In its judgment of 26 October 1999 in *Sirdar* (case no. C-273/97, EU:C:1999:523), which concerned the refusal to employ the applicant, a woman, as a chef in the British Royal Marines (the BRM"), the CJEU ruled that the exclusion of women from service in special combat units such as the BRM might be justified by reason of the nature of their activities in question and the context within which they were to be carried out. The BRM excluded women from service as a matter of policy on the grounds that their presence was incompatible with the requirement of "interoperability" – that is to say the need for all Royal Marines, irrespective of their respective specialisations, to be capable at any time of serving at their respective rank and skill level in a commando unit.

26. In its judgment of 11 March 2003 in *Dory* (case no. C-186/01, EU:C:2003:146), the CJEU ruled that Community law – and in particular Article 2 § 2 of Council Directive 76/207/EEC of 9 February 1976 – did not preclude compulsory military service being reserved for men.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN TOGETHER WITH ARTICLE 2 OF PROTOCOL NO. 1 TO THE CONVENTION

27. The applicant complained that the decisions of the national authorities (that is to say the EMH and the domestic courts) not to allow her to participate in the admission process for studying military medicine had constituted a discriminatory restriction of her right to education on the grounds of her anthropometric attributes. She relied on Article 14 of the Convention taken together with Article 2 of Protocol No. 1 to the Convention, which read as follows:

Article 14

"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."

Article 2 of Protocol No. 1

"No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

A. Admissibility

28. The Court has consistently held that Article 14 of the Convention complements the other substantive provisions of the Convention and the Protocols thereto. Article 14 has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded thereby. 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 them. The prohibition of discrimination enshrined in Article 14 thus extends beyond the enjoyment of the rights and freedoms which the Convention and the Protocols thereto require each State to guarantee. It applies also to those additional rights, falling within the general scope of any Convention Article, for which the State has voluntarily decided to provide (see, among many other authorities, and *Molla Sali v. Greece* [GC], no. 20452/14, § 123, 19 December 2018, with further references).

29. Furthermore, the Court has found that the institutions of higher education and the right of access to them come within the scope of the first sentence of Article 2 of Protocol No. 1 (see *Leyla Şahin v. Turkey* [GC],

no. 44774/98, § 141, ECHR 2005-XI, in the context of a university run by the State).

30. Consequently, the applicant's complaint that she had been discriminated against in the admission process to an institution of higher education falls within the ambit of Article 2 of Protocol No. 1, and therefore Article 14 of the Convention is likewise applicable to the facts of the present case (see, *mutatis mutandis*, *Enver Şahin v. Turkey*, no. 23065/12, § 25, 30 January 2018).

31. Lastly, the Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

32. The applicant argued that because of the anthropometric limitations set by Order no. M.55/2014 she had been unable to prove her physical strength and suitability to become a military physician.

33. Moreover, although the duties and obligations of a military physician remained unchanged, the fact that the anthropometric requirements had been removed in 2020 (see paragraph 18 above *in fine*) proved that they had not been objectively and reasonably justified in the first place.

34. Lastly, she argued that as the discrimination in question had occurred when she had been declared unsuited to sit the examination, the fact that she could now sit the examination was irrelevant to the issue at stake.

(b) The Government

35. The Government stated that the applicant had not demonstrated that she had been treated differently than any other person or group of persons in a significantly similar situation. Her size had rendered her unsuited to carry out military duties, according to the requirements set out by Order no. M.55/2014, which the MND had issued in the exercise of its powers (paragraph 18 above). Those limits had been objective and reasonable as, under Law no. 80/1995, active military personnel (including medics) had had to possess certain physical aptitudes in order to be able to carry out their duties.

36. In addition, the authorities had thoroughly examined her complaint and had applied the relevant domestic law.

37. Lastly, they had pointed out that the applicant's right to education had not been breached, given that she had had unhindered access to the possibility of studying medicine at a civilian university. Moreover, as of 2020 the applicant had had the unrestricted possibility of applying to the military

medical institutes as well, but had not used that possibility to reapply to study military medicine.

2. The Court's assessment

(a) General principles

38. The Court reiterates that only differences in treatment based on a personal characteristic (or "status") by which persons or groups of persons are distinguishable from each other are capable of amounting to discrimination within the meaning of Article 14. However, the list set out in Article 14 is illustrative and not exhaustive, as is shown by the words "any ground such as" (in French, "*notamment*") (see *Carson and Others v. the United Kingdom* [GC], no. 42184/05, §§ 61 and 70, ECHR 2010).

39. In the enjoyment of the rights and freedoms guaranteed by the Convention, Article 14 affords protection against different treatment, without objective and reasonable justification, of individuals in analogous, or relevantly similar, situations. For the purposes of Article 14, 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 (see *Molla Sali*, cited above, § 135, and *Konstantin Markin v. Russia* [GC], no. 30078/06, § 125, ECHR 2012 (extracts), with further references).

40. The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment. The scope of this margin will vary according to the circumstances, the subject matter and its background (see *Molla Sali*, cited above, § 136). In that regard, the Court has stated, albeit in the context of general measures of economic or social strategy, that because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the State's policy choice unless it is "manifestly without reasonable foundation" (see *Muñoz Díaz v. Spain*, no. 49151/07, §§ 48-49, ECHR 2009). Furthermore, the Court has also afforded States a wide margin of appreciation in matters relating to national security in general and the armed forces in particular, because they are intimately connected with the nation's security and thus central to the State's vital interests (see *Konstantin Markin*, cited above, §§ 128 and 134).

41. Lastly, the Court reiterates that Article 2 of Protocol No. 1 allows the limitation of access to universities to those who have duly applied for entrance and have passed the relevant examination (see *Altınay v. Turkey*, no. 37222/04, § 35, 9 July 2013; also see, for an exhaustive presentation of the general principles concerning the right to education, *Çam v. Turkey*,

no. 51500/08, § 52, 23 February 2016, and *G.L. v. Italy*, no. 59751/15, § 49, 10 September 2020, with further references).

(b) Application of those principles to the facts of the present case

42. The Court observes that the applicant was not allowed to sit the entrance examination to study military medicine because of her size, a genetic feature which represents a personal characteristic or "status" that is capable of falling within the non-exhaustive list of prohibited grounds for discrimination set out in Article 14 (see also Article 21 of the Charter of Fundamental Rights of the European Union, cited in paragraph 22 above). At the time in question, the MND, in exercising its regulatory power (see paragraphs 18 and 35 above), had set anthropometric limits in respect of all potential candidates for the country's military educational establishments.

43. At the outset, it is to be noted that the anthropometric limits set by law were different for male and female candidates, and that the applicant did not make any allegations to the effect that those limits gave rise to discrimination on the basis of sex (contrast *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, §§ 55 and 66, ECHR 2006-VI (concerning a difference in pensionable age between men and women). In particular, the applicant did not argue that despite the different height and weight limits for men and women the latter were disproportionately affected. The domestic courts also unequivocally found that the case raised no issue of indirect discrimination on the basis of sex (see paragraph 13 above).

44. That said, it has been established that the applicant was treated differently from other female candidates whose height and weight did fall within the limits set by law – that is to say set by Order no. M.55/2014 of the MND. It can thus be inferred that, as compared to that group, the authorities' decision to declare her unsuited to be admitted to sit the entrance examination to study military medicine placed her at a disadvantage.

45. The Court's role, however, is not to assess and review in abstract the State's policy in this field or to rule on which interpretation of the domestic legislation is the most correct, but to consider the consequences that the authorities' decisions had for the applicant (see, *mutatis mutandis, Ádám and Others v. Romania*, nos. 81114/17 and 5 others, § 98, 13 October 2020, and *Molla Sali*, cited above, § 142, with further references). Its task is thus to decide whether there was any objective and reasonable justification for the difference in treatment that affected the applicant, and which had its basis in the application of domestic law. More precisely, the Court must determine whether the reasons put forward by the authorities to justify the treatment applied to the applicant were relevant and sufficient (see, *mutatis mutandis*, *Napotnik v. Romania*, no. 33139/13, § 78, 20 October 2020).

46. In the domestic proceedings, the MND posited that the restriction at issue served the purpose of ensuring that the military was fit to participate in any mission. It referred to Article 8 § 2 of Law no. 80/1995, which, in its

view, required all personnel, including medics, to be able to carry the standard military equipment (see paragraph 9 above). That restriction, which could be argued to correspond to the legitimate aim of protecting national security (see, *mutatis mutandis*, *Konstantin Markin*, cited above, § 137), was accepted as justified by the domestic courts that examined the merits of the action brought by the applicant (see paragraphs 10 and 13 above).

47. The Court reiterates that the imposition of selection criteria for access to higher education is not in itself contrary to the requirements of Article 2 of Protocol No. 1 to the Convention (see paragraph 41 above). This finding is equally valid for admission to a civilian university and for admission to military educational establishments. For this reason, setting limits for access to military service does not, as such, run counter to the obligations set by the Convention in respect of Article 2 of Protocol No. 1. In the same vein, the principle of interoperability, referred to by the domestic authorities in the present case (see paragraph 9 above, and also paragraph 46 above), may also justify imposition of restrictions to the access to military service.

48. However, a reasonable relationship of proportionality must exist between the means employed and the aim sought to be realised by those restrictions (see *Andrejeva v. Latvia* [GC], no. 55707/00, § 81, ECHR 2009, with a further reference). In this respect, the Court observes that the domestic courts took for granted the MND's assertions concerning the duties of a military physician without assessing their legal basis or legitimacy. Article 8 of Law 80/1995, relied on by the MND, does no more than describe in general terms the duties of an officer. In fact, there is no reference either in the parties' submissions or in the court decisions to a legal instrument describing specifically the duties of a military physician or their relation to the other, non-medical officers. In the same vein, the domestic authorities did not clearly identify the duties of military physicians or which of those duties would require physical strength.

49. Furthermore, the Court observes that, in fact, the domestic authorities did not point to any specific legal instrument that would support the allegation that the Romanian military was, at that moment, organised under the principle of interoperability or that a military physician would be called to perform missions involving a certain amount of physical strength going above what is expected of a medic (see paragraph 9 above).

50. In fact, the Court cannot but observe that no particular attention was given by the domestic authorities to the status of a military physician and his/her actual duties and possible assignments.

51. The Court also notes that the arguments raised by the authorities and accepted by the domestic courts seem to indicate the necessity that all military personnel possess a certain degree of strength. The Court accepts that, as a matter of policy, it is within the purview of the State authorities to set the criteria for the selection of candidates for military educational institutes (see, *mutatis mutandis*, *Ádám and Others*, cited above, § 98 and, *mutatis mutandis*,

the case-law cited in paragraph 40 above). To that effect, in accordance with the principle of subsidiarity, the Court will not substitute itself for the national authorities in the issue of the recruitment to and organisation of the armed forces unless they are "manifestly without reasonable foundation".

52. The Court thus accepts, as pointed out by the domestic courts (see paragraph 11 above), that the mere fact that other criteria could also be used in the process of selecting candidates, as argued by the applicant (see paragraphs 8 and 32 above), is not in itself sufficient to invalidate those set by the authorities.

53. However, the national authorities did not show that there was necessarily a link between the criteria selected by the legislature (including the minimum size of candidates) and the justification given for those restrictions (that is the need to determine each candidate's strength). The applicant expressly noted that point during the domestic proceedings (see paragraph 8 above), and relied on the findings of the CJEU in *Kalliri* to lend force to her argument (see paragraphs 8 and 12 above). The domestic courts, however, contested her assertions, including her reliance on *Kalliri*. In doing so, they limited their examination and regarded the CJEU judgment exclusively from the standpoint of indirect discrimination based on sex (see paragraphs 11 and 13 above).

54. Admittedly, it is not for this Court to interpret European Union law as such. That said, the Court cannot but note that by summarily deeming *Kalliri* to be irrelevant to the facts of the case, the domestic courts failed to engage meaningfully with that judgment of the CJEU and to examine its ramifications highlighted by the applicant in her arguments before the court.

55. Overall, the Court cannot but observe that the domestic courts did not provide any justification concerning the connection between a candidate's size and his or her strength. It does not appear that they had at their disposal any studies, research or statistical data, or any type of empirical evidence, that could have informed their decisions. It appears that the domestic courts, relying exclusively on the arguments put forward by the MND, equated size and strength, and in doing so, failed to advance any reasons for their findings.

56. Lastly, the Court notes that anthropometric requirements have been recently eliminated from the MND's list of criteria for selection (see paragraph 18 *in fine* above) and that the applicant is now free to apply to the military educational institute of her choice. That said, the Court accepts, as argued by the applicant, that this fact alone does not retroactively remove the disadvantage that she encountered during the admission process (see paragraph 34 above).

57. In the light of the above-noted findings, the Court considers that the domestic authorities have failed to put forward any reasonable and objective justification for the disadvantage faced by the applicant in the admission process to study military medicine.

58. There has accordingly been a violation of Article 14 of the Convention taken together with Article 2 of Protocol No. 1.

II. 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 claimed 10,000 euros (EUR) in respect of non-pecuniary damage.

61. The Government contested the amount sought and argued that the finding of a violation should constitute sufficient just satisfaction.

62. The Court considers that the applicant must have sustained non-pecuniary damage that cannot be compensated for solely by the finding of a violation. Having regard to the nature of the violation found and making its assessment on an equitable basis, the Court awards the applicant EUR 7,500 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

63. The applicant made no claim under this head. Consequently, no award is called for.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 14 of the Convention taken together with Article 2 of Protocol No. 1 to the Convention.

3. *Holds*
   (a) that the respondent State is to pay to the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 7,500 (seven thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;

(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;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 8 November 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Ilse Freiwirth Deputy Registrar	Gabriele Kucsko-Stadlmayer President