

# European Anti-Discrimination Law Review

# 9

December 2009

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# European Anti-discrimination Law Review

No. 9 - 2009



Legal Review prepared by the European Network of Legal Experts in  
the non-discrimination field (on the grounds of Racial or Ethnic Origin,  
Religion or Belief, Disability, Age and Sexual Orientation)

**The content of this publication has been drafted by the European Network of Legal Experts in the non-discrimination field and does not necessarily reflect the opinion or position of the European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities.**

This publication is supported for under the European Community Programme for Employment and Social Solidarity – PROGRESS (2007-2013). This programme is managed by the Directorate-General for Employment, Social Affairs and Equal Opportunities of the European Commission. It was established to financially support the implementation of the objectives of the European Union in the employment and social affairs area, as set out in the Social Agenda, and thereby contribute to the achievement of the Lisbon Strategy goals in these fields.

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The information contained in this ninth issue of the review reflects, as far as possible, the state of affairs on 15 June 2009.

ISBN 2-930399-53-8

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Andrei | 1988



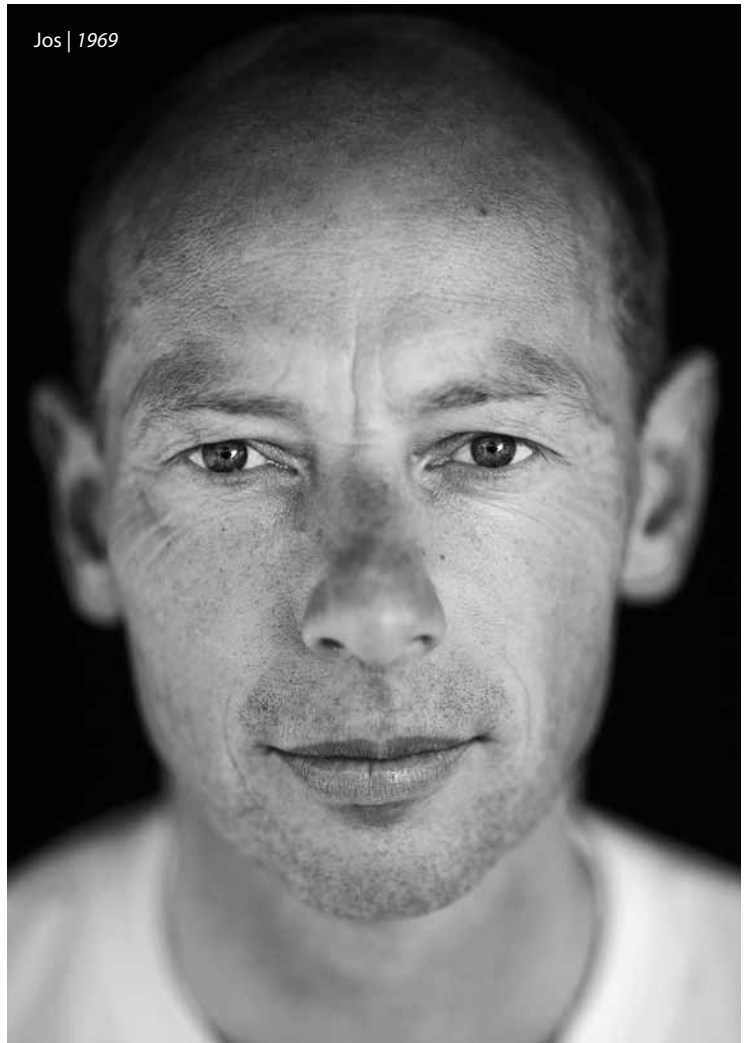
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# Introduction

The European Network of Legal Experts in the non-discrimination field<sup>1</sup> has been managed by Human European Consultancy and the Migration Policy Group (MPG) since 2004. This Network is also composed of one national expert per EU Member State, senior researchers and ground coordinators. The aim of the Network is to continually monitor the transposition and implementation of the two Anti-discrimination directives<sup>2</sup> on the national level and to provide the European Commission with independent advice and information. It also produces the European Anti-discrimination Law Review and various Thematic Reports, which are all available in English, French and German. Moreover, the Network launched its Website in June 2009 ([www.non-discrimination.net](http://www.non-discrimination.net)) providing all relevant information about the Network, its reports, publications, state of affairs in the EU Member States (legislation as well as case law) and activities.

In October 2009 the Network organised its legal seminar for representatives of the Member States, Equality bodies and its own members; this was the second year that the seminar was held together with the European Network of Legal Experts in the field of gender equality and addressed all 6 grounds of discrimination. The legal seminar involved approximately 200 participants and included workshops on the following themes: discrimination in access to goods and services; age discrimination: recent developments; link between equality and other fundamental rights; discrimination against transgender: gender identity as a ground of discrimination; discrimination against Roma: legal developments and discrimination on grounds of gender and religion: a case of conflict between grounds. In addition, during the plenary session, MEP Lyz Lynne elaborated on the European Parliament's approach to discrimination and Prof. D. Oppenheimer of the University of Berkeley presented the U.S. anti-discrimination legal developments.

This is the ninth issue of the European Anti-discrimination Law Review, prepared by the European Network of Legal Experts in the non-discrimination field. The Law Review provides an overview of the latest developments in European anti-discrimination law and policy (the information reflects, as far as possible, the state of affairs as of 15 June 2009). Furthermore, it includes an article on the South-African equality law by Cathi Albertyn, Professor of Law at the University of the Witwatersrand, and an article by Dr. Natalie Boccadoro of Paris Ouest Nanterre University, addressing the issue of housing rights and racial discrimination.

In addition, there are updates on legal policy developments at the European level and updates from the case law of the European Court of Justice and the European Court of Human Rights. At the national level, the latest developments in non-discrimination law in the EU Member States can be found in the section on News from the Member States. These four sections have been prepared and written by the Migration Policy Group (Isabelle Chopin and Eirini-Maria Gounari) on the basis of the information provided by the national experts and their own research in the European sections.

Isabelle Chopin

Piet Leunis

<sup>1</sup> <http://www.non-discrimination.net>.

<sup>2</sup> Directives 2000/43/EC and 2000/78/EC.

Meet ordinary people in this Review,  
facing discrimination

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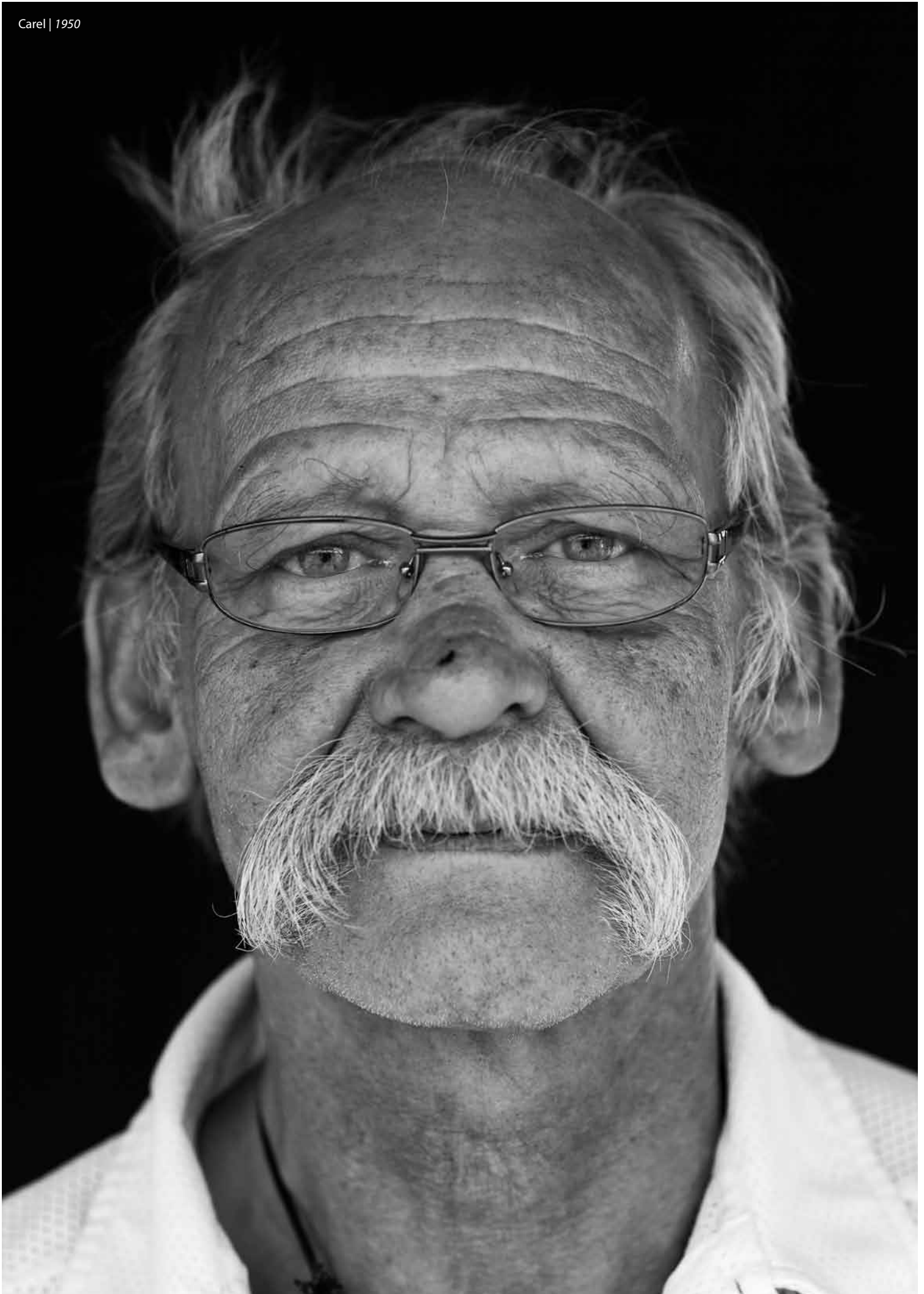
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# South African Equality Law

By Cathi Albertyn\*

## Introduction

South Africa is a constitutional democracy with strong powers of judicial review. The Constitution is the supreme law of the Republic, and all 'law or conduct inconsistent with it is invalid'.<sup>3</sup> The Constitution includes a Bill of Rights described as 'the cornerstone of democracy in South Africa'.<sup>4</sup> Equality is both a foundational value of South Africa's new democracy and a powerful right.<sup>5</sup> A detailed equality guarantee in Section 9 of the Bill of Rights provides for protection against unfair discrimination<sup>6</sup> and enables positive measures 'designed to promote or advance persons, or categories of persons, disadvantaged by unfair discrimination'.<sup>7</sup>

Equality and discrimination are regulated in South Africa by the Constitution and two key pieces of legislation. The Employment Equity Act, no. 55 of 1998, (the EEA) provides protection against unfair discrimination in the workplace and enables affirmative action for three designated groups (based on race, gender and disability). The Promotion of Equality and Prevention of Unfair Discrimination Act, no. 4 of 2000, (the Equality Act) provides comprehensive protection against unfair discrimination in the public and private spheres, except where the EEA is applicable.<sup>8</sup>

Legal protection against unfair discrimination is comprehensive. Sixteen 'prohibited' grounds are mentioned in the Constitution: race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. Others may be added if differential treatment on such a ground has the potential to impair human dignity.<sup>9</sup> Similar grounds are included in the Equality Act<sup>10</sup> and the EEA.<sup>11</sup>

In *MEC for Education, Kwazulu-Natal v. Pillay*,<sup>12</sup> the Constitutional Court confirmed that litigants 'cannot circumvent legislation enacted to give effect to a constitutional right by attempting to rely directly on the constitutional right'.<sup>13</sup> Potential litigants must thus bring claims under the Equality Act or the EEA

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<sup>3</sup> Section 2 of the Constitution of the Republic of South Africa, 108 of 1996. See also Section 8 addressing the application of the Bill of Rights.

<sup>4</sup> Section 7.

<sup>5</sup> Preamble, Section 1 of the Constitution.

<sup>6</sup> Section 9(3) & (4).

<sup>7</sup> Section 9(2).

<sup>8</sup> Section 5(3) of the Equality Act provides that the Equality Act 'does not apply to any person to whom and to the extent to which the Employment Equity Act 1998 ... applies'. The EEA applies to 'employees' only (Section 4(1)).

<sup>9</sup> *Harksen v. Lane* NO 1997 (11) BCLR 1489 (CC) para 49. The court has thus recognised grounds relating to citizenship. See *Larbi-Odam v. Member of the Executive Council for Education (N-W Province)* 1997 (12) BCLR 1655 (CC).

<sup>10</sup> Section 34 of the Equality Act notes that the grounds of HIV/AIDS; nationality; socio-economic status and family responsibility and status should be given special consideration by the Minister for inclusion in the Act. Despite a report by the SA Human Rights Commission that these should be included, no legislative amendments have been forthcoming. The open ended nature of the list means that a court may accept any one of these as a ground if it is deemed to pass the test set out in s 1(1)(xxii) (b) relating to systemic disadvantage and human dignity.

<sup>11</sup> Although slightly differently articulated, the EEA covers the same broad range of grounds in Section 6(1).

<sup>12</sup> (CCT 31/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC).

<sup>13</sup> Para 40.

where they are applicable. The Court also noted that the Equality Act cannot be applied in a manner that decreases the protection given under Section 9 of the Constitution.<sup>14</sup>

### Unfair discrimination

South African equality law uses the term 'unfair discrimination'. This has slightly different meanings under the Constitution and each Act. In general, the notion of fairness envisages the possibility of fair or legitimate discrimination. Under the Constitution, the concept of fairness has tended to be reflected in a moral enquiry focusing on the impact of the impugned act on the complainant and assessing this impact in relation to degrees of disadvantage and its potential to undermine human dignity.<sup>15</sup> It is only during the limitations analysis under Section 36 that this is weighed against justifications on the part of the State.

By contrast, the notion of fairness under the Equality Act and the EEA tends to blend all complainant-based and justificatory factors into a single enquiry into fairness, thus requiring a weighing up of the violation against the justifications of the respondent.

### Section 9 of the Constitution

#### *Positive measures*

Section 9(2) confirms that positive measures are intrinsic to the idea of equality in the South African Constitution and shields positive measures from attack.<sup>16</sup> In the leading case on positive measures, *Minister of Finance v. Van Heerden* (concerning a race-based measure to subsidise the pensions of post-1994 members of parliament),<sup>17</sup> the Constitutional Court confirmed that positive measures are 'not a derogation from, but [are] a substantive and composite part of, the equality protection envisaged by the provisions of Section 9 and of the Constitution as a whole. Their primary object is to promote the achievement of equality'.<sup>18</sup> As long as such measures conform to the internal test set by Section 9(2), they are lawful.<sup>19</sup> This test requires three criteria to be satisfied for a defence to succeed: (a) Does the measure target persons or categories of persons who have been disadvantaged by unfair discrimination? (b) Is the measure designed to protect persons or categories of persons who have been disadvantaged by unfair discrimination? (c) Does the measure promote the achievement of equality?<sup>20</sup>

Successful compliance with the criteria means that the measures are fair.<sup>21</sup> Thus fairness remains an important principle in Section 9(2) enabling the examination of competing moral claims within the social and historical context of inequality in South African society. The enquiry entails balancing the prejudice caused to individuals by positive measures against the collective benefit of these measures to society in overcoming past discrimination and disadvantage. In general, the enquiry entails an examination of many of the factors relevant to the fairness enquiry under Section 9(3), but with an emphasis on the group being advanced, rather than the group being prejudiced. Section 9(2) has a forward-looking focus

<sup>14</sup> Para 43.

<sup>15</sup> For more detail see C Albertyn & B Goldblatt 'Equality' in S Woolman *et al Constitutional Law of South Africa* (2 ed, 2007) chapter 35, pp 75-82.

<sup>16</sup> Section 9(2) reads: 'Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect and advance persons, or categories of persons, disadvantaged by unfair discrimination, may be taken.'

<sup>17</sup> (CCT 63/03) [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC).

<sup>18</sup> *Van Heerden* para 32.

<sup>19</sup> *Van Heerden* para 32.

<sup>20</sup> Para 37.

<sup>21</sup> *Van Heerden* para 140.



that places more weight on the remedial aspects of equality as applied to a disadvantaged group, rather than an assessment of the impact of allegedly discriminatory measures.<sup>22</sup>

## Unfair discrimination

Although Section 9 prohibits unfair discrimination by the state and any person, this section has almost exclusively been used to challenge legislation or state conduct.

### *Race and ethnicity*

The Constitutional Court has decided a number of cases on the ground of race and related grounds. These have either targeted apartheid legislation or race-based transitional measures. *City Council of Pretoria v. Walker*<sup>23</sup> and *Bel Porto School Governing Body v. Premier, Western Cape*<sup>24</sup> concerned the constitutionality of transitional measures in local government and education, whereas *Moseneke v. Master of the High Court*<sup>25</sup> concerned apartheid laws that treated the estates of deceased black people differently from others and *Bhe v. Magistrate, Khayalitsha* the customary law rule of primogeniture (unfair discrimination on race and gender).<sup>26</sup> Most recently, in *Gumede v. President of the RSA*<sup>27</sup> the court found a provision of the Recognition of Customary Marriage Act, no. 112 of 1998, a law passed by the democratic parliament, to constitute unfair race and gender discrimination as it continued to subject women married before the passage of the act to a discriminatory customary inheritance regime.

As the problematic legal remnants of apartheid decrease in number, fewer cases of legislative discrimination are likely to reach the courts, although indirect race discrimination cases may continue for as long as the material legacy of past racism remains. Challenges to affirmative action cases dealing with issues of race brought under Section 9(2) may well increase as previously advantaged groups question the continued existence of positive measures. It is also likely that a number of race discrimination cases will be brought under the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) which covers racism and inequality in daily life.

### *Religion or belief*

Protection against discrimination on the basis of religion in South Africa includes the protection of individuals and groups identifying with a particular religion as well as those adhering to the practices

<sup>22</sup> Paras 78 to 80 (per Mokgoro J).

<sup>23</sup> *City Council of Pretoria v. Walker* 1998 (3) BCLR 257 (CC) at para 81. The case concerned a complaint against alleged differential treatment by the Pretoria City Council. The Council's policy saw residents of a formerly white suburb paying metered rates for municipal services while residents of the adjacent, formerly black township paid a flat rate. The Constitutional Court said that there was race discrimination (albeit indirect) but that it was not unfair as the flat rate was the only practical response to the immediate post-apartheid situation. In the second part of the case, however, the Court held that the Council's differential debt collection policy constituted unfair discrimination.

<sup>24</sup> 2002 (3) SA 265 (CC). The Court in found that the distinction between previously black and white schools did not result in unfair race discrimination.

<sup>25</sup> *Moseneke v. Master of the High Court* 2001 (2) BCLR 103 (CC) at para 21. In this case a section of the Black Administration Act treating the administration of the estates of black people differently from that of others in the country was declared to be unfair race discrimination on the basis of race, colour and ethnic origin. Also see *Ex Parte Western Cape Provincial Government; In Re: DVB Behuising (Pty) Ltd v. North West Provincial Government* 2000 (4) BCLR 347 (CC) on the racist history of the Black Administration Act and its predecessors.

<sup>26</sup> *Bhe v. Magistrate, Khayalitsha* 2005 (1) BCLR 1 (CC). The case also concerned a challenge to succession provisions under the Black Administration Act and to the customary law of male primogeniture. The offending section of the Act was held to be unfair race discrimination (at paras 60-8).

<sup>27</sup> (CCT 50/08) [2008] ZACC 23; 2009 (3) BCLR 244 (CC); 2009 (3) SA 152 (CC).



and beliefs of that religion. The concepts of belief and conscience extend to moral or other value systems which may be part of or separate from faith-based systems. Other than protection against unfair discrimination, the Bill of Rights guarantees freedom of religion, belief and opinion in Section 15. Cases concerning religion and belief are more likely to be adjudicated under Section 15<sup>28</sup> rather than Section 9. Equality remains an important component of these cases however. *Christian Education of SA v. Minister of Education* concerned a claim by a group of Christian schools that the legislative prohibition of corporal punishment violated the right to freedom of religion. In rejecting this claim, the Constitutional Court was mindful of the relationship between issues of religion and equality:<sup>29</sup>

The respondent contended that, in line with the above considerations, the State had two powerful interests in the matter. The first was to uphold the principle of equality. It contended that to affirm the existence of a special exemption in favour of religious practices of certain children only, would be to violate the equality provisions contained in S 9 of the Bill of Rights. More particularly, it would involve treating some children differently from others on grounds of their religion or the type of school they attended. I think this approach misinterprets the equality provisions. It is true that to single out a member of a religious community for disadvantageous treatment would, on the face of it, constitute unfair discrimination against that community. The contrary, however, does not hold. To grant respect to sincerely held religious views of a community and make an exception from a general law to accommodate them, would not be unfair to anyone else who did not hold those views. As the Court said in *Prinsloo v. Van der Linde and Another*, the essence of equality lies not in treating everyone in the same way, but in treating everyone with equal concern and respect. Permission to allow the practice to continue would, in these circumstances, not be inconsistent with the equality provisions of the Bill of Rights.<sup>30</sup>

### *Sexual orientation*<sup>31</sup>

A large number of cases have been brought to the courts challenging sexual orientation discrimination, many following a carefully formulated litigation strategy starting with challenges to the criminal law,<sup>32</sup> then moving on to cases addressing the status of, and extending benefits to, same sex couples,<sup>33</sup> and finally addressing the issue of same sex marriage.<sup>34</sup> In *Minister of Home Affairs v. Fourie* the Constitutional Court concluded that the common law and the formula in the Marriage Act were inconsistent with constitutional rights to equality and dignity and invalid to the extent that they excluded same-sex couples from marriage. The declaration of invalidity was suspended for one year to enable Parliament to enact legislation. The Civil Union Act, no. 17 of 2006, was duly passed.

<sup>28</sup> See for example, the case of *Prins* – an unsuccessful challenge to the state's failure to provide a religious exemption that would allow adherents of the Rastafari religion to use marihuana for religious purposes.

<sup>29</sup> 2000 (10) BCLR 1051 (CC).

<sup>30</sup> Per Sachs J para 42.

<sup>31</sup> For a more detailed discussion of the cases, see Albertyn & Goldblatt, above, pp 64-69.

<sup>32</sup> *National Coalition for Gay and Lesbian Equality v. Minister of Justice* 1999 (1) SA (6) found the criminalisation of sodomy to be unfair discrimination.

<sup>33</sup> *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs* 2000 (1) BCLR 39 (CC) found the failure to confer immigration benefits provided to spouses on permanent same-sex life partners to be unfairly discriminatory. *Satchwell v. President of the Republic of South Africa* 2002 (9) BCLR 986 (CC) (unfair exclusion of same-sex couples from the provisions of the Judges Remuneration and Conditions of Employment Act 88 of 1989); *Du Toit v. Minister for Welfare and Population Development* 2002 (10) BCLR 1006 (CC) (finding provisions of the Child Care Act 74 of 1983 unconstitutional for limiting joint adoption to married people to the exclusion of same-sex couples); *J v. Director-General, Department of Home Affairs* 2003 (5) BCLR 463 (CC).

<sup>34</sup> *Minister of Home Affairs v. Fourie; Lesbian and Gay Equality Project v. Minister of Home Affairs* 2006 (3) BCLR 355 (CC).

## Disability

Disability has not been the focus of constitutional litigation. In *Hoffman v. SAA* the Constitutional Court found there to be unfair discrimination on the basis of HIV status, which is similar in many respects to disability discrimination,<sup>35</sup> especially in relation to the denial of employment, prejudice and stigma suffered by HIV-positive people in South Africa.<sup>36</sup>

## Age

The Constitutional Court has not considered age discrimination, although the High Court considered this in two cases. In *Christian Lawyers Association v. Minister of Health*,<sup>37</sup> a challenge to the provision of the Choice on Termination of Pregnancy Act, no. 92 of 1996, allowing girls under the age of 18 to choose to terminate their pregnancies without parental consent. The Court rejected the claim that girls under 18 were not capable of making this decision alone, especially as the Act made informed consent, and not age, the basis for access to termination of pregnancy. In reaching this conclusion, Mojaelo J noted that '[S]ection 9(3) ... prevent(s) unfair discrimination against "anyone" *inter alia* on the ground of "age". Any distinction between women on the ground of their age, would invade these rights.'<sup>38</sup>

*Harris v. Minister of Education* concerned a government policy that prevented a child from entering Grade 1 before the year in which he or she turned 7.<sup>39</sup> In finding unfair age discrimination, the Court concluded that there was no reason from an educational perspective why a child should not be ready for school in the year he or she turned 6. Since the case related to an independent rather than State school, there were no good administrative reasons for preventing younger children from attending independent schools.

## The Equality Act

The Equality Act provides for claims of unfair discrimination to be brought in Equality Courts. These are courts within the Magistrates' (lower) and High Courts in which the presiding officer is duly qualified to hear such cases. There is a paucity of reported judgments on these matters, both because Magistrates' Court cases are not reported and because relatively few cases have been heard in the High Courts.

The Equality Act applies to the state and all persons.<sup>40</sup> It makes no provisions for exemptions from exclusions. Rather, the line between permissible and impermissible discrimination is determined by presiding officers when they decide whether discrimination is fair or unfair. Effectively one must go to court to secure an exemption as fair discrimination.

A wide list of remedies available to these courts is designed to encourage a creative, informal judicial approach that is sensitive to the circumstances of each case and the needs and interests of the parties.<sup>41</sup>

## Race and ethnicity

Race and ethnic origin are both prohibited grounds under the Equality Act. Research suggests that many cases of alleged race discrimination come before the Equality Courts, including cases challenging state

<sup>35</sup> However the Court chose not to decide whether discrimination had also occurred on the listed ground of disability. Para 40.

<sup>36</sup> Para 28.

<sup>37</sup> 2005 (1) SA 509 (T).

<sup>38</sup> At 48.

<sup>39</sup> 2001 (8) BCLR 796 (T).

<sup>40</sup> Section 5(1).

<sup>41</sup> Section 21 of the Equality Act.



affirmative action programmes. In *Du Preez v. Minister of Justice and Constitutional Development*, short-listing criteria for the post of regional court magistrate which effectively rendered it impossible for white and/or male candidates to score sufficient points to qualify to be interviewed, were found to constitute unfair race and gender discrimination.<sup>42</sup>

### *Religion or belief*

The only Equality Act case to reach the Constitutional Court is *MEC for Education, Kwazulu-Natal v. Pillay*,<sup>43</sup> a case in which a school's refusal to grant a religious or cultural exemption from school regulations to enable a learner to wear a nose-stud was found to be unfair discrimination based on culture. This is the first time that the Court has sought to define 'culture'. It accepted a core meaning of culture that relates to groups that are defined by a combination of religion, language, geographic origin and artistic tradition, but left the outer limits of its meaning open.<sup>44</sup>

In deciding whether the school's conduct amounted to cultural or religious discrimination, the Court noted that while a practice or belief qualifies as religious if it is sincerely held, it is disputed as to whether cultural beliefs should be subjectively or objectively determined. Without deciding the law, the Court found, as a matter of fact, that both subjective and objective evidence demonstrated that wearing a nose-stud is a voluntary, but not a mandatory, expression of South Indian Tamil Hindu culture.<sup>45</sup> The Court went on to find that the protection of voluntary cultural practices was consonant with the Constitution's commitment to dignity (and hence human identity), equality (including diversity) and freedom (entitlement to respect for the unique set of ends that an individual pursues).<sup>46</sup>

Turning to the question of fairness and justification (which are combined under 'fairness' in the Equality Act), the Court found that, in this instance, fairness required 'reasonable accommodation' of religious and cultural practices. The essence of reasonable accommodation is an exercise in proportionality that entails, *inter alia*, a consideration of the centrality of the practice to the claimant vis-à-vis the school's justifications. Centrality is determined subjectively by looking at 'how important the belief or practice is to the claimants' religious or cultural identity'.<sup>47</sup> Weighing up all the evidence, the Constitutional Court found that the refusal to grant an exemption from the school uniform code to permit the claimant to wear a nose stud was unfair discrimination.

### *Sexual orientation*

In *Strydom v. Nederduitse Gereformeerde Gemeente Moreleta Park*,<sup>48</sup> the Equality Court considered whether a religious association should be granted an exemption from the Equality Act<sup>49</sup> to permit it to engage in work-related discrimination on the basis of sexual orientation with respect to a gay music teacher.

<sup>42</sup> 2006 (5) SA 592 (EqC).

<sup>43</sup> (CCT 31/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC).

<sup>44</sup> Para 50.

<sup>45</sup> Paras 56-60.

<sup>46</sup> Para 61-66.

<sup>47</sup> Para 88.

<sup>48</sup> (26926/05) [2008] ZAGPHC 269; 2009 (4) SA 510 (T) (27 August 2008).

<sup>49</sup> The claim was brought under the Equality Act rather than the Employment Equity Act as the teacher concerned was considered an independent contractor rather than an employee. Section 5(3) of the Equality Act provides that the Equality Act 'does not apply to any person to whom and to the extent to which the Employment Equity Act 1998 ... applies'. Section 4(1) of the Employment Equity Act states that it applies to 'employees', where 'employee' is defined as excluding independent contractors. Had Strydom been considered an employee presumably the Equality Act would have been inapplicable and the claim would have been brought under the Employment Equity Act.

The central issue was whether religious freedom outweighed the constitutional imperative of no unfair discrimination based on sexual orientation.<sup>50</sup> Taking into account the fact that the claimant was not in a position of spiritual leadership, nor a member of the church, nor required to be a role model for his (adult) students, the Court found that a refusal to grant an exemption would have a minimal impact on religious freedom compared to the substantial impact on the claimant's dignity that was caused by the discrimination.<sup>51</sup>

### *Disability*

The Equality Act addresses the issue of disability in some detail, both in removing barriers to opportunities, eradicating discrimination and in providing positive measures to accommodate and include the disabled.<sup>52</sup> Although there have been no reported cases, anecdotal evidence and media reports suggest that there have been several successful settlements and judgments concerning access to buildings.<sup>53</sup>

### *Age*

Age is defined in Section 1 of the Equality Act as including 'the conditions of disadvantage and vulnerability suffered by persons on the basis of their age, especially advanced age'; however there are no reported cases.

## **The Employment Equity Act**

The Employment Equity Act addresses both unfair discrimination and affirmative action within the workplace. Section 5 of the Act requires all employers 'to promote equal opportunities in the workplace by eliminating unfair discrimination in any policy or practice', while Section 6 prohibits unfair discrimination on a range of grounds. Only 'employees' may bring claims under this section. Employees are also protected against unfair labour practices in Section 186(2) of the Labour Relations Act, no. 66 of 1995, (LRA) and unfair dismissals in Section 187(1) of the LRA. Dismissals are 'automatically unfair' if the reason for the dismissal is, *inter alia*, pregnancy or intended pregnancy, or unfair discrimination.

Chapter III of the EEA requires designated employers to prepare and implement employment equity plans that will achieve reasonable progress towards equity, especially for three designated groups (race, gender, disability).

### *Race*

Most of the race-related claims under the EEA tend to be brought by persons aggrieved by affirmative action. Respondent employers rely on Section 6(2)(a) of the Act to the effect that that an affirmative action appointment consistent with the purposes of the EEA is not unfair. In certain circumstances, this allows the appointment of less qualified candidates in order to obtain a representative workforce.<sup>54</sup> On the other hand, members of previously disadvantaged groups have also brought claims of unfair discrimination

<sup>50</sup> Para 14.

<sup>51</sup> Para 17-25.

<sup>52</sup> See C Albertyn, B Goldblatt and C Roederer *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act* (2001) pp 65-7.

<sup>53</sup> In May 2006, the Port Elizabeth Equality Court delivered judgment in a case against the Minister of Justice and the Public Works Department centres requiring that a firearm licence office should be moved to the ground floor of a police station within the next month and that a system such as a wheelchair elevator should be brought into the renovation. (*Legal Brief* 30 May 2006)

<sup>54</sup> See, for example, *Stoman v. Minister of Safety and Security* (2002) 23 ILJ 1020 (T).

because they have not been accorded preferential treatment, suggesting that the affirmative action provisions give rise to an individual's right to preferential treatment.<sup>55</sup> This has been rejected by the Labour Appeal Court. Preferential treatment of a member of a designated group might be a defence to a claim of unfair discrimination by aggrieved persons, but absence of such treatment is not a cause of action.<sup>56</sup>

#### *Religion or belief*

It is not unfair discrimination to require an employee to work on a day on which his or her faith precludes him or her from working, if the employer has a genuine operational reason for requiring the employee to work on that day.<sup>57</sup>

#### *Disability*

In *IMATU v. City of Cape Town*<sup>58</sup> the Labour Court found there to be unfair discrimination on the ground of disability in terms of the EEA. In this case, a law enforcement officer applied to be transferred to the position of fire fighter. His application was turned down on the basis that he was an insulin-dependent diabetic and might become ill while under pressure.

#### *Age*

Questions of retirement age have been addressed under unfair dismissal claims rather than unfair discrimination. Section 187(2)(b) of the LRA states that it is not unfair to dismiss employees who have reached 'the normal or agreed retirement age for persons employed in that capacity'. In *Rubin Sportswear v. SACTWU*,<sup>59</sup> the Labour Appeal Court left open the question of whether this would allow differential retirement ages across different groups of employees within a single enterprise.

### **Conclusion**

Fifteen years after the advent of constitutional democracy, South Africa has seen significant developments in many aspects of equality law. The Constitutional Court has established impressive constitutional case law which has extended equality rights to many groups, including gay and lesbian people, permanent residents, women living under customary law and people living with HIV and AIDS. In some instances, however, a more formalist (non) application of the same case law has had disappointing results for people in co-habiting relationships, sex workers and refugees.<sup>60</sup>

While the more public constitutional battles over discriminatory laws are likely to continue, the more invisible terrain of private discrimination is slowly beginning to be addressed in the courts under the Equality Act and the EEA. The Labour Courts are developing important judgments on affirmative action

<sup>55</sup> See, for example, *Dudley v. City of Cape Town* (C828/2002) [2004] ZALC 1 which rejected such a claim versus *Harmse v. City of Cape Town* [2003] 6 BLLR 557 (LC) which agreed that there was such a cause of action.

<sup>56</sup> *Dudley v. City of Cape Town* (CA 1/05) [2008] ZALAC 10; [2000] 12 BLLR 1155 (LAC).

<sup>57</sup> *Food and Allied Workers Union v. Rainbow Chicken Farms* (2000) 21 ILJ 615 (LC).

<sup>58</sup> [2005] 10 BLLR 1084 (LC).

<sup>59</sup> [2004] 10 BCLR 986 (LAC).

<sup>60</sup> *Volks NO v. Robinson* 2005 (5) BCLR 446 (CC), *The State v. Jordan* 2002 (6) SA 642 (CC) and *Union of Refugee Women v. The Director: The Private Security Industry Regulatory Authority* 2007(4) BCLR 339 (CC), 2007 (4) SA 395 (CC). For a discussion of this see C Albertyn 'Substantive Equality and Transformation in South Africa' (2007) 23 SAJHR 253; E Bonthuys 'Institutional Openness and Resistance to Feminist Arguments: The Example of the South African Constitutional Court' (2008) 20 *Canadian Journal of Women and the Law*; M Pieterse 'Finding for the Applicant? Individual Equality Plaintiffs and Group-based Disadvantage' (2008) SAJHR 397.



and unfair dismissals, and slowly engaging other areas of discrimination. Cases are beginning to flow to the Equality Courts, targeting a broad range of equality and dignity-based violations, including unfair discrimination, hate speech and harassment. Many of these are unrecorded, except in the media, and early judgments have addressed technical issues of jurisdiction rather than discrimination. Over time, however, more cases will give substance to the provisions of the Equality Act, including the relatively undeveloped grounds of discrimination, such as culture, age, belief, social and ethnic origin, and disability. Given their focus on private discrimination, it is the Equality Act and the EEA, rather than Section 9 of the Constitution, that will truly be the measure of South Africa's transformation into a society based on human, dignity, freedom and equality.



# Housing Rights and Racial Discrimination

**Natalie Boccadoro\***

Council Directive 2000/43/EC of 29 June 2000 (the Racial Equality Directive) implementing the principle of equal treatment on the grounds of racial and ethnic origin<sup>61</sup> aims to combat discrimination by imposing common definitions of different forms of discrimination and by requiring Member States to introduce remedies and enforcement procedures. The Directive's scope is wide, and in particular it mentions "access to and supply of goods and services which are available to the public, including housing".<sup>62</sup> But these goods and services are not specified and the word "housing" not defined, leading to uncertainty as to its meaning. This paper will hence address the issue of the scope of the Racial Equality Directive in the field of housing (I) before examining what prohibiting discrimination based on racial or ethnic origin implies in the field of housing (II).

## **I- The meaning of housing within the Directive**

The scope of the Directive as regards housing is imprecise and potentially wide as it mentions "including housing" with no further details. Moreover, only a few Member States have fully implemented the Directive.

### **Housing is not defined by the Directive**

As is regularly mentioned when discussing this topic, housing as such is not an EU competence.<sup>63</sup> But, taking into account its repercussions on the everyday lives of millions of people, the European institutions have, directly or indirectly, adopted legislation on this topic.<sup>64</sup> Access to housing is a fundamental right and guaranteeing that access will not be limited by discriminatory practices is a major step forwards. Moreover, even before the adoption of the Racial Equality Directive, the Court of Justice of the European Communities on several occasions dealt with the question of discrimination in the field of housing. In 1988 for instance, the Court ruled that a nationality requirement for access to social housing and reduced-rate mortgage loans was discriminatory.<sup>65</sup> In 1999, a similar decision was reached concerning

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<sup>61</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *Official Journal* L 180, 19/07/2000, p. 22.

<sup>62</sup> Article 3, 1, h) of the above-mentioned Directive.

<sup>63</sup> See for instance G. Braibant, *La Charte des droits fondamentaux de l'Union européenne*, Points (Seuil) Paris, Nov. 2001, specifically pp. 189-197, or point 1 of the Communiqué of the informal Housing Ministers meeting, 24 November 2008, Marseille, France.

<sup>64</sup> See for instance Article 9.1 of Regulation EEC 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, *Official Journal*, L 257, 19.10.1968, p. 2, stipulating that "A worker who is a national of a Member State and who is employed in the territory of another Member State shall enjoy all the rights and benefits accorded to national workers in matters of housing, including ownership of the housing he needs", or point 27 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, *Official Journal*, L 376, 27/12/2006, p. 36.

<sup>65</sup> "By permitting, under various provisions of its legislation, only Italian nationals to purchase or lease housing built or renovated with the help of public funds and to obtain reduced rate mortgage loans, the Italian Republic has failed to fulfil its obligations under articles 52 and 59 of the EEC Treaty", Judgment of the Court of Justice of 14 January 1988, Case 63/86, *Commission of the European Communities v. Italian Republic*, *European Court Reports*, 1988, p.29.

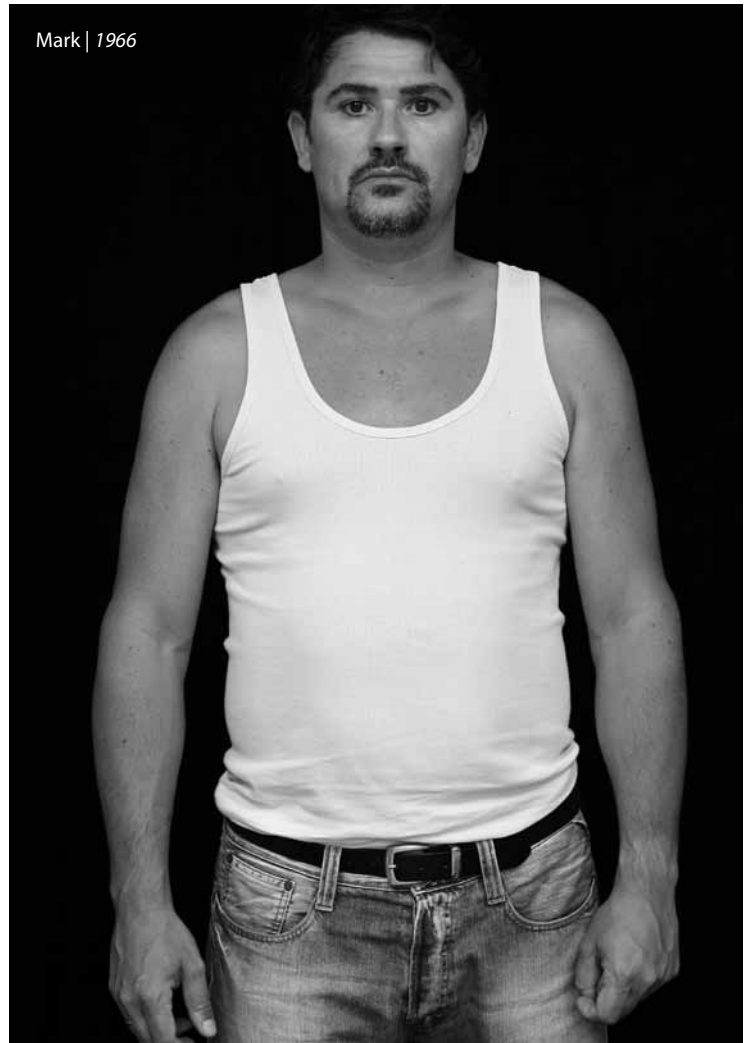
Abdel | 2008



Yolanda | 1969



Mark | 1966



Austrian planning regulations requiring administrative authorisations for non-nationals in order to limit secondary residences.<sup>66</sup>

These cases were based on freedom of establishment and free movement of capital but their resolution is coherent with the principles governing the Racial Equality Directive. The discussions and debates provoked by these decisions indirectly led to the inclusion of housing in the Racial Equality Directive.

Nevertheless, the Directive does not specify what fields are covered by “access to and supply of goods and services which are available to the public, including housing”, and “housing” has never been defined at EU level. When mentioned, it often seems to appear at the end of a sentence, as if added at the last moment. Moreover, the various documents that do refer to housing are often highly technical, the word “housing” being used in very specific contexts (VAT<sup>67</sup>, the Services Directive<sup>68</sup>, state aid and social services of general interest<sup>69</sup>). The few EU documents (directives, regulations or communications) that mention housing focus on social housing (with the exception of the 1999 Directive on reduced rates of VAT, which refers to “renovation and repairing of private dwellings”<sup>70</sup>). We must therefore look at national level to see how the Racial Equality Directive has been implemented and how the word “housing” has been understood and defined.

### Implementation of Directive 2000/43/EC regarding housing

Given the fact that most EU Member States had constitutions or legislation containing general provisions prohibiting discrimination and that the Directive was adopted without any major difficulties, its transposition into national law was surprisingly long and laborious.<sup>71</sup> The deadline for Member States to transpose the Racial Equality Directive was 19 July 2003. By 1 January 2007, the 27 Member States were due to have fully implemented the Directive but in June 2007, 14 Member States still had not<sup>72</sup>, compelling the European Commission to send them formal requests to do so.

More predictably, few Member States have fully transposed the provisions concerning housing, leading to gaps between the Directive and national provisions. More disconcertingly, several States have

<sup>66</sup> “In those circumstances, given the risk of discrimination inherent in a system of prior authorisation for the acquisition of land as in this case and the other possibilities at the disposal of the Member State concerned for ensuring compliance with its town and country planning guidelines, the authorisation procedure at issue constitutes a restriction on capital movements which is not essential if infringements of the national legislation on secondary residences are to be prevented”, point 49, Judgment of the Court of 1 June 1999, Case C-302/97, *Klaus Konle v Republik Österreich*, *European Court Reports*, 1999, p.I- 3099. See also the article by F. Haumont and P. Steichen “CJCE, 5 mars 2002, C-515/99, C-519/99 à C-524/99 et C-526/99 à C-540/99, *Reisch et crts. Question préjudicielle posée par l’Unabhängiger Verwaltungssenat Salzburg*» in *Études foncières*, n°96, mars-avril 2002, p. 42.

<sup>67</sup> Commission proposal, COM (2008) 428 of 5 July 2008.

<sup>68</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ, L 376, 27.12.2006, p. 36.

<sup>69</sup> Communication from the European Commission, *Implementing the Community Lisbon programme: Social services of general interest in the European Union*, Brussels, 26 April 2006, COM (2006) 177 final. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, of 20 November 2007, accompanying the Communication on “A single market for 21st century Europe” - *Services of general interest, including social services of general interest: a new European commitment*, COM(2007) 725 final.

<sup>70</sup> Council Directive 2009/47/EC of 5 May 2009 amending Directive 2006/112/EC as regards reduced rates of value added tax, *Official Journal of the European Union*, L 116, 9 Sept. 2009, p. 18.

<sup>71</sup> Oliver Treib, *Les conflits politiques en Allemagne autour de la transposition de la directive européenne contre le racisme*, *Critique internationale*, Presses de Sc. Po., no 33 2006/4, p. 27.

<sup>72</sup> The countries concerned were Spain, Sweden, Czech Republic, Estonia, France, Ireland, United Kingdom, Greece, Italy, Latvia, Poland, Portugal, Slovenia and Slovakia.

formally transposed the Directive, but provisions implementing the transposition measures have not been adopted.

### *Delays in transposition*

Even in States where anti-discrimination policy was adopted long before the Racial Equality Directive and whose systems inspired Community law, such as the United Kingdom and the Netherlands, transposition and implementation of the Directive took time. Indeed, the more a national system differs from the one set out in a directive, the more complicated transposition is.<sup>73</sup> As most national constitutions or legislation contained general anti-discrimination provisions, many people at national level, including lawyers and politicians, did not consider it necessary to adopt new provisions. In Germany for instance, the organisation and philosophy of the law were very different from the EU anti-discrimination model.<sup>74</sup> Adding such provisions into private contract law was seen as introducing a significant element of legal insecurity as well as signalling an important shift in legal thinking.

But legal similarities or mismatches between Community and national law are not the sole reasons for the delay. Political factors are also important and the transposition strategy may also take into account the electorate's concerns.<sup>75</sup> Hence, even the new Member States, often more respectful of transposition deadlines<sup>76</sup>, seem to have had trouble implementing the housing provisions. Neither Latvia<sup>77</sup>, Lithuania<sup>78</sup> or Poland<sup>79</sup> have adopted anti-discrimination provisions concerning housing, and Estonia and the Czech Republic transposed them only in December 2008<sup>80</sup> and June 2009<sup>81</sup> respectively.

When delays have occurred in transposition, the housing provision was not the core problem, but it suffered from the general difficulties. However, the housing provision was specifically problematic for the German Churches, which were particularly worried by the idea of having to rent their accommodation to everybody, without being able to take faith into account.

<sup>73</sup> J. Porta, *La réalisation du droit communautaire. Essai sur le gouvernement juridique de la diversité*, (2 volumes), Fondation Varenne, LGDJ, 2008.

<sup>74</sup> Matthias Mahlmann, *German Country Report on measures to combat discrimination, Directives 2000/43/EC and 2000/78/EC*, European Network of Legal Experts in the non-discrimination field, 2008.

<sup>75</sup> Ryosuke Amiya-Nakada, *Transposition Strategy and Political Time in the Europeanisation of Social Norms: Comparing Transposition of the Anti-discrimination Directives in Germany and Austria*, Meijigakuin University, Paper prepared for delivery at the fourth General Conference of the European Consortium for Political Research, 6-8 September 2007, Pisa.

<sup>76</sup> In its Internal Market Scoreboard of July 2005, the European Commission commented that "the new Member States thus perform better in transposing Internal Market directives on time than the EU-15 Member States, despite having had to absorb the whole *acquis* in a short time frame".

<sup>77</sup> "The Law on Housing does not contain a non-discrimination clause", Gita Feldhune, *Latvian Country Report on measures to combat discrimination*, European Network of Legal Experts in the non-discrimination field, 2008.

<sup>78</sup> "There are no specific anti-discrimination provisions in national housing legislation", Edita Ziobiene, *Lithuanian Country Report on measures to combat discrimination*, European Network of Legal Experts in the non-discrimination field, 2008, p.29.

<sup>79</sup> "There is no law on non-discrimination in housing", Łukasz Bojarski, *Polish Country Report on measures to combat discrimination*, European Network of Legal Experts in the non-discrimination field, 2008.

<sup>80</sup> Law on Equal Treatment [*Võrdse kohtlemise seadus*] of 11 December 2008, RT I 2008, 56, 315.

<sup>81</sup> See for instance Pavla Boucková, *Czech Republic Country Report on measures to combat discrimination*, European Network of Legal Experts in the non-discrimination field, 2008, p.5; Eastern Europe: Eighth session of the UN Human Rights Council, 2-20 June 2008: Review of the Czech Republic, Poland and Romania under the Universal Periodic Review: Amnesty International's reflections on the outcome, 1 June 2008; Oral statement on the outcome of the Czech Republic under the Universal Periodic Review, 11 June 2008; UN Human Rights Council Eighth Session, 2-18 June 2008: Compilation of statements by Amnesty International, 18 July 2008.

### *Gap between the Directive and national law*

Probably more problematic is the gap between the Directive and its transposition into national law as this hinders the EU objective of harmonisation.

If the Directive is not fully transposed and implemented, citizens lose their legal remedy, as for instance in Italy where the shift in the burden of proof was not implemented until 2008, or in Poland where the shift has not yet been implemented in the field of housing.<sup>82</sup> Moreover, the absence of provisions permitting organisations to engage in proceedings on behalf of a complainant, as in the United Kingdom for example, also limits the effects of the Directive.

In most Member States that have transposed the Directive, the grounds of anti-discrimination are wider than those of the Racial Equality Directive and include other fields such as disability (Austria, France, United Kingdom), gender (Belgium), sexual orientation (France, Belgium, Denmark), age (Belgium), nationality (Luxemburg), religion (Belgium, Denmark) and health (France). On the other hand, its scope of the transposed legislation is often limited and indirect discrimination is not always taken into account.

#### *1 The scope of the Racial Equality Directive is often limited regarding housing*

The expression “access to and supply of goods and services which are available to the public, including housing” used in the Racial Equality Directive is deliberately wide and open. It covers discrimination in all aspects of housing, such as the sale and letting of properties, allocation of tenancies in the public and private sectors, and housing loans as well as other less obvious fields such as management of rented accommodation in the public and private sectors and residential care institutions. However, only a few Member States, such as Austria and the United Kingdom, seem to have fully implemented the housing provisions of the Directive. In the other Member States, different situations have arisen.

Some Member States such as Bulgaria, Estonia and Lithuania have transposed the Racial Equality Directive in general terms, and there is no special provision concerning housing. Legislation refers to access to goods and services generally. Commentaries on these laws mention that they implicitly cover housing, but court decisions still remain scarce.<sup>83</sup>

All Member States that have implemented the housing provision prohibit discrimination in the rental housing sector, where racial and ethnic discrimination is most likely to occur. In some States, the courts have convicted private landlords as well as rental agencies acting on behalf of owners. In France, for instance, the Racial Equality Directive was transposed through the 2002 Modernisation Act<sup>84</sup> in order to prohibit discrimination in the access to rental housing, whether public or private. On the basis of this law,

<sup>82</sup> Łukasz Bojarski, *Polish Country Report on measures to combat discrimination*, ibidem.

<sup>83</sup> Emmanuelle Bribosia and Isabelle Rorive, *Belgian Country Report on measures to combat discrimination*, European Network of Legal Experts in the non-discrimination field, 2008; Margarita Ilieva, *Bulgarian Country Report on measures to combat discrimination*, European Network of Legal Experts in the non-discrimination field, 2008; Vadim Poleshchuk, *Estonian Country Report on measures to combat discrimination*, European Network of Legal Experts in the non-discrimination field, 2008; Gediminas Andriukaitis, *Lithuanian Country Report on measures to combat discrimination*, European Network of Legal Experts in the non-discrimination field, 2008.

<sup>84</sup> 2002 Modernisation Act of 17 January 2002 [*Loi n°2002-73 du 17 janvier 2002 de modernisation sociale*], *JO*, n° 15, 18 Jan. 2002, p. 1008 amending the 1989 Tenant and Landlord Relations Act, n° 89-462 of 6 July 1989 [*Loi n°89-462 du 6 juillet 1989 tendant à améliorer les rapports locatifs*].

an eighty-year-old woman was found guilty of having refused to rent her flat to a woman of Senegalese origin<sup>85</sup>. Another landlord was convicted of having refused to rent to non-French applicants.<sup>86</sup>

Not only is it prohibited for a landlord to discriminate when renting, but agencies working on behalf of landlords must also respect the prohibition. Several directors of housing rental agencies as well as state agents have thus been sentenced on the basis of collusion to discriminate for agreeing to comply with landlords' requests that they discriminate<sup>87</sup> or creating registers noting the requirement of "no immigrants".<sup>88</sup> Similar decisions can be found in Belgium where private landlords<sup>89</sup> as well as several agencies have also been convicted.<sup>90</sup> Moreover, in the cases against rental agencies, the courts interpreted Belgium legislation in the light of the Directive, refusing to examine if the discrimination was justified, as authorised by legislation but in violation of Community law.<sup>91</sup>

The Directive specifies that the goods and services concerned are those "which are available to the public". In accordance with Community Law, some Member States such as Germany define this as covering "any good or service that is offered to an unlimited group of people by any means"<sup>92</sup>, such as advertising for a rental in a magazine or through an agency. In Belgium, Germany and Ireland private and family relations are not subject to the prohibition as long as there is no publicity. More questionably, the English legislation allows discrimination in residential accommodation that is shared with the owner or their near relatives.<sup>93</sup>

As generally occurs in Community law, this expression does not distinguish between the public and private sectors. Although this is clearly stated in some Member States such as France or Italy, the situation is more uncertain in other States. For instance, until several transpositions in 2008 and 2009<sup>94</sup>, anti-discrimination provisions did not apply to Belgian social housing (public sector). Social housing was excluded from the scope of the Federal Racial Equality Law as it was a regional competence and the Directive had not been

<sup>85</sup> *Tribunal d'instance de Paris* [Paris District Court], 16 Jan. 2004.

<sup>86</sup> *Tribunal de grande instance de Paris* [Paris Regional Court], 16 Nov. 2006, n° 0527808779.

<sup>87</sup> *Cour d'Appel de Toulouse* [Toulouse Court of Appeal], 3<sup>rd</sup> Chamber, 5 Oct. 2004, decision n° 03/00593, *Juris-Data* n° 2004-254288, confirmed by the *Cour de cassation* [Supreme Court of Appeal], Criminal Chamber, 7 June 2005, n° 04-87354.

<sup>88</sup> *Tribunal correctionnel de Paris* [Paris Regional Criminal Court], 20 Sept. 2007, n° 0308500058.

<sup>89</sup> *Correctionele Rechtbank van Antwerpen* [First Instance Tribunal of Antwerp], *Centrum voor gelijkheid van kansen en voor racismebestrijding* [Prosecutor and Centre for Equal Opportunities and the Fight against Racism] v. H. Neuville, 7 Dec. 2004, cited in *Belgian Country Report on measures to combat discrimination*, 2008.

<sup>90</sup> *Tribunal de première instance de Bruxelles* [Brussels Court of First Instance], 3 June 2005; *Tribunal de première instance de Bruxelles*, 3 April 2008, Criminal Chamber, [www.diversite.be](http://www.diversite.be).

<sup>91</sup> The justification defence is also being abolished for direct discrimination in the provision of services in the UK, *Equality Bill*, clause 13.

<sup>92</sup> Matthias Mahlmann, *German Country Report on measures to combat discrimination*, *Directives 2000/43/EC and 2000/78/EC*, European Network of Legal Experts in the non-discrimination field, 2008.

<sup>93</sup> Colm O'Cinneide, *UK Country Report on measures to combat discrimination*, European Network of Legal Experts in the non-discrimination field *Directives 2000/43/EC and 2000/78/EC*, United Kingdom Country Report, State of affairs up to 8 January 2007, European Network of Legal Experts in the non-discrimination field.

<sup>94</sup> Wallon Decree of 19 March 2009, *Moniteur belge*, 10 April 2009 p. 28 557; Ordinance modifying the Ordinance of 17 July 2003 creating the Brussels Housing Code of 19 March 2009 [*Ordonnance modifiant l'ordonnance du 17 juillet 2003 portant le Code bruxellois du Logement*], *Moniteur belge*, 7 April 2009, p. 26032; Programme-Decree [*Décret programme*], 25 June 2007, *Moniteur belge*, 26 Oct. 2007.



implemented at regional level. In 2007, studies showed that one Belgian landlord in two still filtered applicants according to their origin, name or skin colour<sup>95</sup> and relatively little case-law can be reported<sup>96</sup>.

## *II "Access to and supply of goods and services" also refers to sale and homeownership*

This aspect seems to be more complicated to implement as it has been ignored by the legislation of many States. For example, the Cyprus Supreme Court ruled that access to ownership was outside the scope of the Directive.<sup>97</sup>

Often it is the remedy or shift in the burden of proof that has not been implemented. For instance, the French transposition laws only refer to housing *rentals*, thus excluding sales from the benefit of the burden of proof inversion. A similar wording to the 2000/43 Directive was used in the French Penal Code prohibiting discrimination in the "supply of goods and services".<sup>98</sup> But there is no shift of the burden of proof for the victim of a verbal refusal to sell on discriminatory grounds.

However, when given the opportunity, the courts have condemned such practices. A landowner was for instance found guilty of discrimination and given a suspended prison sentence and a sizeable fine for having refused to sell his land to a man of Algerian origin.<sup>99</sup> But this decision was obtained because a third party - a state agent shocked by the landowner's attitude - testified. As the legislation stands, the burden of proof lies on the applicant and in such matters it is not easy to prove that one has been discriminated against. Moreover, a French court of appeal has also convicted a mayor for discrimination in the access to goods and services when the latter abused his right to prevent the sale of a house based on the origin of the buyer.<sup>100</sup>

## *III Indirect discrimination in housing*

The Racial Equality Directive prohibits direct and indirect discrimination in housing. However, at national level indirect discrimination is not always recognised as such and properly prohibited.

For instance, a Flemish Decree of 15 December 2006 imposed language criteria in the access to social housing. In order to facilitate community integration, applicants had to speak Dutch or register for free courses. It was commented that such a criterion constituted indirect discrimination as it would hinder non-Belgian applicants. Despite the objections of the European Commission against Racism and Intolerance<sup>101</sup>, the Belgian Constitutional Court ruled that as long as there was no obligation of result as regards

<sup>95</sup> See the article by the Belgium NGO MRAX (Movement against racism, anti-Semitism and xenophobia): [http://www.mrax.be/article.php?id\\_article=517](http://www.mrax.be/article.php?id_article=517).

<sup>96</sup> Emmanuelle Bribosia and Isabelle Rorive, *Belgian Country Report on measures to combat discrimination*, European Network of Legal Experts in the non-discrimination field, 2008.

<sup>97</sup> *Perihan Mustafa Korkut or Eyiam Perihan v. Apostolos Georgiou through his attorney Charalambos Zoppos* (17.12.2007) Case No. 303/2006, in *Cypriot Country Report on measures to combat discrimination*, 2008.

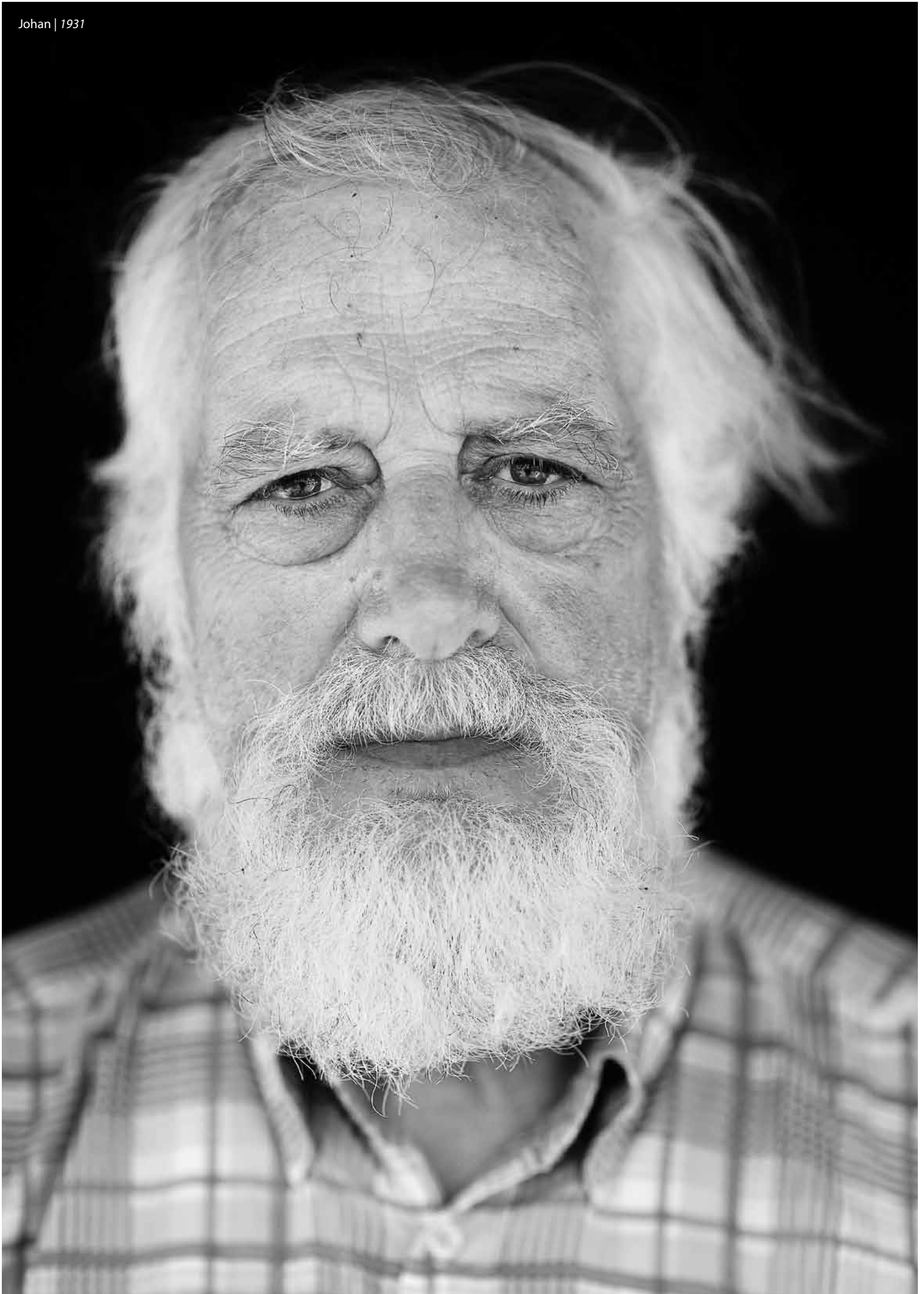
<sup>98</sup> Article 225-2 French Penal Code.

<sup>99</sup> AFP, 15 Sept. 2004; B. Bissuel, Une propriétaire jugée pour avoir refusé de vendre un terrain à bâtir à "un Arabe" (A landlord judged of having refused to sell land for construction to "an Arab"), *Le Monde*, 2 Sept. 2004; S. Pueyo, Discrimination au tribunal de Grenoble (Discrimination before the Grenoble Court), *Le Figaro*, 17 Sept 2004.

<sup>100</sup> *Cour d'Appel de Grenoble* [Grenoble Court of Appeal], 8 Nov. 2006, case n° 06/0053, *Dezmpte, boyer c. Ghezzal*.

<sup>101</sup> *ECRI Report on Belgium*, fourth monitoring cycle, Adopted on 19 December 2008, published on 26 May 2009.





language proficiency and that certain “facility areas”<sup>102</sup> were excluded from the condition, the provision was not discriminatory.<sup>103</sup>

Moreover, although nationality was excluded from the scope of the Racial Equality Directive, it was possible to challenge indirect discrimination in access to Italian social housing.<sup>104</sup> In 2002, a court ruled that a “national priority” criterion in the allocation of public housing by a town council was void.<sup>105</sup>

Refusals to provide housing loans or imposing higher interest rates can also be considered indirect discrimination concerning housing. If no special procedure is provided in national legislation, the victim might find it difficult to prove the refusal is linked to discrimination.

### **Difficulties resulting from the failure to define housing**

The Racial Equality Directive does not define housing, and few Member States have done so at national level. Would discrimination in access to a camp site be considered as discrimination in the field of housing? The complex issue of whether a caravan can be assimilated to housing arose several years ago in France, but the law supposed to settle the issue still has not been adopted. Can someone seeking *shelter* - as opposed to proper housing - be entitled to go before the courts to claim damages because they have been discriminated against? The terms of the Directive imply it would be possible, but it is probable that such claims would not be possible in many Member States. The same uncertainty applies to the sale of a boat which is to be the main home of the buyer and to access to a shantytown.

In order to avoid additional distress to those facing discrimination, the Directive should have specified that the prohibition of discrimination in particular includes rentals, sales of housing and housing loans. A short definition of housing, defined as the premises where people actually live regardless of their status or of normal practice would also have been very useful. This would mean that even those in the most difficult situations would be able to claim damages for discrimination in access to a boat, a caravan or just to shelter.

## **II- Implementing equal treatment in the field of housing**

The purpose of Directive 2000/43/EC is to put into effect the principle of equal treatment. As well as prohibiting direct discrimination in the field of housing, the Directive in particular prohibits indirect discrimination and instructions to discriminate. It imposes a remedy for the victims and authorises the Member States to adopt positive action. But the question remains of how to evaluate the implementation of these provisions.

### **A remedy**

One of the major contributions of the Directive is the possibility to shift the burden of proof in order to help victims when they seek justice before the courts.<sup>106</sup> As landlords tend to argue that the dwelling has

<sup>102</sup> Facility areas are specific communities where, according to the law, the minority language can be used in the official relations with the public administration.

<sup>103</sup> See the Belgian Constitutional Court, judgment n° 101/2008 of 10 July 2008, which includes further details of the Court’s analysis of the legislation at issue.

<sup>104</sup> Alessandro Simoni, *Italian Country report on measures to combat discrimination*, European Network of Legal Experts in the non-discrimination field, 2008.

<sup>105</sup> Tribunale di Milano [Milan Court of First Instance], Chamber. I, judgement 20/21 3.2002 n. 3624, published in *Diritto, Immigrazione e Cittadinanza*, 4. 2002, with a commentary by Alessandro Simoni.

<sup>106</sup> *The Meaning of Housing: A Pathways Approach*, D. Clapham, Bristol, The Policy Press, 2005.

already been rented rather than admit to discrimination, it used to be difficult for applicants for rental housing to prove that their application was refused on the grounds of colour or origin. The Directive states that if a victim can present facts from which it may be presumed that there has been direct or indirect discrimination, it is for the respondent to prove that there has been no breach of the principle of equal treatment.

Moreover, courts increasingly accept “situational testing”, which in certain cases seems to be the only way to prove discrimination.<sup>107</sup> This consists in “testing” the good faith of landlords when they refuse to rent to an applicant on the basis of skin colour for example, by sending a similar white candidate preferably with slightly fewer financial resources. If the white candidate is allowed to rent the dwelling, there is a strong suspicion of discrimination.

In order to help the victim in his claim, the Directive has also stipulated that States should ensure that an association, organisation or other entity can engage either on behalf or in support of the complainant in any judicial and/or administrative procedure.<sup>108</sup> And indeed, most of the few courts cases in France and in Belgium have been supported by an organisation.

### **Positive action?**

Some people such as the Roma suffer such discrimination that it is clearly not enough to prohibit discriminatory actions and call for equal treatment. It is argued that only specific measures can help. The idea therefore emerged to use “positive action”.

Article 5 of the Directive rules that “with a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin”. When this directive was adopted many authors regretted this provision was not compulsory.

The situation of the Roma population, whether settled or still mobile, is plainly extreme: the discrimination and contempt suffered is hardly believable.<sup>109</sup> When land for camp sites is allocated, it is often situated far from urban centres, on undeveloped land, near motorways or waste sites or even on polluted sites.<sup>110</sup> The Roma find themselves far from employment centres, schools and hospitals. Moreover these sites often do not have even minimal sanitary facilities.<sup>111</sup> The extent of their rejection is so serious that some local authorities even refuse to use money granted to finance infrastructure for the Roma because of the hostility of the local population.<sup>112</sup>

<sup>107</sup> G. Calves, *Au service de la connaissance et du droit: le testing*, *Horizons stratégiques*, n° 5 2007/3; V. van der Plancke, *Les tribulations du testing en Belgique: quels enseignements ?*, *Horizons stratégiques*, n° 5 2007/3.

<sup>108</sup> Article 7-2 of EC 2000/ 43.

<sup>109</sup> *Report on the situation of fundamental rights in the European Union in 2003*, EU Network of independent experts in fundamental rights.

<sup>110</sup> “There is a shortage of camping sites, and they are frequently under-equipped and over-populated. In addition, these sites are too frequently built in insalubrious or ecologically dangerous areas (edges of motorways, near waste disposal sites, industrial zones, etc) and at a distance from city centres”, Memorandum prepared by the Secretariat on problems facing Roma/ Gypsies in the field of housing, 17 March 2000, MG-S-ROM (2000) 3.

<sup>111</sup> “Even where site provision is made available for nomadic communities, facilities (especially on older sites) are frequently inadequate in number and substandard in terms of infrastructural provisions. Moreover, the research confirmed that in situations where site provision is made for nomadic Communities, the location of sites is frequently (70%) on marginal land, and some public sites are in potentially dangerous environments”, *The Situation of Roma in the Enlarged European Union*, point 82, p. 43.

<sup>112</sup> See for instance Corina Demetriou, *Cypriot Country report on measures to combat discrimination*, European Network of Legal Experts in the non-discrimination field, 2008.

Discrimination against the Roma is so strong that it is not limited to housing issues. The question remains if and how should their specific characteristics be taken into account. The repression they suffer is due as much to their origin as to their choice of lifestyle, often considered as incompatible with public order. The Roma as well as Travellers face two types of difficulties: on the one hand when pitching their caravans and on the other when trying to settle. This situation requires broad public policy and not just a few one-off measures.

## Statistics?

Data and statistics are needed to evaluate and control the implementation of racial and ethnic discrimination provisions, but collecting such data can be complicated.<sup>113</sup> In certain countries, such as France, the State does not recognise minorities or ethnic groups and references to such groups appear intrusive and discriminatory. It is not possible to collect such data as it is discriminatory to even ask a person's origin.

In the French social housing rental field this issue was problematic a few years ago. Public social housing organisations were classifying tenants on criteria such as skin colour or origin (based on surnames) and were allocating accommodation according to internal quotas (in order to limit the number of people from certain groups in certain buildings). This was considered a typically discriminatory action and was officially ended.

In order to give the social housing sector relevant instruments to allocate accommodation and solve urban segregation, the concept of *social mix* was developed in France<sup>114</sup> and other Member States such as Belgium<sup>115</sup>, Germany, Sweden and the United Kingdom.<sup>116</sup> The first question is whether *urban segregation* can be considered as discrimination. Urban ghettos have developed over several years in run-down areas where the poor quality of housing and lack of infrastructure lead to low rents. Those who can leave the neighbourhood do so as soon as possible. The people left in such areas are often migrants or of immigrant origin with a low income if any. Unemployment is high. It is often difficult to separate whether it is social disadvantage or racial discrimination that hinders any wish to move. Moreover, in some cases such segregation was deliberately organised, notably in the 1960s by social housing policies. Another difficult issue is that some groups living in underprivileged neighbourhoods may want to be together and may not consider it as a problem to be "collected" by origin. On the contrary they benefit from the solidarity and the help the community can bring.<sup>117</sup>

Secondly, we may ask if the policy of social mix is not also discriminatory. In order to comply with legislation supposed to impose respect for social diversity, many housing providers have applied discriminatory actions. For instance, social housing providers have refused to allocate housing in certain suburbs on the grounds of the "social mix". Can intentionally locating people in designated places for various reasons including their origin be considered racial discrimination? The line is not easy to draw, but in February 2009, a French civil court found a social housing provider and its employees guilty of discriminatory

<sup>113</sup> See for instance P. Simon and J. Stavo-Debaugé, Les politiques anti-discrimination et les statistiques: paramètres d'une incohérence, *Sociétés contemporaines*, n° 53 2004/1 and J. Stavo-Debaugé, Mesurer la discrimination, *Revue internationale des sciences sociales*, n° 183 2005/1.

<sup>114</sup> N. Houard, *Droit au logement et mixité - Les contradictions du logement social*, L'Harmattan, 2009.

<sup>115</sup> N. Bernard, Le secteur du logement à l'épreuve des réglementations anti-discrimination, *Courrier hebdomadaire*, n° 1926, 2006.

<sup>116</sup> G. Galser, Neighbourhood Social Mix as a Goal of Housing Policy: A Theoretical Analysis, *European Journal of Housing Policy*, Vol. 7, No. 1, 19–43, March 2007.

<sup>117</sup> N. Bernard, Le secteur du logement à l'épreuve des réglementations anti-discrimination, *Ibidem*.

practice. In order to respect the legal objective of achieving a social mix, the employees had been classifying applicants according to their supposed origins.<sup>118</sup>

In Germany, the law authorises unequal treatment if it serves to create and maintain stable social relations between inhabitants and balanced patterns of settlement and economic, social and cultural relations.<sup>119</sup> However, this clause is not to be interpreted as justifying the underrepresentation of any racial or ethnic minority. Some measures will be justifiable as positive action provided that they increase the presence of an underrepresented minority.

The difficulty with the concept of “social mix” is that it was meant to be based on “social” factors such as income, education and employment. But because most poor, unemployed and uneducated people tend to be immigrants or of immigrant origin, or just non-white, an amalgam between “social” diversity and “racial” diversity has emerged. For instance, in the Netherlands, it remains to be seen whether the right of local authorities to refuse to rent houses in certain areas to persons or households with a low income or without steady employment and to refer them to other areas will be considered indirectly discriminatory on the ground of ethnic origin when/if a case is brought to court.

### **Limits**

The Directive only mentions discrimination based on racial and ethnic origins thus excluding many other grounds of discrimination such as disability, age, religion or belief, gender and sexual orientation.

### **Conclusion**

Discriminatory situations in the field of housing were sometimes blatant and the Racial Equality Directive was an important step towards resolving them. But its wide scope has led certain Member States to only implement part of it, and some of the most important aspects of the Directive, for instance the right to complain before the courts and the sharing of the burden of proof, are not always respected.

Is the protection afforded by the Equality Directive effective in the field of housing? Today much discrimination still occurs and many discriminatory situations will still not be brought before the courts. But much work has been done. And even if some people still do not agree with the equal treatment principle, especially when renting accommodation to others, they might be aware of the sizeable fines imposed for such practices.

Long-term policies are needed more than just one-off actions. Moreover, discrimination is probably less common when there is no shortage of housing, but this is a different topic that deserves separate examination.

<sup>118</sup> Tribunal de grande instance de Saint-Etienne [Saint-Etienne Regional Court], 3 Feb. 2009.

<sup>119</sup> Matthias Mahlman, *German Republic Country Report on measures to combat discrimination*, European Network of Legal Experts in the non-discrimination field, 2008.



# European Legal Policy Update

On 16 March 2009 the European Parliament adopted amendments on the proposal of the Commission (COM(2008)0426) for a directive establishing a general framework for action to combat discrimination on grounds of religion or belief, disability, age or sexual orientation, with a view to implementing the principle of equal treatment outside the labour market in the Member States.

<http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A6-2009-0149&language=EN&mode=XML#title5>

## European Court of Justice Case Law Update

### References for preliminary rulings – Applications

*Case C-109/09 Reference for a preliminary ruling in the case of Deutsche Lufthansa AG v. Gertraud Kumpan, lodged on 23 March 2009*

*OJ C 141 of 20.06.2009, p.25*

A reference for a preliminary ruling has been made to the European Court of Justice by the Federal Labour Court (*Bundesarbeitsgericht*) of Germany regarding age discrimination in the context of Council Directive 2000/78/EC. In particular, the questions referred are:

Are Article 1, Article 2(1) and Article 6(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation and/or the general principles of Community law to be interpreted as precluding a provision of national law, which entered into force on 1 January 2001, under which fixed term employment contracts may be agreed without further conditions with workers simply because the latter have reached the age of 58?

Is Clause 5(1) of the ETUC-UNICE-CEEP<sup>120</sup> Framework Agreement, which was implemented by Council Directive 1999/70/EC of 28 June 1999, to be interpreted to the effect that it precludes a provision of national law which, without further conditions, allows the conclusion over an indefinite period of an unlimited number of successive fixed term employment contracts without objective grounds, simply because the worker has reached the age of 58 by the time the fixed term employment relationship begins and there is no close objective connection with a previous employment relationship of indefinite duration with the same employer?

If Questions 1 and/or 2 are answered in the affirmative, must the national courts disapply the provision of national law?

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en> (search term: Case C-109/09)

*Case C-45/09 Reference for a preliminary ruling in the case of Gisela Rosenblatt v. Oellerking Gebäudereinigungsgesellschaft GmbH, lodged on 2 February 2009*

*OJ C 102 of 01.05.2009, p.10*

A reference for a preliminary ruling has been made to the European Court of Justice by the Labour Court (*Arbeitsgericht*) of Hamburg, Germany, regarding the automatic termination of employment upon attainment of a specific age. The referring court asks whether, following the entry into force of the German General Law on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz*, 'the AGG') the rules under collective law, which discriminate based on age, are compatible with the prohibition of age discrimination in

<sup>120</sup> ETUC-UNICE-CEEP stands for the European Trade Union Confederation, the Confederation of European Business and the European Centre for Public Enterprises.





Article 1 and Article 2(1) of Council Directive 2000/78/EC, without the AGG expressly permitting this (as was previously the case in Paragraph 10 Sentence 3 Point 7 of the AGG). The court also wishes to ascertain if a national rule that permits the state, the parties to a collective agreement and the parties to an individual employment contract to specify the automatic termination of an employment relationship upon reaching a specific fixed age (in this case: reaching the age of 65), contravenes the prohibition of age discrimination laid down in Article 1 and Article 2(1) of Directive 2000/78/EC if, according to established practice in place for several decades in the Member State, clauses of this type have consistently applied to the employment relationships of nearly all workers, irrespective of the prevailing economic, social and demographic state of affairs and the actual labour market situation.

The court also asks whether a collective agreement that permits an employer to end an employment relationship at a specific fixed age contravenes the prohibition of age discrimination laid down in Article 1 and Article 2(1) of Council Directive 2000/78/EC if, according to established practice in place for several decades in the Member State, clauses of this type have consistently applied to the employment relationships of nearly all workers, irrespective of the prevailing economic, social and demographic state of affairs and the actual labour market situation. Finally, the referring court wishes to establish whether a state that declares a collective agreement permitting employers to end employment relationships at a specific fixed age to be generally applicable and upholds this extension contravenes the prohibition of age discrimination laid down in Article 1 and Article 2(1) of Council Directive 2000/78/EC, if this is effected irrespective of the prevailing economic, social and demographic state of affairs and irrespective of the actual labour market situation.

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en> (search term: Case C-45/09)

## References for preliminary rulings – Advocate General Opinions

*Case C-555/07 Opinion of Advocate General M. Yves Bot in the case of Seda Küçükdeveci v. Swedex GmbH & Co. KG) delivered on 7 July 2009*

*OJ C 79 of 29.03.2008, p. 12*

A reference was made to the European Court of Justice on 13 December 2007 regarding differences of treatment on the grounds of age as allowed by Directive 2000/78/EC.<sup>121</sup> To summarise, the Federal State Labour Court (*Landesarbeitsgericht*) of Düsseldorf, Germany, asked the ECJ if a national provision that provides for the periods of notice on termination which employers are required to observe to be increased incrementally with the length of service, but which disregards periods of the employee's employment before the age of 25, is incompatible with Directive 2000/78/EC. The court also invited the ECJ to provide further clarification on whether the fact that employers are required to observe only a basic period of notice when terminating the employment of younger employees is justified on the grounds that employers are recognised as having a commercial interest in flexibility regarding staffing and that younger employees are not recognised as having the protection available to older employees with respect to their employment status or arrangements because younger employees are assumed to have greater professional and personal flexibility and mobility.

The Advocate General in his opinion remarked that the threshold of 25 years might be viewed as following a legitimate objective of employment policy as it aimed to decrease the higher unemployment rate among young workers by creating conditions likely to facilitate the recruitment of this age group. In other words, the fact that they would have to respect only the basic period of notice would encourage employers to employ a higher number of young workers.

<sup>121</sup> See *European Anti-Discrimination Law Review (EADLR)*, issue 6/7, p. 57-58.

In the light of this possible justification, the Advocate examined whether the national law in question serves a legitimate objective in the sense of Paragraph 1 of Article 6 of Directive 2000/78. He considered it necessary to differentiate between the progressive increase of the notice period according to length of employment and the fixing of a minimum age of 25 years to benefit from this increase.

Moreover, the application of the national law in question leads to a situation in which all workers who commence an employment relationship before the age of 25 years and who (like the applicant) are dismissed shortly after having attained this age are generally deprived of an important element of protection of workers in cases of dismissal, regardless of their personal and family situation and their level of training.

In addition, the Advocate General remarked that the Directive must, in his opinion, be able to be invoked in litigation between individuals with a view to excluding the application of an unlawful national disposition. For these reasons the Advocate General proposed that Article 6(1) of Directive 2000/78/EC must be interpreted as opposing national legislation, such as that in question, which envisages, in a general manner, the non-consideration of periods of employment performed before the age of 25 in the calculation of a notice period before dismissal, and that it falls to the national courts not to apply the legislation in question.

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN> (search term: Case C-555/07)

### References for preliminary ruling – Judgments

*Case C-388/07 Incorporated Trustees of the National Council for Ageing (Age Concern England), v. Secretary of State for Business, Enterprise and Regulatory Reform, Judgment of 5 March 2009*  
*OJ C 102 of 01.05.2009, p.6*

A reference was made to the European Court of Justice on 9 August 2007<sup>122</sup> by the High Court of Justice of England and Wales, Queen's Bench Division (administrative court) regarding age discrimination. To summarise, the High Court asked the ECJ whether the scope of Directive 2000/78/EC extends to national rules which permit employers to dismiss employees aged 65 or over by reason of retirement, if they were introduced before or after the adoption of the Directive. Additionally, the referring court wished to ascertain whether Article 6(1) of the Directive permits a general justification of differences of treatment on grounds of age, such as that provided for by the Employment Equality Regulations 2006 which transposed Directive 2000/78/EC, or whether it requires Member States to specify the kinds of differences of treatment which may be justified by means of a list or other measure which is similar in form and content to the list in Article 6(1).

The ECJ observed that the Member States enjoy broad discretion when choosing the means to achieve their social policy objectives, but held that this discretion cannot have the effect of frustrating the implementation of the principle of non-discrimination on grounds of age. According to the judgment, 'mere generalisations concerning the capacity of a specific measure to contribute to employment policy, labour market or vocational training objectives are not enough to show that the aim of that measure is capable of justifying derogation from that principle and do not constitute evidence on the basis of which it could reasonably be considered that the means chosen are suitable for achieving that aim.'

In addition, the ECJ stipulated that the national court should ascertain whether the legislation at issue in the main proceedings (provision for a system of compulsory retirement) is justified by a legitimate aim and whether the national legislative or regulatory authority could legitimately consider, taking account of the Member States' discretion in matters of social policy, that the means chosen were appropriate

<sup>122</sup> See *European Anti-Discrimination Law Review (EADLR)*, issue 6/7, p. 57 and *European Anti-Discrimination Law Review (EADLR)*, issue 8, p. 29-30.

and necessary to achieve that aim. Finally, it concluded that Article 6(1) of Directive 2000/78 offers the Member States the discretion to provide for certain kinds of differences in treatment on the ground of age if they are 'objectively and reasonably' justified by a legitimate aim, but it imposes on Member States the burden of establishing to a high standard of proof the legitimacy of the aim relied on as a justification. <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en> (search term: Case C-388/07)

*Case C-88/08 David Hütter v. Technische Universität Graz, Judgment of 18 June 2009*  
*OJ C 180 of 01.08.2009, p.15*

A reference for a preliminary ruling was made to the European Court of Justice by the Austrian Supreme Court (*Oberster Gerichtshof*) on the justification of differences of treatment on grounds of age under Directive 2000/78/EC.<sup>123</sup> Specifically, the Austrian Supreme Court wished to ascertain if Articles 1, 2 and 6 of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation preclude national legislation (in this case Paragraphs 3(3) and 26(1) of the Austrian 1948 Law on Contractual Employees [*Vertragsbedienstetengesetz* 1948]) which excludes accreditable previous service from being taken into account in the determination of the reference date for salary increments in so far as such service was completed before the person concerned reached the age of 18 years.

The applicant in the main proceedings claimed that, where professional experience is equal, there is no justification under the Directive to support a difference in treatment based exclusively on the age at which that experience was acquired, as such a rule provides a disincentive to pursue an occupation before attaining the age of 18 and it constitutes discrimination prohibited under Directive 2000/78/EC. The Technische Universität Graz submitted that the national legislation contested applies without distinction to all persons irrespective of age and therefore there can be no question of age discrimination.

The Court observed that the national law in question excludes accreditation of any professional experience acquired before the age of 18 for the purposes of grading contractual staff on the Austrian public service scale; it noted that this provision affects the determination of the incremental step at which such persons will be graded, thus having an effect also on their pay. Taking this into account, the Court stated that legislation of this nature must be regarded as establishing rules relating to the conditions for access to employment, recruitment and pay within the meaning of Directive 2000/78/EC.

The Court continued by establishing that such national legislation imposes less favourable treatment for persons whose professional experience has, although only partially, been acquired before the age of 18 comparing with those who have acquired experience of the same nature and of comparable length after attaining that age. However, as the aims of the legislator was to avoid putting persons who have pursued a general secondary education at a disadvantage as compared with persons with a vocational education and to avoid making apprenticeships more costly for the public sector and thereby promoting the integration of young people who have pursued training of this type into the labour market, the Court held these aims must be considered to justify objectively and reasonably within the context of national law, as provided in the first subparagraph of Article 6(1) of Directive 2000/78, a difference in treatment on the ground of age.

Examining also whether the means used to achieve the aim of the national law are 'appropriate and necessary', the Court observed that the criterion of the age at which the vocational experience was acquired does not seem appropriate for achieving the aim of not treating general education less favourably than vocational education and for promoting the integration in the labour market of a category of workers defined by their youth. Therefore, the national law in question cannot be regarded as appropriate within the meaning of Article 6(1) of Directive 2000/78/EC.

<sup>123</sup> See *European Anti-Discrimination Law Review (EADLR)*, issue 6/7, p. 58.

The Court concluded that Articles 1, 2 and 6 of the Directive must be interpreted as precluding national legislation which, in order not to treat general education less favourably than vocational education and to promote the integration of young apprentices into the labour market, excludes periods of employment completed before the age of 18 from being taken into account for the purpose of determining the incremental step at which contractual public servants of a Member State are graded.

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en> (Search term: Case C-88/08)

# European Court of Human Rights Case Law Update

## Judgments

*Löffelmann v. Austria (no. 42967/98), First Section Judgment of 12 March 2009*

The applicant was born in 1976 and lived in Maissau. In 1994 he became a member of the Jehovah's Witnesses in Austria, within which he assumed the function of a preacher or "general pioneer" (*Prediger, allgemeiner Pionier*) and, since 1996, a deacon or 'ministerial servant' (*Diakon, Dienstamtgehilfe*). In this function he assisted the clerical work of Jehovah's Witnesses elders.

In November 1994 the Lower Austrian Military Authority (*Militärkommando*) found that the applicant was fit to perform military service, which the applicant started in July 1995. However, in August of that year he was discharged when a military medical expert opinion found him unfit for service. In September 1995 the Lower Austrian Military Authority issued a conscription order (*Stellungsbescheid*), ordering the applicant to undergo another examination of his ability to perform military service pursuant to section 24(8) of the Military Service Act (*Wehrgesetz*) and stating that as the applicant was not a member of a recognised religious society, he could not be exempted from military service under section 24(3) of the Military Service Act. The applicant appealed against this order, claiming that he should be dispensed from military service since he performed a function within the Jehovah's Witnesses which was equivalent to that of members of a recognised religious society who were exempted from military service. In November 1995 the Federal Minister for Defence (*Bundesminister für Landesverteidigung*) dismissed the applicant's appeal and confirmed the lower authority's decision. Consequently the applicant lodged a complaint with the Constitutional Court (*Verfassungsgerichtshof*), requesting it to repeal the wording 'recognised religious societies' in section 24(3) of the Military Service Act; however, in December 1997 the Constitutional Court refused to deal with the applicant's complaint on the grounds of lack of prospects of success, observing that the obligation to perform military or civilian service raised no concerns as regards compliance with Article 9 of the Convention.

On 26 March 1998 the Administrative Court (*Verwaltungsgerichtshof*) dismissed the applicant's complaint, as it found no indication to institute proceedings to review constitutionality (*Gesetzesprüfungsverfahren*). In May 1998 the Lower Austrian Military Authority issued another conscription order for an examination of the applicant's fitness to perform military service. The applicant lodged a complaint with the Constitutional Court against this order, claiming that by virtue of the 1998 Recognition Act (*Anerkennungsgesetz*), the Jehovah's Witnesses had been granted the status of a 'registered religious community', the ten-year period for a successful application for recognition under the Recognition Act lacked objective justification and that the Act precluded any recognition for the following 10 years. Since section 24(3) of the Military Service Act refers to 'recognised religious societies' and restricted exemption from military service to members of recognised religious societies, the applicant again requested the Constitutional Court to revoke this limitation and also to revoke the ten-year period for recognition under the Recognition Act. In June 1998 the Constitutional Court refused for the second time to deal with the complaint for lack of prospects of success and held that the provision of the 1998 Act referred to was not directly applicable to the case at issue.

Subsequently, the applicant filed a request for recognition as a conscientious objector (*Zivildienstklärung*), which was granted. Between February 1999 and January 2000 he performed his civilian service in a social institution. In February 2000 the applicant joined the Religious Order of the Jehovah's Witnesses







(*Orden der Sondervollzeitdiener der Zeugen Jehovas*), where he lived and worked as a preacher (*Bethelmitarbeiter*). In February 2001 he left the order and continued to work as a preacher and deacon.

The European Court noted that the exemption from military service under section 24(3) of the Military Service Act is exclusively linked to members of recognised religious societies performing specific services of worship or religious instruction; however, as the Jehovah's Witnesses was at the time a registered religious community and not a religious society, there was no room for an exemption from military service under the above-mentioned legislation. The Government argued that the applicant had not been discriminated against, because the criterion that a person applying for exemption from military service must be a member of a religious society was only one condition among others and the applicant would not have fulfilled the further conditions as he had not completed a course of theological studies at university or at a comparable level of education. The Court did not accept this argument, observing that since the competent authority explicitly based its refusal of the applicant's request on the ground that he did not belong to a religious society, there is no need to speculate on what the outcome would have been if the decision had been based on other grounds.

The Court found that the difference in treatment between the applicant, who does not belong to a religious group which is a religious society within the meaning of the 1874 Recognition Act, and a person who belongs to such a group, did not have an objective and reasonable justification; as a result, the applicant had been discriminated against on the ground of his religion, therefore there had been a violation of Article 14 taken in conjunction with Article 9 of the Convention. The Court awarded the amount of 4 000 EUR in respect of non-pecuniary damages and 10 698.53 EUR in respect of costs and expenses.

## **Admissibility**

*M.W. v. United Kingdom (no. 11313/02), decision of 23 June 2009*

The applicant was living in a same-sex couple with M. for 23 years, until the latter's death in April 2001. From the late 1980s onwards, they resided in jointly-owned properties and they were financially interdependent. Each had designated the other as his heir and, according to the applicant, their degree of mutual commitment was such that had they been a heterosexual couple they would have married. Around two weeks after M.'s death, the applicant asked a social worker whether he could claim a Bereavement Payment. He was advised that the benefit was only payable to the survivor of a married couple, and so he did not formally claim it.

The applicant complained under Article 14 of the Convention taken in conjunction with Article 8 and Article 1 of Protocol No. 1 that, as a survivor of a same-sex couple who had had no means to achieve formal recognition of their relationship, he had been denied a benefit available to a survivor of a married couple. He argued that domestic law did not afford him an effective remedy, and contended that his relationship with M. should not be assimilated to that of an unmarried heterosexual couple, since, unlike the latter, it had been legally impossible for him and his partner to gain formal legal recognition of their relationship. The third party interveners (FIDH, ICJ, the AIRE Centre, and ILGA-Europe) argued that the applicant was the victim of indirect discrimination based on his sexual orientation. The right to equal treatment required that the State find alternative means to allow the survivor of a same-sex couple to receive a Bereavement Payment. The ineligibility of same-sex couples had to be shown to be necessary to achieve the State's objective of supporting marriage, and this had not been demonstrated in the present case.

Concerning the substance of the application, the Court recalled that in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in relevantly similar situations (*Burden v.*

*the United Kingdom* [GC], no. 13378/05, 29 April 2008, § 60). Contrary to the submission of the applicant, it is not implicit in the *Burden* judgment that, had there been no Civil Partnership Act, same-sex relationships would still have been equated with marital relationships. As that judgment was delivered after the entry into force of the Civil Partnership Act, the status of couples who had availed themselves of the possibility of entering into a civil partnership could likewise be distinguished from informal personal relationships, however permanent and supportive. The relationship the applicant had with his partner came within the latter category, and so his situation is to be distinguished from that of a surviving spouse.

The Court observed that the applicant's complaint that it was impossible during his partner's lifetime to gain formal recognition of their commitment to one another, was in effect criticism of the length of time it took the United Kingdom to enact the necessary legislation. However, as stated in *Courten v. the United Kingdom* (no. 4479/06), the Government cannot be criticised for not having introduced the Civil Partnership Act at an earlier date that would have entitled the applicant to claim a Bereavement Payment; nor can the enactment of the Civil Partnership Act be taken as an admission by the domestic authorities that the non-recognition of same-sex couples was incompatible with the Convention. Moreover, the comprehensive manner in which the Act ensures equal entitlements for same-sex couples who enter into a civil partnership means that the United Kingdom is certainly part of the emerging European consensus described by the third party interveners. Therefore, the Court concluded that the applicant could not claim that, at the material time, he was in an analogous situation to a bereaved spouse and rejected his complaint as manifestly ill-founded.

<http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=28443617&skin=hudoc-en&action=request>

*V.C. v. Slovakia* (no. 18968/07), Decision of 16 June 2009

The applicant was Slovakian of Roma ethnic origin. She finished compulsory education in the sixth grade and was unemployed. On 23 August 2000 the applicant was sterilised while hospitalised at the Hospital and Health Care Centre in Prešov, which is under the management of the Ministry of Health. The procedure was carried out during the delivery of the applicant's second child by Caesarean section; her first delivery had also been by Caesarean section.

According to the delivery record, when labour was well underway and the Caesarean section was imminent, the applicant requested sterilisation. That request was recorded directly in the delivery record with the typed words 'patient requests sterilisation', accompanied by the shaky signature of the applicant. The applicant submitted that, after she had been in labour for several hours, the medical personnel of Prešov Hospital had asked her whether she wanted to have more children. The applicant responded in the affirmative but was told by the medical personnel that if she had one more child, either she or the baby would die. The applicant was convinced that her next pregnancy would be fatal, so she told the medical personnel, 'Do what you want to do'. She was then asked to sign the delivery record under the note indicating that she had requested sterilisation. The applicant did not understand the term 'sterilisation' and she signed the form in fear that there would otherwise be fatal consequences. As she was in the last stage of labour, her recognition and cognitive abilities were influenced by labour and pain. The words 'Patient is of Roma origin' appear in the record of the applicant's pregnancy and delivery.

The applicant suffered serious medical and psychological after-effects from the procedure. At the end of 2007 and the beginning of 2008 the applicant displayed the symptoms of a hysterical pregnancy. Subsequently in July 2008 she was treated by a psychiatrist in Sabinov. According to the latter's statement, the applicant continues to suffer as the result of her infertility. The applicant has also been ostracised by the Roma community due to her infertility.

The Director of Prešov Hospital claimed that a Caesarean section was necessary due to the risk of rupture of the uterus and that after they had explained to her the situation and the risks inherent in a possible third pregnancy, the applicant signed the sterilisation request.

The applicant considered that her ethnic origin had played a decisive role in the decision by the medical personnel to sterilise her. She referred to the attitudes of the medical personnel and also to the fact that in her medical record it was clearly stated that she was of Roma ethnic origin; also, that during her hospitalisation patients were segregated by ethnic origin and she was separated from women who were not of Roma origin.

On 9 September 2004 the applicant lodged a claim with the Prešov District Court, alleging that the sterilisation performed on her had been carried out in violation of Slovakian legislation and international human rights standards and claiming that she had not been duly informed about the procedure as such, its consequences and alternative solutions. She also stated that she had experienced problems in her relationship with the father of her children due to her infertility. On 28 February 2006 the Prešov District Court dismissed the action, holding that the procedure had been performed only after the medical personnel had obtained the signature of the applicant and that it had been necessary due to the applicant's poor medical condition.

On 12 May 2006 the applicant appealed but on 25 October 2006 the Prešov Regional Court upheld the first-instance judgment. On 17 January 2007 the applicant lodged a complaint with the Constitutional Court, which dismissed it as being manifestly ill-founded, but the European Court considered the application admissible under Articles 3, 8, 12, 13 and 14 of the Convention.

<http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=28443617&skin=hudoc-en&action=request>

## European Committee of Social Rights Update

### *Complaint No. 58/2009, Centre on Housing Rights and Evictions (COHRE) v. Italy*

The complaint was registered on 29 May 2009. The complainant organisation alleges violation of Articles 16 (the right of the family to social, legal and economic protection), 19 (right of migrant workers and their families to protection and assistance), 30 (right to protection against poverty and social exclusion) and 31 (right to housing), alone or in conjunction with Article E (non-discrimination) of the Revised Charter. The complainant organisation argues that recent so-called emergency security measures and racist and xenophobic discourse have resulted in unlawful campaigns and evictions leading to homelessness and expulsions, disproportionately targeting Roma and Sinti.

### *Complaint No. 52/2008, Centre on Housing Rights and Evictions (COHRE) v. Croatia*

On 30 March 2009 the Committee declared admissible a complaint under Article 16 of the Charter (the right of the family to social, legal and economic protection), read alone or in the light of the non-discrimination clause of the Preamble, alleging that the 'ethnic Serb' population displaced during the conflict in the former Yugoslavia has been subjected to disproportionate discriminatory treatment regarding their housing needs, as families have not been allowed to reoccupy their former dwellings inhabited prior to the conflict, nor have they been granted financial compensation for the loss of their homes. The complaint also claims that Croatia's continuing failure to provide adequate restitution or compensation is a violation of their housing and human rights.

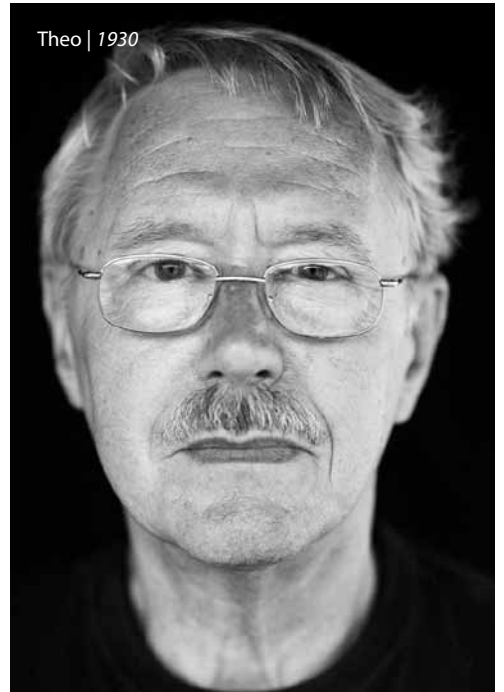
Michel | 1994



Lenneke | 1985



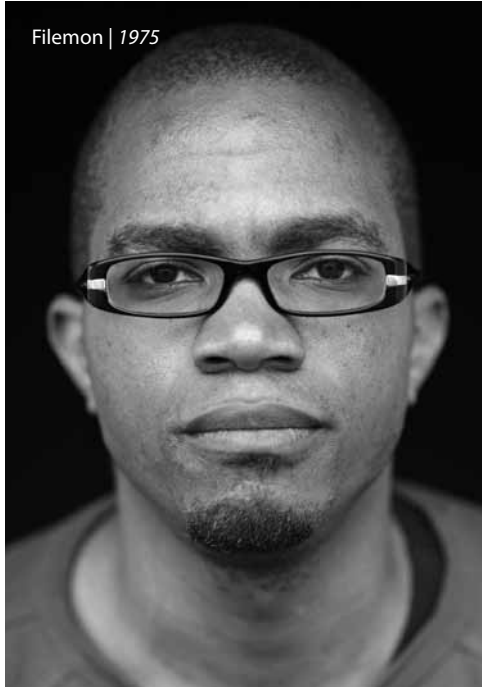
Theo | 1930



Theodora | 1984



Filemon | 1975



Jolien | 1986



Nasim | 1956



Manuël | 1989




Sipke | 1958



# News from the EU Member States

More information can be found at <http://www.non-discrimination.net>

**Harsh criticism is not protected by the prohibition of discrimination on grounds of 'belief'**


The plaintiff was a high-ranking civil servant at the Federal Asylum Service (*Bundesasylamt*). In 2004 he wrote and published a book about the Austrian asylum system, in which he expressed strong views about asylum seekers who misuse the right to asylum and generally warned about the asylum system being a loophole for all kinds of criminals and unwanted immigrants. He also held press conferences on this topic and revealed internal data to the public. The Federal Asylum Service reacted by withdrawing his authority to decide on individual cases and other disciplinary measures. The plaintiff filed a complaint to the Federal Equal Treatment Commission and to the courts against these measures, claiming harassment on the ground of belief. All decisions rejected his complaint. Acting as the last instance, the Supreme Court also dismissed the claim, stating that the views expressed did not fulfil in any way the necessary criteria to be considered as 'belief'.<sup>124</sup> The Supreme Court defined the scope of protection and the definition of 'belief', stating that 'The generic term "belief" (*Weltanschauung*) is closely related to the term "religion". However, it also serves as a collective term to describe other overarching concepts of life and the world and is furthermore used to indicate a personal and societal position with regard to how life is understood.' According to the Court, being critical of the asylum system and claiming in a book to be 'objective and free from ideology' clearly does not meet the criteria to be considered as 'belief' and is therefore not protected.

*Internet link source:*

[http://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT\\_20090224\\_OGH0002\\_009OBA00122\\_07T0000\\_000](http://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_20090224_OGH0002_009OBA00122_07T0000_000)

*Legislative developments***Ordinance of 19 March 2009 of the Region of Brussels-Capital in the field of social housing**

The Ordinance implements Directives 2000/43/EC and 2004/113/EC in the field of social housing in the Region of Brussels-Capital.<sup>125</sup> Its material scope applies to access to social housing including conditions and criteria, presentation, information and publicity related to social housing (Article 184). This Ordinance enshrines a limitative list of grounds including all grounds specified in Article 13 EC, plus political opinion, civil status, birth, wealth/income, language, state of health, physical or genetic characteristics, nationality, colour, ancestry and national or social origin, and it complies with the concepts set out by both Directives.

The Ordinance also criminalises public incitement to discrimination, the spreading of ideas based on racial hate or superiority, as well as membership of a group advocating discrimination or segregation; in addition it penalises employees or civil servants who intentionally discriminate and endorses sanctions for contempt of court in the event of non-compliance with injunctions.

It also provides that the Government of the Region of Brussels-Capital has to designate a body responsible for the promotion of equality.

*Internet link source:*

<http://www.ejustice.just.fgov.be/loi/loi.htm>

<sup>124</sup> Supreme Court (*Oberster Gerichtshof*) Nr.: 9ObA122/07t, 24.02.2009.

<sup>125</sup> Legislation, Official Journal (*Moniteur Belge*), 7.04.2009, pp. 26032 *et seq.*



## **Publication in the Official Journal of the Walloon Decree on combatting certain forms of discrimination<sup>126</sup>**

Through the amendment of the Walloon Decree of 6 November 2008, the Decree on combatting certain forms of discrimination of 19 March 2009<sup>127</sup> implements, in the remaining competences of the Walloon Region, European Directives 76/207/EC, as modified by Directive 2002/73/EC, Directives 2000/43/EC, 2000/78/EC, 2004/113/EC and 2006/54/EC. The former Decree of November 2008 already applied to the economy, employment and vocational training as long as they fall within the competences of the Walloon Region and covered, more specifically, career advice, socio-professional integration, job placement, funding for the promotion of employment, funding for employment and financial incentives to companies in the framework of economic policy, including the social economy and vocational training, in the public and the private sectors (Article 5).

The remaining fields of competences of the Walloon Region, including those transferred by the French-speaking Community (vocational training), which were not covered by the Decree of 8 November 2008, are now included in the Decree's material scope: social protection, including health care; social advantages, supply of goods and services which are available to the public and outside the private and family sphere, including social housing; access, participation or exercise of an economic, cultural or political activity open to the public; and statutory employment relationships in Walloon Government departments, public authorities under the control of the Walloon Region, decentralised bodies (such as provinces, municipalities, etc.), and public centres for social assistance. With the entering into force of this Decree, the implementation of the European Directives will be complete in the Walloon Region.

Moreover, a new Paragraph 1 of Article 11 has been inserted in the Decree providing that in the case of occupational activities within public or private organisations the ethos of which is based on religion or belief (churches are not explicitly mentioned, but must be considered to be included), a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos (in line with Article 4 (2) of Directive 2000/78/EC). Finally, the provision that protects a victim who has made a complaint under this Decree against reprisal (victimisation) has been rephrased (Article 10).

*Internet link source:*

<http://www.ejustice.just.fgov.be/loi/loi.htm>

### *Case law*

## **Four decisions of the Constitutional Court concerning actions for annulment of the Federal Anti-discrimination Acts of 10 May 2007**

The Constitutional Court has rejected several actions for annulment launched against the Federal Anti-discrimination Acts of 10 May 2007 (the Racial Equality Federal Act, the General Anti-discrimination Federal Act and the Gender Equality Federal Act).

The first case was initiated by Mathias Storme, a lawyer and law professor, and was rejected on 12 February 2009 in Decision no. 17/2009. The applicants had requested the cancellation of almost all the provisions of the three Acts.

<sup>126</sup> Official Journal (*Moniteur Belge*), 10.04.2009, pp. 28 557 and sq.

<sup>127</sup> *Décret relatif à la lutte contre certaines formes de discrimination*.

On 11 March 2009 the Constitutional Court issued two more decisions, Decision no. 39/2009 on the action launched by members of the Vlaams Belang, an extreme right-wing party, against the General Anti-discrimination Federal Act and Decision no. 40/2009, which joined the cases brought by the same applicants from the Vlaams Belang and by the Liga voor Mensenrechten (Flemish Human Rights League) against Article 21 of the Racial Equality Federal Act, which criminalises the dissemination of ideas based on racial superiority or hatred, on the ground that this article violates freedom of speech.

The Court rejected all three actions; in its decisions it offered important guidelines for the interpretation of numerous provisions of the Federal Anti-discrimination Acts in relation to the Belgian Constitution. These guidelines for interpretation fall into two categories: (1) constitutionally consistent interpretations which are expressly stated as such, meaning that the given statutory provisions have to be interpreted in the way indicated by the Constitutional Court in order not to be in breach of the Constitution; (2) guidelines for interpretation that, unlike constitutionally consistent interpretations, are not summarised at the end of the ruling but are likely to be referred to by ordinary courts in future anti-discrimination cases.

Furthermore, on 2 April 2009 the Constitutional Court issued Decision no. 64/2009, following several actions for annulment launched by trade union organisations. This decision is important as it cancels some provisions of the General Anti-Discrimination Federal Act and adds trade union conviction (*conviction syndicale*) to the closed list of discrimination grounds.

Six key issues, significant for the further development of Belgian anti-discrimination law, were raised by these decisions and analysed by the Court:

- (1) The horizontal application of the principle of equal treatment;
- (2) Grounds of discrimination;
- (3) The concepts of discrimination (indirect discrimination and the issue of intention in criminal matters, harassment, instruction to discriminate, intentional forms of discrimination);
- (4) Civil sanctions (basic compensation, nullity of contractual clauses contrary to the principle of equal treatment);
- (5) Criminal sanctions (denial of reasonable accommodation; dissemination of ideas based on racial superiority or hatred; incitement to discrimination, segregation, hatred or violence; participation in organisations which promote and incite to racial discrimination);
- (6) The burden of proof (indirect discrimination proven by statistics, judge's reasoning for allowing the reversal of the burden of proof, influence of civil proceedings on criminal proceedings).

*Internet link source:*

<http://www.arbitrage.be>

### **Ban of conspicuous religious symbols at school by the Council of State**



In 2005, two secondary public schools located in the French-speaking Community changed their internal regulations in order to forbid students to wear any kind of head covering in the school premises. The NGO Movement against Racism, Anti-Semitism and Xenophobia (MRAX) and several parents of schoolgirls wearing the Islamic headscarf brought applications before the Council of State, the highest administrative court in Belgium, in order to cancel these new regulations; the MRAX submitted two actions for annulment but no summary applications, and the parents submitted two actions – firstly as summary applications and then as applications for annulment.

In September 2005 the Council of State issued two decisions in summary proceedings, one with respect to each school. It refused to suspend these new internal regulations on the ground that the legal require-

ment of 'serious harm which is likely to be hard to compensate' was not met. The Council of State stressed that the expelled schoolgirls could pursue their education in another school located in the area that permitted the wearing of religious symbols. According to the Court, the loss of friendship and tiredness caused by a longer journey to school could not be deemed to seriously harm the teenagers.

On 17 March 2009 the Council of State issued two decisions on the merits of the cases brought by MRAX rejecting the applications for annulment as inadmissible; it has not yet examined the actions for annulment brought by the parents on their merits. The Council of State stressed that the aim of MRAX is to fight against racism, anti-Semitism and xenophobia as well as to promote friendship and peace between nations and equality and fraternity between people. According to the Council, the new regulations 'far from being in breach of the corporate aim of MRAX, are actually meeting and strengthening it'.

At this stage, strong criticism of the Council of State has already been voiced in a well-read law journal. As the author strongly contests, the decision of the Council of State is 'a failure for the doctrine of equality'.<sup>128</sup>

*Internet link source:*

<http://www.raadvst-consetat.be>

## Bulgaria

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### *Legislative developments*

#### **New draft law on education introduced into Parliament**

On 30 March 2009 the Government introduced a new draft law into Parliament, the School Education and Preschool Instruction and Preparation Bill, in order to regulate education in schools and kindergartens. The Bill bans discrimination ('restrictions or privileges') on a closed list of grounds excluding religion/belief, disability and sexual orientation.

The Bill prohibits both school students and teachers from 'wearing religious symbols aggressively or obtrusively demonstrating their religious preferences' but it does not clarify what 'aggressive' or 'obtrusive' demonstration of religious preference would be.

The bill provides for 'every citizen's right to equal access to quality education', and students are entitled to use the mechanisms provided by the law to facilitate equal access to education.<sup>129</sup>

The bill creates a duty for the State to take 'special care' of children with 'special educational needs' by providing them with a 'supportive environment and other conditions for equal access ... and full inclusion' in education and instruction. It formally introduces the principle of inclusive education and accommodation of students with special educational needs. Pupils and students with disabilities are to be integrated into mainstream kindergartens and schools, and special kindergartens and schools are only to be used after all possibilities for integrated education have been exhausted. The bill provides definitions of 'children and students with special educational needs', 'inclusive education', 'supportive teacher' and 'supportive environment'.

<sup>128</sup> Van Drooghenbroeck, Sébastien (2009). 'Observations under C.E., XI Ch., 17.03.2009' in *Journal des tribunaux*, p. 253-254.

<sup>129</sup> These mechanisms consist of state subsidies for: student grants and assistance; student transportation and accommodation; textbooks and learning materials; extracurricular activities; sports and relaxation for students; all-day schooling and canteen catering; diagnostics, consultations, rehabilitation and corrective instructional work; assistance in providing resources for children and students with special educational needs.



In addition, the bill provides that students whose mother tongue is not Bulgarian are entitled to study their mother tongue in special classes and that students in preparatory classes whose command of the Bulgarian language is inadequate are entitled to additional training in Bulgarian language skills.

The draft law was criticised by Roma groups for failing, *inter alia*, to: specifically provide for minority students' integration and for intercultural teaching; to specifically ban racially segregated schools and classes; and to lay down the principle of ensuring minority representation in classes commensurate with minorities' share in the local population.

#### *Case law*

### **Supreme Court decision on access to public buildings**

The Equality Body sanctioned the Minister of State for Administration and Administrative Reform for a breach of the statutory duty to create an accessible environment for persons with disabilities. The case was brought by a wheelchair user, on the grounds of failure to act with regard to inaccessibility (stairs) of a polling station during the presidential elections of 2006. The Equality Body imposed a fine of 1 000.00 EUR on the Minister for failing to remove architectural barriers.



The Supreme Court repealed the Equality Body's decision in Decision no. 2518/24.02.2009, holding that the statutory duty to ensure accessibility only bound the proprietor or manager of the respective building, and the Minister was not in charge of the polling station, and therefore not liable.

*Internet link source:*

<http://www.sac.government.bg/court22.nsf/d6397429a99ee2afc225661e00383a86/c8a425aa20dd1e15c2257566002fc1b2?OpenDocument>

## Cyprus

CY

#### *Equality body decisions/opinions/reports*

### **Equality Body criticises the reluctance of police to implement anti-discrimination legislation**

The Equality Body carried out a self-initiated investigation into police handling of a group attack against migrants in June 2008. This took place in a rural area and most of the perpetrators were between 14 and 18 years of age. According to the attackers' own statements to the police, it was revenge for an alleged assault against a Greek Cypriot by two Polish men on the previous night, which led the attackers to hit any person of migrant origin they found in the street. The victims fled without reporting the incident to the police. The incident was reported to the police by a number of British people who rushed to the rescue of the migrants and who were attacked themselves by the youths. Meanwhile the attackers grew in number and equipped themselves with stones and iron bars, causing considerable damage to the homes of migrants and to the property of the British people, shouting racist remarks and injuring several of them. The perpetrators were charged with the offences of common assault, malicious damage to property and riot, which do not involve a racial motive.



The Equality Body's investigation showed that the Police Department for the Combating of Discrimination (PDCD)<sup>130</sup> does not have any mechanism in place to record racial incidents; only a small number of racial offences have been recorded,<sup>131</sup> none of which have led to conviction. It also emerged from the investigation that the system for recording racial offences is such that, unless the investigating officer chooses to classify an offence as racial, the PDCD is not informed of the incident at all. The head of the PDCD admitted that no special training is offered to police officers on the identification and recording of racial motives, and he expressed the view that a change of mentality within the police will come about gradually through experience. The limited activity of the PDCD was attributed to its serious under-staffing and its wide mandate, which simultaneously covers two more departments (domestic violence and youth delinquency).

The Equality Body referred to the reports by ECRI and the European Union Agency for Fundamental Rights on Cyprus and concluded that this incident was not isolated, but that there is an increase in the number and intensity of racial incidents. It noted that although the legislative framework appears to be adequate, the authorities systematically refuse to prosecute racial incidents reported by victims or NGOs or appearing in the media. The report also stressed that in this particular incident the victims did not file a complaint, which indicates that vulnerable groups feel discouraged from reporting racial incidents for fear of deportation or because of lack of trust in the police. The Equality Body recommended the following measures: the precise and credible recording of racial incidents; the provision of assistance and protection to victims and their encouragement to report incidents; and adequate staffing of the PDCD and training of police officers on the identification and handling of racial incidents.

### **Discrimination in teachers' union circular opposing visits by Turkish Cypriots to primary schools**

The Equality Body investigated two complaints submitted by a private individual and by the Cyprus RAXEN National Focal Point against a circular issued by the primary school teachers' union urging its members to refuse to implement the year's targets set by the Ministry of Education for the development of a culture of peaceful coexistence with Turkish Cypriots, with particular emphasis on visits by Turkish Cypriot teachers and pupils. The complaints alleged that the teachers' union circular cultivated fear and distance amongst the pupils of each community and essentially urged teachers to discriminate against Turkish Cypriot pupils and teachers, which is an unlawful act of direct discrimination contrary to the EU anti-discrimination *acquis* as transposed by the relevant Cypriot legislation. In response to the complaints, the teachers' union argued that visits by Turkish Cypriots were likely to disturb the smooth operation of the schools due to the feelings and sensitivities which such visits would stir up.

The Equality Body found<sup>132</sup> that the teachers' union circular indicated mistrust and suspicion towards Turkish Cypriot pupils and teachers; however it fell short of identifying this action as discrimination. It also found that the issue raised by visits by Turkish Cypriots is not restricted to these visits but extends generally to educational targets set by the Ministry of Education in favour of peaceful coexistence between the two communities. It noted that these encounters could promote natural contact amongst children from the two communities through education, hence making an essential contribution towards the general aim of developing a culture of peaceful coexistence in society. Regarding the union's concerns about disturbance to the smooth operation of schools, the Equality Body pointed out that the educational system has the necessary mechanisms at its disposal to address such problems if they arise. However, the Equality Body's report did not address the fact that this circular exceeds the union's mandate of



<sup>130</sup> The mandate of the Police Department for the Combating of Discrimination (PDCD) was extended on 11.02.2008 following the Equality Body's recommendation, to cover and record not only racial offences but also racial incidents as defined, *inter alia*, by the victim.

<sup>131</sup> Two incidents were recorded in 2005, eighteen in 2006 and three in 2007.

<sup>132</sup> Decision Reference number AKR 28/2009, AKR 24/2009 dated 05.06.2009.



safeguarding the labour rights of its members by attempting to intervene in the domain of educational policy development. Instead, the report calls upon the teachers' union to reconsider its position regarding the visits of Turkish Cypriots to Greek Cypriot schools.

### **Discrimination in the Pension Law on the grounds of age**

The Equality Body investigated two complaints received from public servants alleging that Article 27 of the Pension Law contains unlawful age discrimination. The said law states that public servants aged 45 and over with at least five years of service may take early retirement upon which they immediately receive a lump sum whilst their pension is paid upon attaining the age of 55. By contrast, persons aged less than 45 years and with 3 years of service receive upon early retirement only a portion of the lump sum paid to those aged 45 and over, and lose their right to a pension. In defence of this provision, the Public Service Department argued that it was intended to discourage scientific personnel from leaving the public service, which would negatively affect its smooth operation. It further argued that the European Employment Strategy<sup>133</sup> provides for the adoption of policies encouraging employees to remain in employment; that the said provision of the Pensions Law is not in breach of the law transposing Directive 2000/78/EC because it serves a legitimate aim, i.e. the maximum utilisation of the knowledge and experience of public servants acquired at the cost of the state; and that the said law has not been breached because it provides an exception from the non-discrimination rule in the cases of age limits in access to pension benefits.



The Equality Body clarified<sup>134</sup> that the European Employment Strategy provides for measures encouraging the continuation of employment in general, in the sense of maintaining as many people in the labour market as possible and not in the same job, as suggested by the interpretation of the Public Service Department. The Equality Body rejected the allegation that this case falls within the exception provided by the law transposing Directive 2000/78/EC for age limits in access to pension benefits, as the age limit fixed is not related to access to pension benefits but concerns the age of voluntary retirement. Citing the ECJ decisions in *Mangold*<sup>135</sup> and *Palacios*,<sup>136</sup> the decision concluded that the measure was not proportionate, as it covered not only scientific but also non-scientific personnel, who amount to two-thirds of the public service workforce; that the measure did not serve a legitimate aim because the shortages of scientific personnel have since been covered; and that the age limit imposed an excessive restriction on the freedom of movement of labour as the aim could have been achieved by introducing a condition that pension benefits are payable upon completion of a certain number of years of service irrespective of age.

### **Age limit set in the definition of the term 'person with disability' as regards a public benefit scheme amounts to unlawful discrimination**

The Equality Body investigated a complaint against the Welfare Services for rejecting an application for state benefit from an 84-year-old who had lost both feet in an accident in 2005 and additionally suffers from diabetes and high blood pressure. The complainant's application had been rejected because he does not fall within the definition of 'person with a disability' contained in Article 2 of the Public Benefits Law since the event which caused his disability took place after the age of 65. Although two welfare officers testified that the health problems faced by the complainant are such as to merit the award of a public benefit, the Welfare Services nevertheless refused to exercise the discretion granted to them by the law<sup>137</sup> in order to pay benefit to the applicant.



<sup>133</sup> As articulated in the Decision of the Council of the European Union dated 12.07.2005.

<sup>134</sup> Decision Reference number A.K.I. 63/2008 kai A.K.I. 1/2009, dated 04.06.2009.

<sup>135</sup> C-144/04, dated 22.11.2005.

<sup>136</sup> C-411/05, dated 16.10.2007.

<sup>137</sup> Law N. 95(I)/2006, Article 4.

In its report<sup>138</sup> the Equality Body referred to the Law on Persons with Disabilities, which secures the right to independent living and participation in social and economic life, the right to a dignified standard of living, where necessary through financial provisions and social services;<sup>139</sup> and to Article 28 of the Cypriot Constitution which secures equality in enjoyment of constitutional rights and freedoms without discrimination on any ground. The report states that although there is no law at present prohibiting discrimination on the ground of age in social protection, a draft directive has been issued<sup>140</sup> which secures equal treatment on the ground of age in the field of social protection. The exception provided in paragraph 6(2) of the draft directive allows differential treatment on the ground of age where this is justified by a legitimate aim and the means of achieving it are appropriate, but any deviations from the principle of equality must be defined narrowly.<sup>141</sup> The decision concludes that the differential treatment of two categories of persons with disabilities on the ground of age (those who acquired a disability before they reached 65 and those who acquired it after 65) is a paradox that causes discrimination which cannot be objectively justified. The Equality Body recommended (a) that the Welfare Services exercise their discretion to grant the applicant public benefit in view of the seriousness of the health problems faced and (b) that the law is revised in order to comply with the equality principle. At the time of writing, the Welfare Services had still not complied with the recommendations of the Equality Body; however a bill currently under way intended to revise that law is likely to lead to a review of the definition of 'person with disability' as contained in the said law.

## CZ

# Czech Republic

## *Legislative developments*

### **Adoption of national anti-discrimination legislation**

After its approval in the Chamber of Deputies and Senate of the Czech Parliament, the Czech President on 16 May 2008 refused to sign the Anti-discrimination Bill. The President's refusal to sign could be only overturned by a vote in the Chamber of Deputies, but the vote was repeatedly postponed as the Bill did not have the support of opposition parties. Finally on 17 June 2009 the Bill was passed with 118 votes to 16.

The new Law provides definitions of discrimination, harassment, victimisation and disability on seven prohibited grounds: gender, racial/ethnic origin, religion or belief, disability, age and sexual orientation. It also establishes the Defender of Rights (Czech Ombudsman) as the anti-discrimination body. The Law was drafted in order to fully implement EU anti-discrimination legislation, including Directive 2004/113/EC. This means that the Law has quite a broad scope that extends beyond the requirements of the Directives, as it covers work and employment relations, access to employment, self employment and occupation, health care, education, social security and social protection, social advantages and services including housing for all grounds to the same extent.

#### *Internet link source:*

<http://www.psp.cz/sqw/text/tiskt.sqw?O=5&CT=253&CT1=0>

<sup>138</sup> Decision reference number A.K.R 34/2008, dated 10.04.2009.

<sup>139</sup> Law on Persons with Disabilities N.127(I)/2000, Articles 4(1) and 4(2)(f).

<sup>140</sup> COM(2008)426, proposed on 02.07.2008.

<sup>141</sup> Detailed Interpretation of Special Provisions of COM(2008)426, paragraph 5.

## Case law

### First decision of the Czech Constitutional Court regarding discrimination on the ground of age

The complainant was dismissed, together with other employees, from the Czech Office of the Government (the central body of state administration) in 2004, formally on grounds of redundancy. Their places were immediately filled by younger applicants. The complainant alleged that his dismissal was due to his age (59 years), basing this allegation on statistics showing that a majority of employees dismissed from his department on grounds of redundancy were older than 50 years (80%), and applicants offered their jobs were predominantly younger than 28 years (93%). He argued that the ordinary courts (Prague District Court no. 1, Municipal Court of Prague, Supreme Court) dismissed his statistics without shifting the burden of proof, and therefore acted contrary to the constitutionally guaranteed right to a fair trial.



The Constitutional Court<sup>142</sup> in April 2009 declared the statistics submitted by the applicant to be the key evidence in the case. On this basis, the burden of proof had to be shifted to the defendant, who had to prove an objective reason for the differential treatment of the applicant. According to the decision, the courts failed to inquire into the criteria for selecting employees to be made redundant, while the employer deliberately preserved the same jobs under a different label, establishing formally different selection criteria for recruitment. The courts did not inquire into the new jobs and how they differed from those abolished in order to establish whether the new qualification criteria were actually necessary for the job, and whether they were not merely used to conceal the real ground for the dismissals – the age of the employees.

*Internet link source:*

<http://nalus.usoud.cz/Search/ResultDetail.aspx?id=62527&pos=42&cnt=43&typ=result>

## Denmark

DK

## Case law

### Prohibition for judges to wear religious or political symbols in courts

The Danish Act on the Administration of Justice was amended on 29 May 2009,<sup>143</sup> clearly stating that Danish judges are not allowed to be dressed or appear in a way that demonstrates religious or political affiliation (cf. Section 56). Furthermore judges are in the future obliged to wear gowns at court procedures (cf. Section 56a). Lay assessors and jurors are not affected by the amendment since it only concerns legally trained judges.<sup>144</sup>

The issue of judges' appearance and clothing is usually regulated by the Court Administration Act. Its staff guidelines of 22 April 2008 stated that wearing the Muslim headscarf or other religious headgear was no hindrance to function as a judge as long as the face was visible. However, following a national debate on whether female Muslim judges should be allowed to wear headscarves, a majority of Parliament found it necessary to intervene to amend the legislation in this field and prohibit the manifestation of any religious or political affiliation.



<sup>142</sup> Decision of 30.04. 2009 no. II. ÚS 1609/08.

<sup>143</sup> Bill no. L98, 2008-09.

<sup>144</sup> In some Danish court cases, lay assessors and jurors participate; lay assessors are ordinary citizens appointed to rule on a case together with the judges.

The Danish Institute for Human Rights did not support the amendment, stating in its assessment that although there was no violation of international human rights obligations, considering the debate and the impact on Muslim women in particular, the amendment did not promote diversity at the workplace and interfered with the courts' handling of internal staff issues, which the Institute and the public in general seemed to have confidence in.

*Internet link sources:*

<http://www.ft.dk/>

<http://www.domstol.dk/om/organisation/domstolsstyrelsen/Pages/default.aspx>

FR

## France

### *Legislative developments*

#### **Minimum quotas for employees over 50**

According to a decree adopted in May 2009,<sup>145</sup> by the end of 2009 businesses employing 50 persons or more must either be bound by sector-wide collective agreements with respect to the employment of older employees, or must negotiate an agreement or engage in an action plan promoting the employment of workers over 50. Reports on these agreements should be submitted to the Labour departmental authorities. Employers are punished for not undertaking such an agreement or failing to meet its objectives by a special retirement contribution amounting to 1% of the total gross salaries paid to all employees by the employer.

According to the decree, the agreements must set quantitative objectives and employers should provide employees' representative organisations with quantitative annual data on their results in regard to these objectives, which must be reported back to the Labour authorities.

These agreements must cover the employment of older workers, career planning, the improvement of working conditions and prevention of strenuous physical work, access to training and skills development, adaptation of working conditions at the end of working life and transition towards retirement, and, finally, development of tutoring and knowledge transfer programmes.

The objective of the decree is to pressure businesses into modifying their human resources management practices, which are currently based on early retirement and employment of young workers, and improve their record in this regard.

*Internet link source:*

<http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000020639752&dateTexte=&categorieLien=id>

<sup>145</sup> Decree no 2009-560 of 20.05.2009.

### Interim injunctive relief ordering reinstatement in the public adult education system of a student wearing the veil

The petitioner enrolled in an English course between October 2008 and July 2009 in a GRETA, which was a requirement in order to be admitted to a higher education degree in Islamic marketing.<sup>146</sup> After attending classes wearing the veil for three months, her enrolment was annulled on the grounds of violation of the prohibition on wearing the veil in school premises, provided by Article L141-5 of the Education Code. The petitioner challenged this decision through an injunction procedure (*référé*), alleging that this provision did not apply to adult education and that she was facing an urgent situation, given that she had to complete this class in order to be admitted in September 2009 to a Master's programme in Islamic marketing. The Paris Administrative Court subsequently ordered<sup>147</sup> her immediate reinstatement through an interim injunction pending its judgment on the merits, on the ground of the urgency for the student to pursue her course and that the decision appeared to be manifestly illegal.



The adult education authorities argued during the administrative court hearing that her educational plans were not certain enough to meet the requirement of urgency, considering she was pregnant and her husband had been supporting the family for many years.

The Court held that the petitioner's educational plans could not be challenged, stating that it was convinced that she was seriously pursuing these plans, her pregnancy and husband's support of the family being irrelevant to this finding. According to the decision, the decision to exclude her appeared manifestly illegal in the absence of evidence of violation or jeopardy to public order within the school premises. The wearing of the veil could not in itself be held reprehensible. Moreover, the procedural requirements of the Education Code before a decision to expel a student had not been respected. Therefore the Court ordered the immediate reinstatement of the petitioner in the class.

### The extent of the state's obligation as regards access of disabled children to education

The parents of a disabled child, born in 1995, sued the state for damages because of its failure to provide a place for their child in mainstream schools in the academic year beginning autumn 2003.

Article L111-1 of the Education Code provides for the right of each child to education, and L111-2 for that of disabled children. Article L351-1 provides for the obligation of the state to ensure access to education, and Article L351-2 provides for the access to education of disabled children.

The highest administrative court (*Conseil d'Etat*) stressed the principle of the absolute enforceability against the state of the right to and obligation of providing education for children with disabilities. Quashing the judgement of the Administrative Court of Appeal of Versailles,<sup>148</sup> the *Conseil d'Etat* underlined that the Court of Appeal failed to verify whether the state had taken all the steps and measures necessary to give an effective impact to the right and obligation of disabled children to receive an education suitable for their particular needs.



<sup>146</sup> GRETA is a state adult education system managed by state secondary school authorities, offering adult classes in the premises of state secondary schools.

<sup>147</sup> Administrative Tribunal of Paris, 27.04.2009, no 0905233/9, *Said*.

<sup>148</sup> Administrative Court of Appeal of Versailles of 27.09.2007.





The *Conseil d'Etat* decided<sup>149</sup> that the state has an absolute obligation, not a best endeavours obligation. It further held that the state has the obligation to prove that it has taken all necessary measures to enforce a disabled child's right to education; the state is therefore precluded from relying on the insufficiency of existing facilities to justify its failure. The *Conseil d'Etat* held that the Administrative Court of Appeal also failed to effectively implement the right of disabled children to education. Therefore the state was ordered to compensate the parents for the costs incurred in finding an alternative solution to the school designated by the local special needs education commission (whether it is mainstream or specialised school).

*Internet link source:*

<http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000020541183&fastReqId=87376414&fastPos=7#>

### **Insurance company's refusal to underwrite an insurance contract due to age**

Following the purchase of a new car, the plaintiff requested an insurance quote from the defendant, an insurer. The defendant refused to quote any prices on the ground that the insurance company did not insure 'old people' as the plaintiff was 78 years of age.

The first instance criminal court dismissed the complaint on the ground that insurance is a risk evaluation business and that age is recognised as a relevant factor when assessing risk in car insurance. Moreover, despite having a full, clean driving licence, the plaintiff had declared an accident in the recent past.

The Court of Appeal reversed the decision; it stated that, despite the fact that insurance contracts are based on the evaluation of risks on the basis of statistical data, Article 225-1 *et seq.* of the Penal Code set a limitative number of 17 grounds that cannot be taken into account by the insurer, among which is the criterion of age.<sup>150</sup> According to the Court, this is confirmed by the fact that Article 225-3 sets out a list of exceptions applicable to this prohibition: the reference to the ground of health in disability, life and physical damage insurance is expressly authorised. However, the defendant did not invoke the plaintiff's health when refusing to underwrite the risk. The Court held that, considering that this exception must be interpreted restrictively, insurers cannot invoke age, alone or in combination with other factors, to quote or refuse to cover an insurance risk without committing the penal offence of discrimination on the ground of age.



The Court of Cassation did not accept it was a *prima facie* case of discrimination, on the ground that no admissible argument was raised during the proceedings; it refused to examine the appeal of the insurance company regarding the order to pay a 1 500 EUR fine for discrimination on the ground of age for refusal to provide access to goods and services.<sup>151</sup>

The refusal of the Court of Cassation to examine the case means that age cannot be construed as a legitimate actuarial ground for insurance. This decision forces the insurance industry to review its mechanisms of risk analysis and replace such criteria as sexual orientation and age with other risk evaluation criteria.

<sup>149</sup> *Conseil d'Etat* no. 311434, 8.04.2009.

<sup>150</sup> *Nîmes Court of Appeal, Lenormand v. Balenci*, no 08/00907 of 6.11.2008.

<sup>151</sup> Court of Cassation Criminal Chamber, 7 April 2009 no M 08-88.017, No 2074.

*Case law***Benefits of occupational employment schemes for same-sex partners**

A registered partner has managed to claim benefits under an occupational pension scheme that reserved this right to spouses.



sexual  
orientation

The Federal Labour Court held that occupational pension schemes should provide benefits to registered partners from 1 January 2005, as at that time the German legislator created comparable legal circumstances for marriages and registered life partnerships. Given the comparable situation of marriage and life partnership, the principle of non-discrimination applies.<sup>152</sup> This decision of the Federal Labour Court is therefore an important example of implementation of ECJ case law.<sup>153</sup>

*Internet link source:*

[www.bundesarbeitsgericht.de](http://www.bundesarbeitsgericht.de)

**Age limit for entrance into the civil service**


age

The plaintiff, who was born in 1962 and worked as a teacher from 1999, applied in 2000 for the conversion of his employment status into that of a civil servant. The defendant, the *Land*, rejected his application, arguing that the plaintiff exceeded the statutory age limit of 35 years and no exceptions could be made on the ground of delay due to childcare and military service because of the long duration of plaintiff's studies (21 semesters).

The Federal Administrative Court decided<sup>154</sup> that age limits in civil service employment law do not violate the German Constitution or European or German anti-discrimination legislation. The Court held that such provisions constitute a restriction of the constitutional principle of equal access to the public service according to performance as well as direct discrimination on the ground of age, but may be justified according to Article 6.1 (a) (b) of Directive 2000/78/EC and sentences 1 and 2 of Section 10 of the General Act on Equal Treatment. In this respect, a reasonable relation between the period of employment and the later pension entitlement, as well as a balanced age structure in the civil service, are considered legitimate aims, which can render age limits necessary and appropriate. However, the Court held that in this specific case the concrete provisions<sup>155</sup> on the age limit of 35 years for employment as civil servant and on possible exceptions from this requirement were void, since the provisions allowed for a wide scope of discretion for the administration to decide whether an exception to the age limit is granted or not. The Court therefore ruled that the plaintiff had the right to demand the re-examination of his application and underlined that the reasonableness of any new regulation on age limits depends partly on the scope of exceptions allowed.

*Internet link source:*

[www.bverwg.de](http://www.bverwg.de)

**Occupational requirement for social worker job in a religious organisation**


religion  
or belief

The plaintiff applied for a job with Diakonie, an organisation run by the Protestant Church of Germany, as a social worker working with immigrants. The plaintiff received a phone call from the defendant express-

<sup>152</sup> Federal Labour Court (*Bundesarbeitsgericht*), decision of 14.01.2009, Az.: 3 AZR 20/07.

<sup>153</sup> European Court of Justice, C-267/06 – *Maruko*.

<sup>154</sup> Federal Administrative Court Decision, 19.02.2009, BVerwG 2 C 54.07.

<sup>155</sup> Sec. 52.1, 84.1 sentence 1 *Verordnung über die Laufbahnen der Beamten im Lande Nordrhein-Westfalen*.

ing interest in her application, but asking about her religious affiliation. After being informed that the plaintiff regarded herself as a non-practising Muslim, the defendant asked whether the plaintiff could imagine changing her religion. The plaintiff expressed the view that this was not necessary for the kind of employment she sought, and she subsequently received a rejection letter.<sup>156</sup>

After a first instance decision in favour of the plaintiff, the appeal court reversed the decision, arguing that the plaintiff was objectively not qualified for the job as she did not possess a university degree mentioned as a requirement in the job advertisement.<sup>157</sup> According to the court, given the objective lack of qualification the question of possible discrimination did not arise. The telephone call was not regarded as an indicator that the employer wanted to waive the requirement to possess formal qualifications. The court did not grant the right to an appeal; the plaintiff filed an appeal against this specific decision, which has not been decided yet.

*Internet link source:*

<http://www.hamburg.de/landesarbeitsgericht/774996/pressemeldung-2008-1.html>

## Greece

EL

### Case law

#### Appeal against the acquittal of an anti-Semitic writer

A recent decision of the Athens Court of Appeal overturned a 2007 conviction and acquitted Kostas Plevris, the author of the book *Jews – The whole truth* from charges of inciting racial hatred.<sup>158</sup>

The First Instance Court of Athens in its December 2007 ruling convicted the author, who denies the Holocaust and promotes Nazi ideology in his writings, of inciting racial hatred through his book and sentenced him to a 14-month suspended prison sentence under Anti-racism Law no. 927/1979. The author filed an appeal. The Athens Court of Appeal considered the book to be a 'scientific work' and not racist, and therefore pronounced him not guilty. On 1 July 2009 the Prosecutor of the Court of Cassation appealed the Court of Appeal decision on points of law. The Prosecutor argues, *inter alia*, that the Court of Appeal incorrectly interpreted the Convention on the Elimination of Racial Discrimination and the relevant Greek Law no. 927/1979.

*Internet link sources:*

[http://cm.greekhelsinki.gr/uploads/2009\\_files/ghm1150\\_plevris\\_trial\\_english.doc](http://cm.greekhelsinki.gr/uploads/2009_files/ghm1150_plevris_trial_english.doc)

[http://cm.greekhelsinki.gr/uploads/2009\\_files/ghm1152\\_jewish\\_ngos\\_antinazi\\_pantazopoulos\\_on\\_plevris\\_trial\\_english.doc](http://cm.greekhelsinki.gr/uploads/2009_files/ghm1152_jewish_ngos_antinazi_pantazopoulos_on_plevris_trial_english.doc)



<sup>156</sup> See *European Anti-Discrimination Law Review (EADLR)*, Issue No. 6/7, p. 97.

<sup>157</sup> *Landesarbeitsgericht Hamburg*, 29.10.2008, 3 Sa 15/08.

<sup>158</sup> Athens Court of Appeal, decision 913/27.03.2009.

*Legislative developments***Amendment of the Equal Treatment Act**

At the end of June 2009, the Parliament adopted Act LVI of 2009 amending numerous laws, including the Equal Treatment Act (ETA). The bill came into force on 1 July 2009, but its amendments concerning the ETA will only take effect as of 1 October 2009. Employer and employee interest groups will now fall under the scope of the ETA and must therefore comply with the principle of equal treatment.<sup>159</sup>

The amendment also clarifies that not only the external relations of public bodies and employer and employee interest groups, but also the exercise of members' rights and participatory rights in such organisations, fall under the scope of the Law. In addition, the amendment enables parties concerned by a decision of the Equal Treatment Authority to ask for an equitable modification of the decision if its implementation would be disproportionately disadvantageous for them due to a change in their situation after the decision was taken.

One of the most important amendments is that under the previous law, the ETA provided that decisions of the Equal Treatment Authority concerning the violation of the principle of equal treatment could not be altered or annulled by the minister exercising supervisory powers over the Authority (currently the Minister of Social and Labour Affairs). The amendment stipulates that this restriction on the minister's supervisory powers only prevails while a case is pending before the Authority. This basically means that the Minister of Social and Labour Affairs may alter or annul the Authority's final decisions, raising serious concern with regard to the independence of the Equal Treatment Authority.

*Internet link source:*

[http://net.jogtar.hu/jr/gen/hjegy\\_doc.cgi?docid=A0900056.TV](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A0900056.TV)

**Amendment of laws setting criteria for receiving state support and participating in public procurement proceedings**

As of 1 June 2009, Act XXXVIII of 2009 amended a number of laws, including Article 15 of Act XXXVIII of 1992 on the State Budget. Before the amendment, the provision stipulated, *inter alia*, that support from the state budget and state funds may only be provided to those entities that have not been sanctioned, within two years preceding the application for support, by a final and legally binding decision for violation of Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (ETA). Under the new legislation, such entities are excluded from applying for state support if within two years from a final and binding decision imposing a fine, it is established that they have again committed a violation of the same kind.

The other amendment concerned Article 60 of Act CXXIX of 2003 on Public Procurement. Before the amendment, the provision prescribed that entities that have been sanctioned by a final and legally binding decision with a fine for violating the ETA may not participate in public procurement proceedings as bidders or subcontractors. This particular provision has been repealed, so violations of the ETA no longer exclude entities from taking part in procurement procedures.

*Internet link sources:*

[http://net.jogtar.hu/jr/gen/hjegy\\_doc.cgi?docid=A0300129.TV](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A0300129.TV)

[http://net.jogtar.hu/jr/gen/hjegy\\_doc.cgi?docid=99200038.TV](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=99200038.TV)

<sup>159</sup> The employer and employee interest groups are independent legal entities organised to represent their interests, which before the amendment did not fall under the Law's scope.

### Supreme Court decision on Roma segregation case

The plaintiff (the Chance for Children Foundation) requested in its petition for review that the Supreme Court quash the part of the second instance decision<sup>160</sup> which claimed that the local council and schools concerned had not segregated Roma pupils.<sup>161</sup> Moreover, it called for a preliminary ruling before the European Court of Justice, claiming it necessary to interpret Directive 2000/43/EC on whether segregation may be committed through failure to act against existing separation of Roma and non-Roma pupils.

The Supreme Court adopted the opinion that a preliminary ruling may not be requested in this case since the facts giving rise to the legal dispute arose prior to Hungary's accession to the European Union. The Court therefore stated that the case may be fully decided on the basis of domestic law. The Court established that segregation does not require active behaviour: by not taking measures against the situation in which the proportions of ethnic groups present were significantly different in different buildings of the same schools, the defendants effectively segregated Roma pupils. The Court pointed out (in line with the original first instance decision) that neither the lack of space in the central buildings, nor long-standing traditions, nor special forms of education such as so-called 'Gipsy minority education'<sup>162</sup> justified the segregation of the Roma pupils. Thus, in addition to direct discrimination (established by both the first and the second instance court on the basis that the buildings where Roma pupils study are much worse equipped), the Supreme Court also established the existence of segregation and ordered the local council to send the decision to the Hungarian News Agency.



The Supreme Court laid down two very important principles in the decision, namely: (i) segregation does not require active behaviour and may be committed by omission; (ii) the parents' request that the school should introduce 'Gipsy minority education' may not be understood as a request for separated education under the meaning of Article 28 of the ETA. Since this form of education simply means additional classes compared to the normal curriculum, it shall not be interpreted by schools as a request for separation, unless the parents expressly articulate such a wish. Thus, the introduction of this form of education may not be invoked as statutory exemption from the requirement of equal treatment.

### Violation of the principle of equal pay for equal work on the grounds of age

The claimant, who was working as an accountant in a forestry company, alleged that his former employer had violated the principle of equal pay for equal work. He claimed that after his retirement in 2002 under an early retirement scheme, the company continued to employ him on an indefinite-term contract, but he received a lower salary than other accountants employed by the same company: unlike the other accountants', his salary was not reviewed annually, so after a certain time his salary was significantly less than that of the others. The claimant complained about this in December 2007, and shortly after, in March 2008, he was dismissed. The company argued that the applicant in fact did not perform some tasks that were listed in his job description, so his work could not be considered as equal to the other accountants' work, therefore the difference between the salary of the claimant and of the other accountants was justified.



On the basis of testimonies and documents submitted by the claimant, the Equal Treatment Authority found that his tasks had not changed after his retirement. The Authority established that before his retirement, the claimant's work must have been considered as equal to that of the other accountants, as

<sup>160</sup> High Court of Appeal of Debrecen decision, case no. Pf.I..20.361/2007.

<sup>161</sup> See *European Anti-Discrimination Law Review (EADLR)*, Issue No. 6/7, p. 98, Issue No. 4, p. 64 and Issue No. 3, p. 68.

<sup>162</sup> 'Gipsy minority education' is a special form of education providing additional classes on Roma culture. DEC-E2009-011 *An Employee –v- A Limited Company* 27.04.09.

at this time differences between salaries were insignificant. Although the claimant continued to perform the same duties after he became a pensioner, a gap in the salaries evolved due to the fact that he was not granted the same annual increase as his colleagues. The Equal Treatment Authority therefore established a violation of the principle of equal treatment, ordered the company to refrain from this violation in the future and imposed a fine of 500 000 HUF (approximately 1 800 EUR) on the company.

*Internet link source:*

<http://www.egyenlobanasmod.hu/zanza/234-2009.pdf>

## Ireland

### Case law

#### Discrimination in selection for redundancy

racial  
or ethnic  
origin

The complainant, who is not an Irish national, and was working as a payroll administrator performing also human resources and translation duties, complained that she had an argument with her employer during which, she alleged, he spoke to her as he would never have spoken to an Irish national. Following the argument she was absent from work for one week on stress-related sick leave and during this time she was made redundant. When the complainant asked on what basis she had been selected for redundancy, the respondent replied that her role (in spite of the varied nature of her duties) had been outsourced. The complainant argued that in reality she had been dismissed rather than made redundant, and had been discriminated against on grounds of race and gender.

The Equality Tribunal was satisfied that the complainant has proved as a matter of probability that she was singled out for special unfavourable treatment by the respondent, that other employees of a different racial origin were not treated this way and that her dismissal appeared as a direct consequence of the special treatment to which she was subjected. The respondent's explanation that her role had been outsourced and that her dismissal was not racially motivated did not convince the Tribunal, and, therefore the Tribunal awarded the complainant the sum of 20.000 EUR in compensation for the discriminatory dismissal suffered.<sup>163</sup> However the gender aspect failed, as the Tribunal found no link between the unfavourable treatment received by the complainant and the gender ground.

*Internet link source:*

<http://www.equalitytribunal.ie/index.asp?locID=164&docID=1989>

#### Jurisdiction of Equality Authority

disability

Ms T, who is an Equality Officer with the Equality Tribunal, had referred a complaint to the Tribunal against the insurance company Eagle Star Life Assurance Company in 2002 when she was already an Equality Officer, on the basis that she was being discriminated against on the grounds of disability in the imposition of an increased premium payable on her income protection policy compared to that payable by her colleagues. The Equality Tribunal subsequently appointed a temporary external equality officer to hear the complaint in 2006 but Eagle Star considered that at this stage the complaint should be dismissed because it had not been pursued by Ms T. Eagle Star also questioned the jurisdiction of the Tribunal to hear the complaint in light of the definition of disability contained in the Equal Status Act 2000, which, they contended, did not cover the complainant's circumstances. The definition did not explicitly mention obesity and they contended that it was not capable of covering it.

<sup>163</sup> DEC-E2009-011 An Employee -v- A Limited Company 27.04.09



The Equality Tribunal decided in favour of Ms T.<sup>164</sup> The respondent appealed to the High Court, which held that primary responsibility for interpreting the provisions of the Equal Status Acts 2000-2008 rests with the Equality Officer. The High Court declined the appellant's request to quash the Equality Officer's decision on grounds of lack of jurisdiction. This case is an important affirmation of the jurisdiction of the Equality Tribunal. The Equality Tribunal will now continue to investigate the matter, which concerns imputed disability on grounds of obesity.

*Internet link source:*

<http://www.equality.ie/index.asp?docID=786>

## Netherlands

NL

### *Legislative developments*

#### **Extension of the scope of the Disability Discrimination Act**

On 29 January 2009, the Dutch legislator passed a bill (no. 30 859) which extends the scope of the Act on the Equal Treatment of Disability and Chronic Illness<sup>165</sup> to the fields of housing and primary and secondary education. The extension to the field of housing entered into force on 15 March 2009, while the extension to the field of primary and secondary education entered into force on 1 August 2009.<sup>166</sup> The initial scope of the above-mentioned Act was restricted to employment and vocational education, as defined in Directive 2000/78/EC. This extension goes beyond what is formally required by the Employment Equality Directive and was welcomed by people with disabilities.

Although the Act now applies to the field of housing, it should be noticed that the legislator has made a restriction with regard to the obligation to provide reasonable accommodation (Article 2). Under the newly added Article 6c, the obligation to provide reasonable accommodation does not apply as far as the constructional requirements of houses and residential facilities/accommodation are concerned. The rationale of this restriction was that adapting houses for people with disabilities is already a responsibility of the local authorities under the Residential Accommodation Act. A shift of this responsibility would probably have a negative impact on the position of people with disabilities on the housing market (as renters/sellers have a great deal of legal discretion in choosing their tenant/buyer).

*Internet link sources:*

<http://parlando.sdu.nl/cgi/login/anonymous>

*Staatsblad* (Official Journal) 2009, 117

<http://www.cgb.nl/cgb123.php>

#### **New Local Non-discrimination Act**

On 16 June 2009 the Dutch legislator passed a bill<sup>167</sup> (Municipal Non-discrimination Services Act),<sup>168</sup> which obliges all local governments to provide independent and accessible local anti-discrimination bureaus. As regards the obligations under the Directives, these bureaus are part of the system of equality bodies in the Netherlands.<sup>169</sup> Under this new act, these equality bodies will have a twofold task: a) to provide

<sup>164</sup> *Eagle Star v. Equality Tribunal and Hugh O'Neill and Bernadette Treanor*, 18.03.2009.

<sup>165</sup> *Wet gelijke behandeling handicap/chronische ziekte 'Wgbl/cz'.*

<sup>166</sup> *Staatsblad* (Official Journal) 2009/117.

<sup>167</sup> *Wet gemeentelijke antidiscriminatievoorzieninge.*

<sup>168</sup> *Kamerstukken Eerste Kamer* 2008/2009, 31 439 A, p. 1-3.

<sup>169</sup> See *Kamerstukken II*, 2007–2008, 31 439, nr. 3 (explanatory memorandum), p. 7.



independent (legal) aid<sup>170</sup> to people with complaints of discrimination; and b) to register all complaints of discrimination. This act will come into force as soon as it is published in the *Staatscourant* (Law Gazette). From that moment, the Act grants a six-month implementation period to the local authorities (Article 4).

This newly enacted law was adopted in order to remedy the supposed large unreported numbers of discriminatory incidents and to record them more effectively. According to a survey conducted by the Dutch non-discrimination NGO Art. 1, only 20% of all discriminatory incidents in the Netherlands are reported and recorded in official statistics.<sup>171</sup> It can also be seen as a reaction to the criticism that the main Dutch equality body, the Equal Treatment Commission (ETC), does not have the responsibility to assist the victims of discrimination to effectively claim their rights under equal treatment legislation.<sup>172</sup> From now on, officially the Dutch Government has chosen a dual track for implementing Article 13 of Directive 2000/43/EC, Art 1(7) of Directive 2002/73/EC and Article 12 of Directive 2004/113/EC (Recast directive): the task of providing independent assistance to victims of discrimination in pursuing their complaints of discrimination now lies with the new local anti-discrimination bureaus, while the task of conducting independent surveys concerning discrimination lies with the ETC.<sup>173</sup> The tasks of publishing independent reports and making recommendations on any issue relating to such discrimination lie with both bodies.

*Internet link source:*

<http://www.eerstekamer.nl/9370000/1/j9vvhwbtbnzpbzzc/vi2hl9afxyev/f=y.pdf>

### **New amendment to Health and Safety at Work Act obliges employers to prevent discrimination**

On 30 June 2009 an amendment to the Health and Safety at Work Act (*Arbowet*) was enacted, obliging employers to prevent and take action against discrimination in their organisations.<sup>174</sup> 'Discrimination' now has been added to the list of possible causes of 'psychosocial pressures' in the workplace, as listed in the definition provided by Article 1(3)(e) of the Act. With regard to this obligation, Article 5 obliges employers to conduct a 'risk assessment' with regard to the existence of psychosocial pressures and adopt an appropriate action plan.

The Labour Inspectorate is responsible for enforcing this obligation and is competent to impose fines upon employers or to shut down a business in cases of persistent neglect of duty by employers.

*Internet link sources:*

[http://www.eerstekamer.nl/behandeling/20090421/gewijzigd\\_voorstel\\_van\\_wet\\_2/f=/vi4l9ox5qv6s.pdf](http://www.eerstekamer.nl/behandeling/20090421/gewijzigd_voorstel_van_wet_2/f=/vi4l9ox5qv6s.pdf) (The *Arbowet* amendment can be found in Article V, p. 8)

[http://home.szw.nl/index.cfm?menu\\_item\\_id=14762&hoofdmenu\\_item\\_id=13826&rubriek\\_item=391844&rubriek\\_id=391818&link\\_id=171933](http://home.szw.nl/index.cfm?menu_item_id=14762&hoofdmenu_item_id=13826&rubriek_item=391844&rubriek_id=391818&link_id=171933)

<sup>170</sup> Under Article 12 (2)(e) of the General Equal Treatment Act (*Algemene Wet Gelijke Behandeling*) associations such as these bureaus have the right to (independently) file complaints before the Equal Treatment Commission and courts.

<sup>171</sup> [http://www.art1.nl/artikel/8816-Nieuwe\\_wet\\_en\\_campagne\\_stimuleren\\_melden\\_discriminatie](http://www.art1.nl/artikel/8816-Nieuwe_wet_en_campagne_stimuleren_melden_discriminatie).

<sup>172</sup> See R. Holtmaat, *Catalysts for Change? - Equality bodies according to Directive 200/43/EC*, report for the European Commission, Luxembourg: European Communities 2007, p. 25.

<sup>173</sup> See *Kamerstukken II*, 2007–2008, 31 439, nr. 3 (explanatory memorandum), p. 7.

<sup>174</sup> *Kamerstukken Tweede Kamer* 2008–2009, 31 811 nr. A.

### MP Geert Wilders prosecuted for discriminatory speech



On 21 January 2009 the Court of Appeal of Amsterdam<sup>175</sup> ordered the criminal prosecution of Member of Parliament Geert Wilders<sup>176</sup> for incitement to hatred and discrimination based on his statements in various media about Muslims and their faith.<sup>177</sup> The Court of Appeal rendered its judgment as a consequence of a number of complaints submitted by people of Islamic faith who claimed to be insulted and discriminated against by the public prosecution's decision not to prosecute Wilders for his inflammatory statements. The Court of Appeal considered that the contested views of Wilders (also shown in his movie *Fitna*) constitute a criminal offence according to Dutch law, both because of their content and method of presentation, characterised by biased, heavily generalised phrasing with a radical meaning, continual repetition and increasing intensity, as a result of which hatred is created. (NB: under the Constitution, as an MP, Mr Wilders can only be prosecuted for views expressed outside the Dutch Parliament) The Court of Appeal considered insulting statements making a connection to Nazism (for instance calling Islam a 'fascist faith' and comparing the Koran to *Mein Kampf*) to be an insult to such a degree for the community of Islamic worshippers that there is a general interest to prosecute Wilders. According to the Court of Appeal, Wilders has also insulted Islamic worshippers themselves by offending affecting the symbols of the Islamic belief.

The Court of Appeal emphasised that this is a provisional judgment in the sense that Wilders has not been convicted. The Court of Appeal has only judged whether there are sufficient indications – at the level of reasonable suspicion – to commence criminal prosecution.

### Dismissal of a female Muslim teacher refusing to shake hands judged lawful

A female Muslim teacher at a state school decided not to shake hands with men anymore on the ground of her religion. The school dismissed her due to breach of trust between employer and employee, an argument accepted by the District Court of Utrecht.<sup>178</sup> According to this decision, the teacher had failed in her duty to communicate her decision properly, and she should have known that her decision would cause commotion and unrest among the multi-ethnic pupils. The Court held that neither the freedom of religion nor any other fundamental principle was at stake in this case, as it merely concerned the reasonableness of continuing the employment contract. In an earlier instance, the Equal Treatment Commission (ETC) had deemed this constituted indirect discrimination on the ground of religion and had called on the school board to reinstate the teacher.<sup>179</sup>



The teacher appealed the decision of the District Court of Utrecht to the Central Council of Appeal,<sup>180</sup> which decided on 11 May 2009 that the fact that there was a *prima facie* case of indirect discrimination on the grounds of religion could not be ignored by just applying general labour law norms. However, the Central Council of Appeal stated that the school had a legitimate aim in requiring their teachers to shake hands irrespective of sex, as they wanted to comply with prevailing customs in Dutch society, especially as the school had many pupils and teachers of multi-ethnic origin. The teacher had also refused to accept an administrative position within the school in which she would not have to shake hands with other

<sup>175</sup> <http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BH0496>.

<sup>176</sup> Geert Wilders is the leader of the Freedom Party.

<sup>177</sup> Court of Appeal (*Gerechtshof*) of Amsterdam, 21.01.2009, LJN BH0496.

<sup>178</sup> Decision of 30.08.2007, accessible at <http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BB2648>.

<sup>179</sup> Opinion 2006-211 of 7.11.2006, accessible at <http://www.cgb.nl/opinion-full.php?id=453056503>.

<sup>180</sup> *Centrale Raad van Beroep*, highest administrative court, dealing with cases relating to civil servants.

people. Therefore, the Central Council of Appeal considered that the dismissal was lawful as it pursued a legitimate aim and was deemed necessary and proportional.

*Internet link sources:*

[http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BI2440&u\\_ljn=BI2440](http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BI2440&u_ljn=BI2440)

<http://www.cgb.nl/opinion-full.php?id=453056503>

### Employment office condemned for complying with discriminatory requests

The municipal employment office of the city of Zwolle, acting as an intermediary in helping people to find a job,<sup>181</sup> was not advancing job applications from candidates of certain ethnic origins, races or ages if employers had indicated that they did not wish to employ such people. A case was submitted to the Equal Treatment Commission by a local non-discrimination NGO, Artikel 1 Overijssel, which was notified of this by another NGO, members of which had conducted some interviews with the manager of the municipal employment office. In these interviews the manager stated that the demands of employers are indicative of their working methods. He explicitly mentioned examples of employers who had indicated that they would not employ applicants above the age of 50 and were not willing to accept applicants of Turkish origin for certain positions. According to the manager, these demands had to be observed because it was pointless to put forward such candidates, and being rejected would only discourage them. Artikel 1 Overijssel had first notified the Zwolle city administration, but an internal inquiry by the city administration concluded that no discrimination had taken place as the proportion of immigrants and older people who were successfully placed by the employment office was assessed to be sufficient (both 25%).

racial  
or ethnic  
origin

age

The ETC<sup>182</sup> judged that the manager's statements constituted a presumption of discrimination on the grounds of age and race. Therefore the burden of proof shifted to the city administration, which did not manage to contest this presumption. In addition, the internal inquiry by the city administration was deemed inaccurate, as it just relied on output percentages without taking into consideration the statements of the employment office management. The ETC stated that it is the responsibility of employment offices to call employers to account and that a certain proportion of employed persons of a given age or race is insufficient to refute a presumption of discrimination.

*Internet link source:*

<http://www.cgb.nl/opinion-full.php?id=453057032>

## Poland

PL

### Case law

#### Termination of employment due to attainment of retirement age

The Supreme Court of the Republic of Poland has issued inconsistent verdicts in cases where employment contracts were terminated because the employee had reached the age of retirement and entitlement to a pension. The ombudsman (Commissioner for Civil Rights Protection) lodged<sup>183</sup> a 'legal question'<sup>184</sup> with the Supreme Court reading as follows: 'May reaching the age of retirement and entitlement to a pension

<sup>181</sup> This is provided in the General Equal Treatment Act (GETA) and the Age Discrimination Act (ADA).

<sup>182</sup> Opinion 2009-40 of 13.05.2009.

<sup>183</sup> The question was lodged on 27.10.2008, sygn. II PZP13/08.

<sup>184</sup> This is a special procedure which may be initiated by the ombudsman in situations where differences in the interpretation of law in Supreme Court judgements exist; the legal question is not based on any particular case.

be the sole reason for the termination of a labour contract with an employee - a woman or a man - and does this not imply discrimination against an employee based on sex and age (Article 11<sup>3</sup> of the Labour Code)’.



The Supreme Court adopted a resolution<sup>185</sup> which reads as follows: ‘Reaching the age of retirement and entitlement to a pension may not be the sole cause for termination of the contract of employment by the employer.’ In its justification, the Supreme Court stressed that termination of employment with an employee just because they have reached a certain age and are entitled to a pension constitutes discrimination: indirect discrimination because of gender (in the case of women since the retirement age for women is lower) and direct discrimination because of age (in the case of both women and men). The Court concluded that the Polish legislator did not intend to treat attainment of retirement age as an exception from the prohibition of age-based discrimination. As a consequence, the termination of an employment contract simply because the employee has reached retirement age must be treated as prohibited discrimination.

The resolution of the Supreme Court has tremendous significance: it clarifies that reaching the age of retirement and entitlement to a pension may not be the sole reason for the termination of a contract and constitutes age discrimination.

*Internet link source:*

[www.sn.pl/aktual/index.html](http://www.sn.pl/aktual/index.html), [www.rpo.gov.pl](http://www.rpo.gov.pl)

PT

## Portugal

### *Legislative developments*

#### **Revision of the Police Law**

The Sindicato Unificado da PSP (one of the police trade unions) expressed in April 2009 the intention to include a clause on discrimination on the ground of sexual orientation in the forthcoming revision of the Police Law. This revision was conducted by the police trade unions and the Ministry of Internal Affairs. It was approved on 5 August 2009 by the President of the Republic and the Parliament and will soon be published in the Official Journal (*Diário da República*). Its goal is to change attitudes and encourage good employment practices through managing equality issues.

The draft revision presented by the Ministry of Internal Affairs (*Ministério da Administração Interna*) did not initially include in Article 8 the term ‘sexual orientation’ as a factor which may lead to discrimination; this omission was considered by the trade union to be against the principle of equality of all citizens laid down by the Portuguese Constitution. The current Article 8 of the Police Law states: ‘Special duties - b) to act without discrimination based on ancestry, sex, race, language, country of origin, religion, political or ideological convictions, education, economic situation or social status.’ This wording corresponds to Article 13 of the Portuguese Constitution, with one exception: the wording does not refer to sexual orientation, but Article 13 of the Constitution does. However, the Ministry of Internal Affairs agreed to include sexual orientation in Article 8 of the Police forces statute.

<sup>185</sup> Resolution of the Supreme Court, Chamber of Labour Law, Social Security and Public Affairs (panel of seven judges) of 21.01.2009.



### **Roma mediators in town halls**

The High Commissioner for Immigration and Intercultural Dialogue (ACIDI I.P.) launched in April 2009 a one-year pilot project aiming to appoint Roma mediators in 10 Portuguese town halls in cities with Roma inhabitants. The mediators will be at the disposal of town halls whenever they are needed; their task will be to offer assistance in solving conflicts arising, for instance, between residents and the police. Through the GACI (Gabinete de Apoio às Comunidades Ciganas - Roma Communities Support Cabinet), the ACIDI I.P. is also coordinating training on institutional rules, mediation and communication for the mediation procedure.

The existence of Roma mediators will hopefully improve the access of Roma communities to services such as town hall facilities, healthcare centres, and hospitals and will promote communication between the Roma community and other inhabitants.

*Internet link source:*

<http://www.ciga-nos.pt/Default.aspx?tabindex=3&tabid=10>

## Romania

### *Legislative developments*

#### **New controversial Civil and Criminal Codes adopted**

Following a lengthy and contested process, new versions of the Civil Code, Criminal Code, Civil Procedure Code and Criminal Procedure Code were adopted by the Government as draft laws on 25 February 2009 and were submitted to Parliament in order to initiate the legislative procedure. By taking this action, the Romanian Government failed to observe the provisions regulating the legislative process<sup>186</sup> and also disregarded the concerns highlighted by the European Commission in its last country report.<sup>187</sup>

Although the draft bills were substantially modified by the special Parliamentary Commission, the amendments were incomplete due to limited time and the lack of proper consultations with stakeholders. Subsequently the Government decided to withdraw its own versions of the Civil Code and the Criminal Code and to adopt the documents produced by the special Parliamentary Commission. In spite of protests by human rights NGOs, the media and trade unions, on 22 June 2009 the Government used

<sup>186</sup> Law no. 52/2003 on transparency in decision-making, Law no. 24/2000 on legislative drafting techniques and Law No. 317/2004 on the competences of the Superior Council of Magistracy.

<sup>187</sup> COM (2009) 70 final of February 2009.

the highly unusual constitutional provision of assumption of responsibility in order to adopt the drafts without further parliamentary debates.<sup>188</sup>

**Civil Code:** In spite of calls to provide for the institution of civil union or partnership both for same-sex and heterosexual couples, the new Civil Code expressly prohibits forms of civil union similar to marriage in Article 277 by specifically stating that ‘marriage between same-sex persons is prohibited’ and adding that ‘same-sex marriages performed abroad, by Romanian citizens or by foreigners are not to be recognised in Romania.’ The Civil Code also stipulates that legal provisions on the freedom of movement in Romania of EU/EEA citizens remain in force without clarifying, however, the inconsistency between provisions recognising the marital status of EU citizens as granted by their countries included in the legislation transposing Directive 2004/38/EC and the recent prohibition of the recognition of same-sex marriages or partnerships conducted abroad.<sup>189</sup>

The new Civil Code also prohibits in Article 462 (3) adoption concluded by persons of the same sex and defines in Article 258 the family as being based on ‘marriage freely entered into by the spouses’ expressly defined as ‘union between a man and woman’ in Article 259.

**Criminal Code:** The members of the special Parliamentary Commission introduced into the text of the Criminal Code aggravating circumstances in cases of offences committed with discriminatory intent, a provision not included in the Government’s initial draft. Article 77 (h) includes as aggravating circumstances ‘perpetrating a criminal act for reasons related to the race, nationality, ethnicity, language, religion, gender, sexual orientation, opinion or political affiliation, wealth, social origin, age, disability, non-contagious chronic illness or infection by HIV/AIDS, or other similar circumstances which are considered by the perpetrator as causes for the inferiority of one person compared to another.’

The new Criminal Code also sanctions abuse in the exercise of authority (Article 297) as the act of a civil servant who, during the exercise of work-related tasks, limits the exercise of a right of a person or creates a situation of inferiority on grounds of race, nationality, ethnic origin, language, religion, gender, sexual orientation, political affiliation, wealth, age, disability, non-contagious chronic illness or infection by HIV/AIDS.

<sup>188</sup> The institution of assumption of responsibility by the Government before the Parliament is provided by Article 114 of the Romanian Constitution and it is deemed in constitutional theory and jurisprudence to be an exceptional measure to ensure the passage of legislative provisions needed to ensure the governmental programme.

Article 114 of the Romanian Constitution provides that: (1) The Government may assume responsibility before the Chamber of Deputies and the Senate in joint session for a programme, a general policy statement, or a bill.

(2) The Government shall be dismissed if a motion of censure, tabled within three days from the date of presentation of the programme, the general policy statement, or the bill, has been passed in accordance with provisions under Article 112.

(3) If the Government has not been dismissed in accordance with paragraph (2), the bill presented shall be considered as passed, and the programme or the general policy statement become binding on the Government.

(4) In the event that the President of Romania demands reconsideration of a law passed in accordance with paragraph (3), the debate thereon shall be carried out in a joint session of both Chambers.

<sup>189</sup> Romanian Governmental Ordinance 102/2005 on the freedom of movement and residence of EU citizens (14.07.2005), approved and amended by Law 500/2006 on amending and approving Ordinance 30/2006 (28.12.2006), defines as a partner ‘a person who lives together with a citizen of the EU, if the partnership is registered according to the law of the Member State of origin or, when the partnership is not registered, the relationship can be proved.’

The new Criminal Code criminalises the prohibition of free exercise of religion in Article 381. However, it protects solely the 'free exercise of the ritual of a religious denomination which is organised and functions according to the law.'<sup>190</sup>

The two codes adopted were promulgated on 10 July 2009 by the President of Romania and will enter into force according to Article 2664 'at the date provided for in the law adopted for the enforcement of the Code,' most probably in the next two years.

*Internet link sources:*

[http://www.cdep.ro/pls/proiecte/upl\\_pck.proiect?cam=2&idp=10256](http://www.cdep.ro/pls/proiecte/upl_pck.proiect?cam=2&idp=10256)

[http://www.cdep.ro/pls/proiecte/upl\\_pck.proiect?cam=2&idp=10255](http://www.cdep.ro/pls/proiecte/upl_pck.proiect?cam=2&idp=10255)

*Case law*

### **Discriminatory article affecting right to dignity of Roma community**

The NGO Institutul pentru Politici Publice filed a petition against the magazine *România Mare* following the publication of an article entitled 'Țiganiada-2008' (Gypsy country-2008) on 3 October 2008. The unsigned article contained racist and xenophobic language, and promoted behaviour infringing the right to dignity and creating a degrading, humiliating and offensive environment for the Roma minority.

The National Council on Combating Discrimination (NCCD), which was reluctant in the past to sanction discriminatory language in the media as the perpetrators invoked their right to free speech, considered that the article infringes the right to dignity guaranteed by the Anti-discrimination Law and promotes public behaviour that is degrading, humiliating and offensive to the Roma minority. The NCCD invoked the case law of the ECtHR in balancing freedom of speech against the right to dignity, and it applied the ECtHR's test to analyse the limitation of the free speech caused; further, it used an interpretation of Article 3 of the European Convention on Human Rights to assess the impact of the statements made in the magazine article. The national equality body found that discrimination had occurred and issued an administrative warning against the magazine *România Mare*.<sup>191</sup>

*Internet link source:*

[www.ipp.ro](http://www.ipp.ro)



### **Constitutional Court decision on the constitutionality of the National Council on Combating Discrimination**

The National Council on Combating Discrimination and the Anti-discrimination Law came under successive attacks before the Romanian Constitutional Court (CCR), with the Court gradually clarifying the content of the law and the mandate of the institution.<sup>192</sup>

<sup>190</sup> Romanian legislation on freedom of religion and religious denominations of 2006 created a three-tiered system of religious entities: religious denominations recognised by the state (*culte*), which have to pass a very restrictive test, religious associations with simplified registration requirements but enjoying only limited rights and religious groups which do not want to or could not register as first or second tier status. This means that religious denominations not registered as first-tier entities, either because they choose not to or because they do not meet the excessive legal requirements, will not enjoy the protection of the criminal law.

<sup>191</sup> National Council on Combating Discrimination, Decision 17 of 13.01.2009, *Institutul pentru Politici Publice v. Revista Romania Mare*.

<sup>192</sup> Romanian Constitutional Court, Decision 444 of 31.03.2009 published in Official Gazette no. 331 of 19.05.2009. Available at <http://www.ccr.ro/cauta/DocumentAll.aspx?SearchDoc=true>.



A complaint brought by a person sanctioned by the NCCD questioned the constitutionality of some substantive and procedural provisions of the Anti-discrimination Law.<sup>193</sup> In particular, it alleged that constitutional provisions had been infringed as the national equality body is an extraordinary court established by means of delegated legislation, and the Ministry of Finance issues an advisory opinion on the NCCD's budget, thereby infringing the NCCD's independence, a pre-requisite for a quasi-judicial body.

The Constitutional Court referred to its prior decisions<sup>194</sup> and found that the complaint did not question the constitutionality of the law, but was simply a complaint as to the interpretation of the law. Consequently, the Constitutional Court rejected the objection as to the constitutionality of the provisions of the Anti-discrimination Law regarding the quasi-judicial mandate of the National Council on Combating Discrimination. The decision reiterates the role of the national equality body as an autonomous specialised public administrative body with a jurisdictional mandate in combating discrimination.

*Internet link source:*

<http://www.ccr.ro>

## Slovenia

SI

### *Case law*

#### **Resettlement of a Roma family does not constitute discrimination**

A complaint was jointly submitted by two non-governmental organisations<sup>195</sup> to the Advocate of the Principle of Equality (hereafter the Advocate) in January 2007 in support of a Roma family alleging discrimination on the grounds of race or ethnicity. The case was not adjudicated during the previous Advocate's term of office and was examined by the new Advocate in October 2008.

The Roma family, consisting of more than 30 members, lived on their own land in barracks and tents. On 22 October 2006, R.Č. (not Roma), who also lived with the family, in the presence of other Roma caused severe physical injuries to a local in their village near Ambrus. This incident provoked turmoil and fear among the locals and on 28 October 2006 around 200 of them gathered in front of the Roma family's plot of ground and demanded they leave the village. Numerous police officers and government representatives were present for security reasons. The agreement was that the Roma family would be resettled in an abandoned refugee centre until a permanent location could be found. On 25 November 2006 the Roma family, who was still living in the refugee centre, tried to return to their land but were stopped by the police and locals. Members of the family met Government representatives again and following their recommendations they returned to the accommodation centre.

racial  
or ethnic  
origin

The complainants claimed that the act of removal of the family, their settlement in the former refugee centre and the prevention of their return to their own land constituted discrimination. They alleged that

<sup>193</sup> Art. 2, Art. 16, Art. 20 alin.(8), (9) and (10), Art. 23 alin.(1) și (2) and Art. 30.

<sup>194</sup> Romanian Constitutional Court, Decision 1096 of 15.10.2008 questioning the constitutionality of Articles 16-25 of the Anti-discrimination Law defining the mandate of the NCCD. The plaintiff alleged that the NCCD was an extraordinary jurisdiction established by ordinary legislation, thus infringing the constitutional prohibition of the establishment of extraordinary instances. The Romanian Constitutional Court found that the NCCD is an administrative body with a jurisdictional mandate, which presents the elements of independence required for administrative-judicial activities and which observes the constitutional provisions of Article 124 and Article 126 (5) on the prohibition of establishment of extraordinary tribunals. Available at <http://www.ccr.ro/cauta/DocumentAll.aspx?SearchDoc=true>.

<sup>195</sup> The complainants were the Peace Institute and the Legal-informational Centre for Non-governmental Organisations.

the family agreed to leave due to fear of the protesting locals and that their consent was not informed and voluntary, arguing that a family of Slovenian ethnicity in a similar situation would not experience the same treatment.

The Advocate stated<sup>196</sup> that the former Minister of Interior talked with both the locals and the Roma family and the family voluntarily requested to be resettled in another location. The Advocate found that the complainants did not present any concrete examples of Slovenian non-Roma families in a similar situation, so he could not evaluate how the state authorities would act in such case. He asserted that if the family remained in the village, other people could be endangered and that resettlement was the best solution. He found that no discrimination occurred since their living conditions were not worsened by resettlement in the former refugee centre and the family was not treated less favourably. Regarding the prohibition of returning to their land, the Advocate reiterated there was no discrimination on the grounds of ethnicity since everyone was prohibited from accessing this piece of land, and therefore the family could not have been treated less favourably.

The opinion of the Advocate was criticised by anti-discrimination experts, and is contradictory to the assessment of the Slovenian Human Rights Ombudsman, who on his own initiative publicly condemned the authorities' actions as discriminatory. It also contradicts the opinion of the Commissioner of Human Rights of the Council of Europe, who stated that the removal of the family was unacceptable and discriminatory. By using the argument that the situation of the family did not worsen after the removal, the Advocate implied that no discrimination could have taken place if the family had been settled in a luxurious hotel, regardless of the method of removal; in addition, it seems biased as it is presenting the family in a negative way, stressing their allegedly criminal past and omitting any information in support of the claim of discrimination.

*Internet link sources:*

<http://www.mirovni-institut.si/lzjava/Detail/si/izjava/lzjava-za-javnost-glede-mnenja-Zagovornika-nacela-enakost/>

[http://www.coe.si/sl/novice/izjava\\_gospoda\\_thomasa\\_hammarberga\\_komisarja\\_za\\_clovekove\\_pravice\\_na\\_novinarski\\_konferenci\\_v\\_ljubljani\\_16\\_novembra\\_2006/](http://www.coe.si/sl/novice/izjava_gospoda_thomasa_hammarberga_komisarja_za_clovekove_pravice_na_novinarski_konferenci_v_ljubljani_16_novembra_2006/)

ES

## Spain

*Case law*

### **Invalid dismissal on the grounds of sexual orientation**

In September 2008 the airline Aerolíneas Argentinas dismissed a homosexual employee, who submitted a complaint to Social Court no. 35 of Madrid (Sentence 84/2009); the Court declared the dismissal void and obliged the airline to re-employ the complainant and pay all wage arrears.



According to the judgment, it was proved during the proceedings that the employee's sexual orientation gave rise to various forms of unfavourable treatment, up to his dismissal. The decision referred to international, European and national legislation. As the judge considered that sexual orientation falls within the sphere of fundamental rights, he asked the employer to prove that the dismissal was not due to the employee's sexual orientation. The employer being unable to demonstrate objective grounds for the dismissal, the Court declared it void.

<sup>196</sup> National Equality Body Opinion No. UEM – 0921-3/2007-43, of 23.03.2009.





## Airline found guilty of not allowing unaccompanied deaf people on board

The airline Air Nostrum, a subsidiary of Iberia Líneas Aéreas de España, did not allow three deaf people on board on the grounds that they were unaccompanied. It claimed that, according to its Flight Operation Manual, the safety of these people could be at risk in an emergency situation. A court of first instance<sup>197</sup> ruled in Iberia's favour, but the Madrid Provincial Court ruled in favour of the three deaf people,<sup>198</sup> who were represented by the National Confederation of the Deaf and the Spanish Committee of Disabled People's Representatives.<sup>199</sup>

The Court stated that this is a case of 'indirect discrimination' and noted that Law 51/2003 of 2 December on Equal Opportunities, Non-discrimination and Universal Access for Persons with Disability prevails over Iberia's Flight Operation Manual, and that not allowing the three deaf people on board may be regarded as 'indirect discrimination' pursuant to Article 6.2 of that law (which transposes Article 2.2.b of Directive 2000/78/EC). Hence the Court ordered Iberia to take steps to ensure that 'the infringement of disabled people's rights ceases and that deaf people are not discriminated against on its flights' and imposed a symbolic compensation of one euro for each one of the complainants.

This is the first court ruling applying the concept of 'indirect discrimination' in access to goods and services in Spain.

## Sweden

SE

### *Legislative developments*

#### **Amendment of the law to allow the marriage of same-sex couples**

On 1 April 2009 the Swedish Parliament decided to amend the Marriage Code (1987:230) to allow same-sex marriage, this modification entering into force on 1 May 2009. At the same time the Registered Partnership Act (1994:1117), which provided for a civic union of same-sex couples that was not equal to that of heterosexual ones, was repealed.

Marriage ceremonies in Sweden can be performed either by civil servants or by faith-based organisations. Such organisations will not be required to perform marriage ceremonies for same-sex couples if it is against their faith; this was criticised by many including the new Equality Ombudsman. One of the basic arguments was that if faith-based organisations are given the authority to decide on the performance or not of marriage ceremonies, which obviously has many legal consequences, the state must insist that they perform this function in a non-discriminatory manner, i.e. perform marriage ceremonies of same-sex couples of the organisation's faith.

### *Case law*

#### **'Over-qualification' and personality issues accepted reasons for not recruiting**

A Bosnian man, A.H., applied through a temporary employment agency (Adecco) for a job in graphic description at ICA (a chain of food stores). Three other persons – all of Swedish ethnic origin – were employed

<sup>197</sup> Court of First Instance nº 57 of Madrid, decision of 31.10.2008.

<sup>198</sup> Madrid Provincial Court, decision 211/2009 of 6.05.2009.

<sup>199</sup> These two organisations initiated the legal proceedings.

by ICA, following the recruitment procedure. A.H. had equal or better educational and professional merits compared to the three persons employed, but ICA regarded him as 'over-qualified'. The employer thought that he had worked with graphic design rather than with graphic description and doubted that he would be content with a 'non-artistic' job producing promotional material from templates. The two persons interviewing A.H. perceived him as an 'individualist' with a creative disposition rather than a 'team player' and two other people working at A.H.'s previous employer described him in the same way.

The Labour Court found that the employer had valid reasons to prefer 'team oriented' persons and persons who would be satisfied with the content of their work with the templates without thinking of the graphic design issues involved earlier in the production process.<sup>200</sup> According to the decision, since A.H. did not have the personality required for the job he was not better qualified than the three persons employed and thus there was no *prima facie* case of discrimination based on merits alone.

*Internet link source:*

<http://www.do.se/Om-DO/Stamningar-och-forlikningar/AD-dom-ICA-och-Adecco/>

UK

## United Kingdom

### *Legislative developments*

#### **Codifying Equality Bill introduced into Parliament**

The UK Government has introduced the Equality Bill 2009 into the UK parliament; the Bill was published on 27 April and given its second reading on 11 May 2009.

The Bill replaces the existing complex structure of UK discrimination law with a common codified framework which applies across the six anti-discrimination grounds recognised in EU law,<sup>201</sup> while also making special provision for disability discrimination and (to a more limited extent) for discrimination on the grounds of marriage or civil partnership.

The Bill imposes a single positive equality duty on public bodies, which brings together the three existing race, gender and disability equality duties and extend these duties to the grounds of gender reassignment, age, sexual orientation and religion or belief. This single equality duty will also require public bodies to promote equality through their public procurement functions.

The Bill gives the power to the UK Government to require employers with a certain number of employees to publish statistics on pay disparities between their female and male workers.

The Bill allows employers to take under-representation of disadvantaged groups into account when selecting between equally qualified applicants. It also extends existing law by prohibiting age discrimination in the provision of goods and services, the performance of public functions and other areas; the legislation however gives the UK Government wide powers to amend these provisions and to make exceptions as required. In addition, the Bill prohibits indirect discrimination on the grounds of disability and 'discrimination based on disability', which replace the previous prohibition of 'disability-related discrimination'.

<sup>200</sup> Labour Court Case 2009 nr 16. *The Ombudsman Against Discrimination v. ICA and Adecco*, decided 11.02.2009.

<sup>201</sup> These grounds are the gender, racial or ethnic origin, religion or belief, disability, age and sexual orientation.

Employment tribunals will be permitted to make wider recommendations in discrimination cases; this will enable tribunals to suggest measures which will benefit other potential victims of discrimination in a given workplace in addition to the employee who brought the claim in question.

*Internet link source:*

<http://services.parliament.uk/bills/2008-09/equality.html>

*Case law*

### **Local councils may take action to remove Traveller and Gypsy families occupying unauthorised sites**

A local authority appealed against a High Court judgment which had overturned the authority's decision, based on planning control legislation, to enforce compliance with enforcement notices requiring Irish Traveller and Gypsy families, residing on unauthorised sites in the local authority's district, to leave these sites. The High Court judge held that the local authority could not evict the families, as it had failed to give due consideration in reaching its decision to the general lack of sufficient camping sites for the UK's Gypsy and Traveller population.



According to the Court of Appeal, the Council had not erred in failing to give adequate consideration to the lack of camping sites or other forms of suitable accommodation for the Gypsy and Traveller population.<sup>202</sup> The Court held that the local authority had discharged its statutory obligations by examining the impact of eviction on each individual family and concluding that an eviction would not violate their duties under the UK's homelessness legislation; no wider consideration of housing matters was required. Policy factors also considered by the Court included the fact that the Gypsy and Traveller families remained on the sites in question in conscious defiance of the relevant planning law, and also that there was no positive obligation in UK legislation on local authorities to provide the number of camping sites sought by the UK's Gypsy and Traveller communities.

This decision makes it clear that local authorities can enforce planning controls by evicting Traveller and Gypsy families, without having to consider the wider problem of the lack of halting site accommodation for such families throughout the UK.

*Internet link source:*

<http://www.bailii.org/ew/cases/EWCA/Civ/2009/13.html>

### **Clarification of the definition of disability applied in UK discrimination legislation**

The complainant, Ms. B., alleged that she had been discriminated against by her former employer of 32 years, SCA Packaging. She had developed vocal nodules which made it very difficult for her to speak, but she managed to minimise the effect of these nodules with a strict regime of treatment, which included specialist speech therapy and constant efforts to keep speaking quietly. Mrs B. began a legal action under the Disability Discrimination Act 1995 (the 'DDA') in 2001, after her employer developed plans to remove partitions near her desk which had shielded her workspace from a noisy environment and thus made it easier for her to keep her voice quiet. Both Mrs B. and her surgeon opposed this step, and finally she argued that the employer had failed to make a reasonable adjustment. However, her employer argued that Mrs B. was no longer disabled, as her condition had responded well to treatment and no longer had an adverse effect on her life. Mrs B. argued that she had to maintain her treatment to prevent the disability returning.



<sup>202</sup> *Basildon District Council v. McCarthy & Ors* [2009] EWCA Civ 13.

The Court of Appeal in Northern Ireland held in favour of Mrs B. in October 2008 after long procedural delays, on the basis that the definition of disability contained in the DDA covered disabilities which were likely to recur, as they could be said to affect the day-to-day activities of a person who suffered from such impairments.<sup>203</sup> However, case law from English courts and tribunals had adopted a different position, and the employer appealed to the House of Lords; the Equality and Human Rights Commission intervened in support of Mrs B.

The House of Lords agreed with the Court of Appeal and held that people with a physical or mental condition which varied in its severity over time should still be termed disabled if it was likely their condition would become substantial again in the future. The House of Lords also expressed serious concern about the length of time it had taken to resolve this preliminary issue.

This decision is significant in that the Law Lords adopted a wider interpretation of the definition of disability in the DDA, which should give protection to those with intermittent or recurring forms of physical or mental impairment.

*Internet link source:*

<http://www.publications.parliament.uk/pa/ld200809/ldjudgmt/jd090701/sca-1.htm>

<sup>203</sup> *SCA Packing v. Boyle* [2009] UKHL 37.



