

In this Issue:

- 2011: a case odyssey into 10 years of anti-discrimination law
- European Legal Policy Update
- ECJ/ECtHR Case Law Update
- Discrimination law, self-employment and the liberal professions
- European Committee of Social Rights Update
- National Legal Developments

European Anti-discrimination Law Review

No. 12 - 2011



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)

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Contents

7	Introduction
11	2011: a case odyssey into 10 years of anti-discrimination law Thien Uyen Do
21	Discrimination law, self-employment and the liberal professions Catherine Barnard
33	European Legal Policy Update
35	European Court of Justice Case Law Update
42	European Committee of Social Rights Update
45	News from the EU Member States, Croatia, the FYR of Macedonia and Turkey
46	Austria
46	Belgium
48	Cyprus
52	Czech Republic
52	Denmark
53	France
57	FYR of Macedonia
58	Germany
59	Greece
59	Hungary
62	Ireland
63	Italy
63	Lithuania
65	Netherlands
67	Poland
67	Romania
70	Slovakia
71	Slovenia
71	Spain
74	Sweden
74	United Kingdom

Ariëlle | 1997



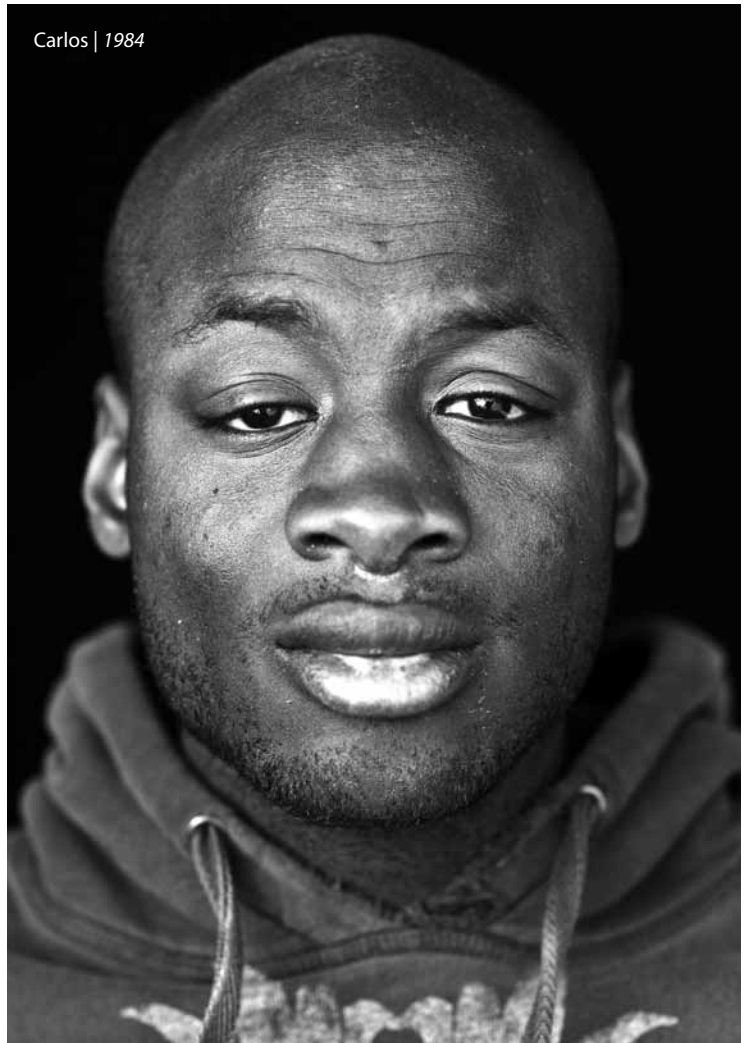
Pietro | 1991



Jedidja | 1985



Carlos | 1984



Introduction

The European Network of Legal Experts in the non-discrimination field has been managed by Human European Consultancy and the Migration Policy Group (MPG) since 2004. This network is composed of one national expert per EU Member State, as well as senior researchers and ground coordinators. In addition to the EU Member States, the candidate countries, Croatia, the Former Yugoslav Republic of Macedonia and Turkey have been part of the Network since December 2009. The aim of the Network is to monitor the transposition of the two Anti-discrimination directives¹ at 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. Full information about the Network, its reports, publications and activities can be found on its website: www.non-discrimination.net.

This is the twelfth issue of the *European Anti-discrimination Law Review* produced 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 January 2011). It includes an article on the case law developed for the past 10 years on the ground of the two EU directives written by Thien Uyen Do, Legal Policy Analyst at the Migration Policy Group and Managing Editor of the European Anti-Discrimination Law Review. Catherine Barnard, Professor at Trinity College, Cambridge, contributes with an article on the meaning of self-employment under the scope of the two anti-discrimination directives. In addition, there are updates on legal policy developments at the European level and updates from the case law of the Court of Justice of the European Union. At the national level, the latest developments in non-discrimination law in the EU Member States and the three accession candidate countries can be found in the section on News from the Member States, Croatia, the FYR of Macedonia and Turkey. These four sections have been prepared and written by the Migration Policy Group (Isabelle Chopin and Thien Uyen Do) on the basis of the information provided by the national experts and their own research in the European sections.

In 2010 the fourth edition of the comparative analysis, *Developing anti-discrimination law in Europe - The 27 Member States compared*, was published. In addition, a thematic report on age authored by Declan O'Dempsey and Anna Beale, a handbook on how to bring a case to court written by Lilla Farkas, a thematic report on transgender by Silvan Agius and Christa Tobler, a thematic report on the possibilities for interested organisations to legally fight discrimination prepared by Margarita Ilieva, a thematic report on the situation of legislation outside the EU covering the US, Canada, South Africa and India written by Sandra Fredman, an updated version of the thematic report on the prohibition of discrimination under European Human Rights Law by Olivier De Schutter and the update of the comparative analysis are in preparation for 2011.

In November 2010 the Network together with the European Network of Legal Experts in the field of gender equality, organised a legal seminar on how to make equality rights work in practice in Brussels for representatives of the Member States, Equality bodies and its own members. The legal seminar dealt with the six grounds of discrimination and involved approximately 200 participants.

Isabelle Chopin
Piet Leunis

¹ Directives 2000/43/EC and 2000/78/EC.

Meet ordinary people in this Review,
facing discrimination

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2011: A case odyssey into 10 years of anti-discrimination law

Thien Uyen Do²

Introduction

With the entry into force of the Treaty of Amsterdam signed in 1997, the European Community (EC) was allowed to legislate not only on gender but also on race and ethnicity, religion and belief, age, disability and sexual orientation. Article 13 of the EC Treaty (now Article 19 of Treaty on the Functioning of the European Union) does not have direct effect but Directive 2000/43/EC (the Racial Equality Directive), adopted in June 2000, fleshed out the principle of equal treatment and protected racial and ethnic origin in different fields of life such as employment, social protection, social advantages, education, and access to and supply of goods and services including housing. Directive 2000/78/EC (the Employment Equality Directive), adopted in November 2000, established 'a general framework for equal treatment in employment and occupation' prohibiting discrimination on grounds of religion or belief, disability, age and sexual orientation. A decade has now passed since the adoption of the two Anti-discrimination Directives, which all Member States had to implement by 2003.³ The ten-year adoption anniversary gives us the opportunity to plunge back into the case law developed at both European and national level and to provide an overview of these two landmarks for Europe's social progress.

The present overview is to a large extent based on court decisions collected by the national experts of the European Network of Legal Experts in the Non-discrimination Field set up by the European Commission.⁴ For the past ten years, the Network has provided independent information and advice on developments in the respective countries, including significant case law, relevant to the scope of the two Directives. Case law specifically falling under the scope of the still-pending proposal for a directive implementing the principle of equal treatment irrespective of religion or belief, disability, age or sexual orientation outside the field of employment is therefore not examined in this retrospective. Similarly, since we are examining national case law within the EU legal order, judgments of the European Court of Human Rights (ECtHR) are not covered. However, we duly note that the ECtHR will be of even greater relevance with the future accession of the EU to the European Convention of Human Rights.

The road less travelled to the Court of Justice of the European Union

Looking at the long-established gender equality case law developed in the 1990s, the activism of the Court of Justice of the European Union (CJEU) in giving a broad interpretation of the Treaty provisions and the deriving directives was remarkable. Concepts and definitions used in the Racial Equality Directive largely reflected the experience of fighting discrimination and implementing equal treatment under gender legislation. However, in contrast to the profusion of decisions on gender, the number of CJEU judgments discussing the two Anti-discrimination Directives is marginal. Thirteen references for a preliminary ruling have derived from the Employment Equality Directive whereas only one judgment has

² Legal Policy Analyst on Anti-discrimination at the Migration Policy Group, Brussels, and Managing Editor of the *European Anti-Discrimination Law Review*.

³ Directive 2000/43/EC had to be implemented by 19 July 2003 and Directive 2000/78/EC by 2 December 2003. Candidate countries had to bring their legislation into line with EC law by the time of their accession (1 May 2004 for the EU 10 and 1 January 2007 for Romania and Bulgaria).

⁴ The Network is managed by the Migration Policy Group and Human European Consultancy and all publications, including country reports and comparative analyses, are available on <http://www.non-discrimination.net>.

been made on the basis of the Racial Equality Directive. Yet the few rulings issued by the Court for each ground are noteworthy, as they at least have the merit of pioneering in a vast and complex area and of providing some interesting lines of interpretation to national judges.

In terms of the highest number of cases by ground, age discrimination ranks first, with nine judgments rendered since 2005, the date of the first ruling. The explosive *Mangold* case⁵ was not only the first ruling ever made on the basis of the Employment Equality Directive but also constituted a progressive twist in the EU legal order. The German legislation under scrutiny in *Mangold* concerned a provision exempting workers of 52 years of age and older from limitations on entering into fixed-term employment relationships. In short, *Mangold* (Germany), followed by *Kücükdeveci*⁶ (Germany) in 2010, expanded the direct effect of directives as the Court held that the principle of non-discrimination, as given expression by the Employment Equality Directive, must be regarded as a general principle of EU law which can apply to horizontal private employment relations between individuals.⁷ The majority of age discrimination cases referred to the CJEU have related to interpretation of retirement age and old-age pension clauses.

The CJEU has rendered two judgments on disability, namely *Chacon Navas*⁸ (Spain) and *Coleman*⁹ (United Kingdom). *Chacon Navas* provides a definition of the concept of disability with which all Member States have to whereas *Coleman* recognises by virtue of discrimination by association that the Employment Equality Directive is not limited only to the protection of people who are themselves disabled but can also apply to the carers of disabled relatives.¹⁰

Cases regarding sexual orientation and racial or ethnic origin have made it only once to the CJEU with respectively *Maruko*¹¹ (Germany) regarding same-sex survivors' benefits and *Feryn*¹² (Belgium) on racial discrimination. In *Maruko*, the life partner of a deceased person challenged the German provision limiting the compulsory occupational pension scheme to employees engaged in opposite-sex partnerships. Such schemes are to be interpreted as pay in the light of the well-established case law of the CJEU, and a difference in treatment between opposite-sex and same-sex partners subsequently amounts to direct discrimination on grounds of sexual orientation. With *Feryn*, the Court declared that public statements regarding the intentional non-recruitment of workers of a certain racial or ethnic origin violate the principle of equal treatment pursuant to the Racial Equality Directive. The Employment Equality Directive has never been subject to a reference before the CJEU on grounds of religion and belief.

National judicial reviews: a growing stream of cases

Given the numerous national provisions, national judicial interpretation is crucial to clarify important boundaries. More than 250 noteworthy cases were reported to the Network of Legal Experts in the Non-discrimination Field by its national experts between 2004 and 2010. The case law reported and presently

⁵ Case C-144/04, *Werner Mangold v Rüdiger Helm*, [2005] ECR p. I-09981.

⁶ Case C-555/07, *Kücükdeveci v Swedex GmbH & Co. KG*, [2010] ECR not yet reported. In *Kücükdeveci* the German legislation on dismissal was challenged on the grounds that it did not take into account the period of employment completed before the age of 25 for the calculation of the notice period.

⁷ See E. Muir, 'Of Ages in – and edges of – EU law', *CMLR*, Vol. 48 no. 1, February 2011, pp. 39-62.

⁸ Case C-13/05, *Sonia Chacón Navas v Eurest Colectividades SA*, [2006] ECR p. I-06467.

⁹ Case C-303/06, *S. Coleman v Attridge Law and Steve Law*, [2008] ECR p. I-05603.

¹⁰ For more details on disability and non-discrimination law in the European Union, see L. Waddington and A. Lawson's thematic report, *Disability and non-discrimination law in the European Union – An analysis of disability discrimination law within and beyond the employment field*, European Network of Legal Experts in the Non-discrimination Field, European Commission Directorate-General for Employment, Social Affairs and Equal Opportunities Unit G.2, July 2009.

¹¹ Case C-267/06, *Tadao Maruko v Versorgungsanstalt der deutschen Bühnen*, [2008] ECR p. I-01757.

¹² Case C-54/07, *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV*, [2008] ECR p. I-05187.

scrutinised is by no means exhaustive as the Network's national experts routinely reported only on the most significant jurisprudential developments in their respective countries.

For the period covered, the number of disputes reported for all Member States for discrimination on grounds of racial or ethnic discrimination stands out as it totally outstrips the other grounds (for which the scope is, by contrast, narrower as it only covers conditions of access to employment, access to all types of vocational guidance or training, employment and working conditions and membership of, and involvement in, organisations of workers or employers, by virtue of the Employment Equality Directive). As opposed to the trend observed at the CJEU, national cases concerning age do not significantly outnumber cases relating to religion. The total number of decisions on disability is twice as high as sexual orientation, which comes last.

Racial/ethnic origin	127
Age	51
Religion	46
Disability	28
Sexual orientation	15

Racial and ethnic origin

Given that the scope of the Racial Equality Directive is not restricted to access to the labour market but also covers social protection, social advantages, education, and access to and supply of goods and services including housing, it seems logical that the number of reported legal actions regarding racial and ethnic origin is higher than for any other ground.

Employment	32
Access to goods and services	21
Education	17
Social protection and social advantages	4
Housing	15
All fields (positive action, burden of proof, situation testing, etc.)	12
Incitement to hatred, racist speech and racial crime, racial profiling	26

Discrimination on grounds of racial or ethnic origin is most commonly experienced by job seekers at the recruitment stage¹³ or employees whose employers treat them differently in terms of salaries, status and career development.¹⁴ In France, in 2005 a labour court dismissed a claim brought by five complainants of African and North African origin on the basis that the employer's intention to discriminate was not

¹³ See, for instance, *N.K. v Nor Di Cuhr Aktiebolag in Norrköping* (Sweden), Labour Court Case 2005 No. 47 of 27 April 2005; Belgian Equal Treatment Authority, case no. 94/2008; *Adecco, Districom and Garnier*, French Supreme Court (*Cour de Cassation*), no 07-85109 of 23 June 2009; District Court of The Hague, LJN BN9971 / LJN BN9983 / LJN BO0022 and LJN BO0019 of 11 October 2010.

¹⁴ See, for instance, *Ahmed v Amnesty International* UKEAT/0447/08 in the UK where the claimant, of Sudanese ethnic background, was not appointed to the position of 'Researcher for Sudan', her employer fearing that her safety would be endangered when visiting Sudan; *L. et CGT Metallurgie vs. Société Airbus Operation SAS*, Toulouse Court of Appeal, no R 08/06630 of 19 February 2010; Irish Equality Tribunal, DEC-E2009-011 *An Employee –v- A Limited Company* of 27 April 2009.

established.¹⁵ Such reasoning is highly controversial as it requires intention to be proven to the detriment of employees alleging discrimination. In a case where the UK Employment Tribunal held that the complainant had been subject to serious racial discrimination by the Kent Police, which examined his job application twice, compensation of approximately EUR 93 000 was granted.¹⁶ Such substantial sums are still exceptional within the European Union. Although exemplary sanctions may operate as a deterrent against discriminatory acts, it is undeniably crucial that other issues relating to the complexity of the law and inadequacy of remedies primarily need to be tackled so to ensure effective implementation and enforcement of non-discrimination laws. Discrimination also frequently occurs in access to nightclubs,¹⁷ gym membership,¹⁸ restaurants,¹⁹ etc., or to housing rentals.²⁰ National courts' reasoning shows that discriminatory behaviour is generally established by reference to comparators who are usually friends of the claimant or random clients of European background present when the event occurred and who were not denied access. This strongly calls for situation testing to be more widely accepted and systematically used as a means of proving discrimination cases in court. In a recent judgment rendered by the Brussels Court of Appeal, both the former Prime Minister and former Minister for Equal Opportunities were found guilty of failure to give effect to the legal provisions allowing situation testing and to define the conditions for such evidence to be deemed admissible.²¹

A significant number of judgments have concerned incitement to hatred or racial crimes²² and racist speech,²³ in particular towards Roma people.²⁴ The discrimination and segregation of the Roma are highly sensitive issues and constitute serious challenges throughout the European Union. Roma pupils are characteristically discriminated against by being placed in 'special schools' in violation of their fundamental right to education and their minority rights.²⁵ Special schools routinely provide a modified curriculum to Roma pupils that results in lower qualifications being acquired. In some countries, Roma pupils are placed in classes together with children with mental disabilities. Practices in terms of housing and evaluation of property prices²⁶ frequently discriminate against Roma, with forced expulsion and relocation to Roma settlements regularly reported. National courts have issued debatable rulings in this respect. For

¹⁵ *Confédération Générale de travailleurs (a union) and Mouvement contre le racisme et pour l'amitié entre les peuples (NGO) v Renault S.A.*, Boulogne Labour Court of 12 December 2005. On 2 April 2008, the Versailles Court of Appeal overruled the first instance decision and found discrimination in two of the five cases.

¹⁶ *Hussain v Chief Constable of Kent*, *Employment Tribunal*, Employment Tribunal of 6 April 2006.

¹⁷ Decision of the District Court of St. Pölten (Austria) Nr. 4 C 480 /09x-12 of 29 January 2010.

¹⁸ Hungarian Equal Treatment Authority EBH 684/2010.

¹⁹ Decision of the District Court of Michalovce (Slovakia) of 29 January 2008, 12C 139/2005.

²⁰ *Public prosecutor and Centre for Equal Opportunities and the Fight against Racism v H. Neuville*, ref. 4918 – AN56.99.441-03, Court of First Instance of Antwerp (criminal section) of 7 December 2004.

²¹ Court of Appeal of Brussels, *Etat belge v Sarrokh Abdelani*, 14 October 2010.

²² See the case in the Czech Republic where the perpetrators of an arson attack against a Roma family were convicted of racially motivated attempted murder by the Regional Court of Ostrava in October 2010. The four convicted men were ordered to jointly pay CZK 9.5 million (approx. EUR 413 043) as non-material compensation to a two-year old child who suffered from burns on 80% of her body.

²³ See, for instance, First Criminal Court of Santarém (Portugal), Case – 357/08.5.TASTR of 21 May 2010; Hungarian Equal Treatment Authority, decision EBH 187/1/2010 of 19 January 2010; Metropolitan Court (Hungary) – no 8.K.34.427/2009/3 of 22 March 2010.

²⁴ For hate speech, see Decision no 141, Bulgarian Protection Against Discrimination Commission of 20 June 2008; *Institutul pentru Politici Publice v. Revista Romania Mare*, Romanian National Council on Combating Discrimination, Decision no. 17 of 13 January 2009.

²⁵ See for instance High Court of Appeal of Debrecen (Hungary), case no. Pf.I.20.361/2007; Decision 4759/2/2008 of Bucharest Court of Appeal of 15 January 2009; County Court of Čakovec (Croatia), decision in judgment no.Gž.539/02 of 14 November 2002 and Constitutional Court, decision no. U-III/3138/2002 of 7 February 2007; Curtea de Apel Craiova (Hungary), File 8011/101/2009 of 19 May 2010.

²⁶ Hungarian Equal Treatment Authority EBH 795/2010.

instance, in Slovenia the removal of a Roma family who were subsequently settled in a former centre for refugees without the possibility of returning to their own land was not held to constitute discrimination. It was argued that the complainants did not bring forward sufficient examples of Slovenian families facing a similar situation which would allow a comparison to be made with how the public authorities would treat non-Roma families.²⁷ Similarly, in Slovakia the Regional Court of Prešov overruled a first-instance decision and declared that there was no provision in the Slovak anti-discrimination act enabling a court to declare a breach of the principle of equal treatment. In any event, given the fact that compensatory measures were put in place, the public authorities had complied with national and international law.²⁸

The correlation between racial and ethnic origin and nationality or language remains ambiguous. While Article 3 of the Racial Equality Directive explicitly stipulates that it does not cover difference in treatment based on nationality nor prevent Member States from freely legislating on conditions relating to entry into, residence and legal status of third-country nationals and stateless persons on the territory of Member States, some cases are equivocal and show the close link between nationality or policies aiming to deter or prevent the entry of non-EU citizens and discrimination on grounds of racial and ethnic origin. Language is not an explicitly protected ground under EU law, but many countries have decided to include it into their respective list of protected grounds. In a case that occurred before the Czech Republic's accession to the EU, the House of Lords remarked that the UK immigration officers operating at Prague Airport discriminated against asylum seekers of Roma origin who were seeking to travel from that airport to the UK by treating them less favourably on racial grounds.²⁹ In Sweden, it was held that the requirement to show a good command of the Swedish language for the position of municipal architect resulted in indirect discrimination on grounds of ethnicity.³⁰

Religion and belief

The majority of reported cases regarding religion and belief come from Belgium, France, the Netherlands and the United Kingdom. A few relevant legal actions have also been filed in Denmark, Germany, Italy, Slovenia and Sweden.

A key controversy around the practical implementation of non-discrimination provisions on religion and belief focuses on dress-codes and religious symbols. Out of the 45 disputes reported in the field of employment, 16 related to the wearing of religious clothing or signs. Characteristically, employees were dismissed for wearing a headscarf in the workplace. In Denmark, the Supreme Court ruled in January 2005 that a policy prohibiting the wearing of clothing covering the face pertained to the political and religious neutrality of the company. Although such a policy affected Muslim women, it was objectively justified and did not constitute a violation of non-discrimination provisions. Similarly, the principle of neutrality in education in Belgium is believed to justify the prohibition imposed on teachers not to wear any visible religious, political or philosophical symbol on school premises. In contrast, a French court of appeal found against a centre providing training to students which forbade a girl of Muslim origin from wearing the veil. Relying on a ruling by the Council of State (the supreme administrative court), it established that the defendants had not succeeded in establishing proselytising behaviour that could justify a ban. The court sentenced the association managing the training centre to a fine of EUR 3 775 and the director to a fine of EUR 1 250. In addition, the court ordered the defendants to jointly pay EUR 10 500 as compensation.³¹ The obligation imposed by British Airways that staff members must conceal

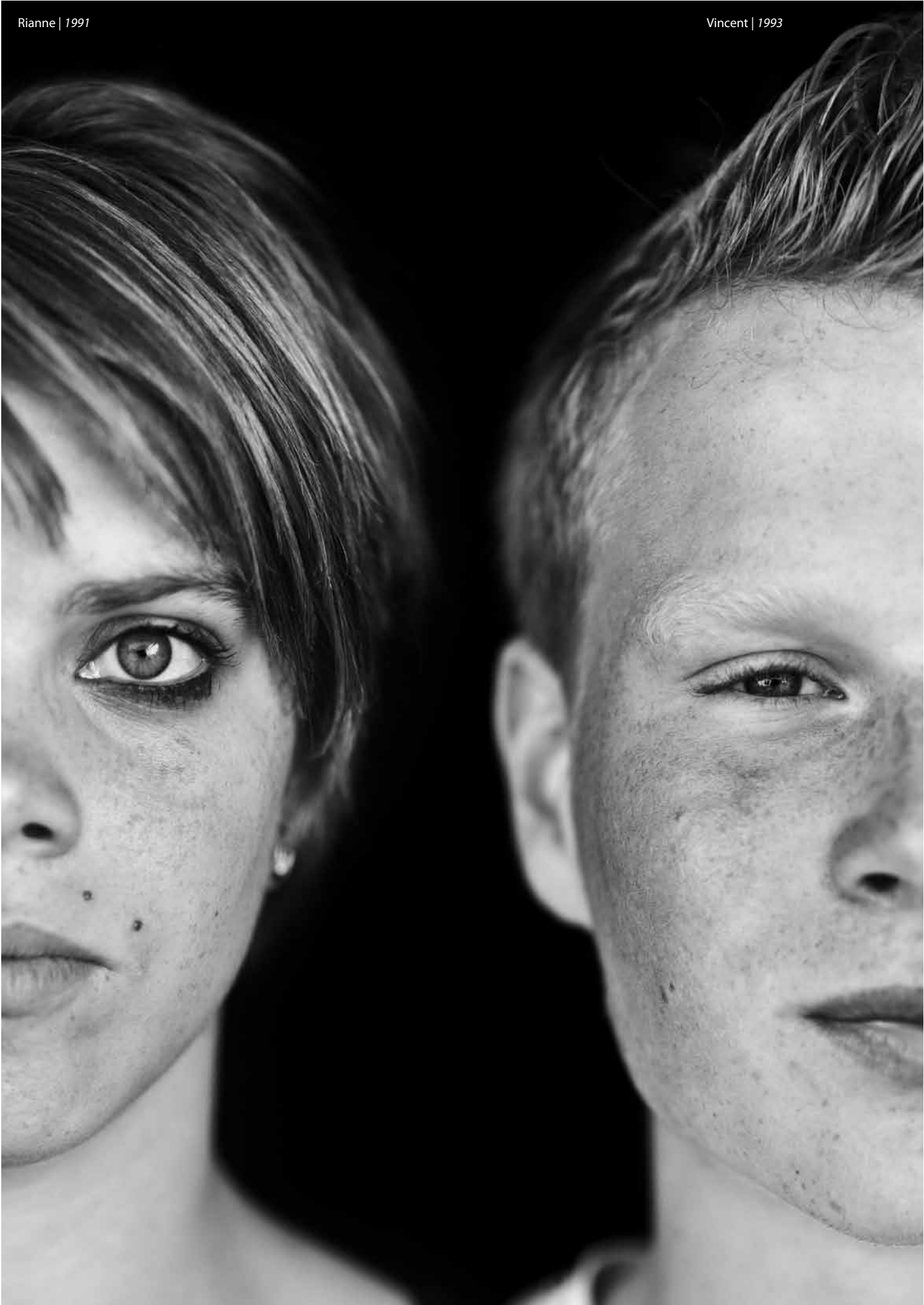
²⁷ National equality body opinion no. UEM – 0921-3/2007-43 of 23 March 2009.

²⁸ Regional Court of Prešov 13Co/44/2009.

²⁹ *R – v Immigration Officer at Prague Airport and another ex parte European Roma Rights Centre and others*, UK House of Lords of 9 December 2004.

³⁰ Swedish Labour Court decision of 19 October 2005, AD 2005 no. 98.

³¹ Paris Court of Appeal of 8 June 2010, file no 08/08286.



religious symbols, such as Christian crosses, inside their uniform was held not to constitute indirect religious discrimination.³² The Court of Amsterdam followed the same line of reasoning in a case where a tram driver was required to remove or at least hide a neck chain with a cross pendant during working hours and did not find the measure disproportionate.³³ However, it is to be noted that the Dutch Equal Treatment Commission suggested in an earlier decision that the rejection of an application due to Islamic style of dress constituted direct discrimination under Article 5 §1(d) of the General Equal Treatment Act, which could not be justified.³⁴ This rise in case law has accompanied fierce public debates, in particular regarding the possible general ban on the wearing of the burka/niqab in public areas, which has been under discussion in many European countries such as Austria, Belgium, Denmark, France, Italy and the Netherlands. Legislative proposals addressing the wearing of clothes that cover an individual's face in public spaces have been tabled in Belgium, Denmark, Italy and the Netherlands. France adopted a law prohibiting the concealment of an individual's face in public spaces in October 2010. Similarly to both the Belgian and Danish initiatives, it provides for criminal sanctions, although Denmark limits its material scope to Danish judges and their right to require the uncovering of witnesses' faces in court. Recently, the Swedish Equality Ombudsman held that although the discrimination caused by prohibiting the wearing of the niqab may be justified for certain reasons such as ensuring safety at work, a general ban is not acceptable.³⁵

Belief and religious convictions can also interfere with employment relationships and conditions when employees refuse to work on certain days of the week or to shake the hand of a person of the opposite sex. According to the Dutch Equal Treatment Commission, a policy requiring an employee to shake women's hands to ensure good customer service mostly affected Muslims' freedom to express their religious convictions and constituted indirect discrimination.³⁶ It was argued before the District Court of Rotterdam³⁷ that discrimination was justified for reasons pertaining to the usual rules of etiquette and greeting in the Netherlands. A number of claims challenging terminations of contracts or refusals to examine job applications because of lack of membership of a specific church or association (such as the Masonic Order³⁸) have been brought to the attention of national courts, which found direct discrimination.

Problems of interference between religious convictions or beliefs and sexual orientation are frequent (see also below), sometimes resulting in conflict between the two protected grounds.³⁹ This is the case, for instance, when local authority employees are subject to disciplinary measures or dismissed for refusing to participate in processing or registering same-sex civil partnerships for reasons of religious conviction. In a case brought to its attention in 2008, the UK Employment Appeals Tribunal held that there was no direct discrimination on grounds of religion and belief as sanctions were imposed on the employee for failure to perform work duties. Indirect discrimination was not found either, as all officers were compelled to perform civil partnerships, which could be objectively justified as a proportionate measure designed to ensure that public authorities apply the principle of equal treatment.⁴⁰ Under Article 4(2) of the Employment Equality Directive, Member States can maintain or adopt exceptions which allow churches and other

³² *Eweida v British Airways plc*. See http://www.bailii.org/uk/cases/UKEAT/2008/0123_08_2011.html.

³³ BK6378, KK 09-1165 of 14 December 2009. <http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ijn&ijn=BK6378>.

³⁴ Opinion no. 2006-202 of 5 October 2006.

³⁵ See http://www.do.se/Documents/pdf/forlikningarochdomstolsarenden/Beslut_%202009_103.pdf (in Swedish).

³⁶ *Op. cit.*

³⁷ District Court of Rotterdam (*Rechtbank Rotterdam*) of 6 August 2008, LJN: BD9643.

³⁸ *Gibson v Police Authority of Northern Ireland* [2006] NIFET 00406_00 of 24 May 2006.

³⁹ See E. Bribosia and I. Rorive's thematic report, *Towards a balance between rights to equality and other fundamental rights*, European Network of Legal Experts in the Non-discrimination Field, European Commission Directorate-General for Employment, Social Affairs and Equal Opportunities Unit G.2, February 2010.

⁴⁰ *Islington v. Ladele*, [2008] UKEAT 0453_08_1912 of 19 December 2008.

public or private organisations whose ethos is based on religion or belief to treat persons differently on the basis of their religion or belief. In other words, such organisations are permitted to establish specific requirements in line with their ethos which take into account employees' religion or belief in narrowly prescribed circumstances. In 2008, the Labour Court of Hamburg notably deviated from established German case law allowing ethos-based organisations to establish differences in treatment as it convicted a sub-organisation of the Protestant Church of Germany of not having hired a Muslim applicant as a social worker, arguing that there was no reason why the job in question could be properly performed by a person of Christian faith only.⁴¹ The *Land* Labour Court of Hamburg overruled that decision on 29 October 2008⁴² and, at the time of writing, an appeal to the Federal Labour Court is still pending.

Disability

The CJEU in *Chacon Navas* clarifies the concept of disability, distinct from the concept of illness, as disability 'must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life (...). In order for the limitation to fall within the concept of "disability", it must therefore be probable that it will last for a long time'.⁴³

This concept has been fine-tuned in some Member States where, for instance, visual or speech impediments have been recognised as disabilities.⁴⁴ In October 2008 the Court of Appeal of Northern Ireland gave a wide interpretation and held that the 1995 Disability Discrimination Act also covers health conditions which evolve over time due to intermittent or recurring disabilities.⁴⁵ With regard to the personal scope, the mother of a disabled child who required regular therapy sessions was deemed in Cyprus to have faced discrimination when she was posted as a teacher to a school that was far away from her place of residence, preventing her from taking adequate care of her child.⁴⁶

The number of legal actions challenging discrimination on grounds of disability brought to the courts' attention still seems very low compared to the other grounds, sexual orientation excepted. The majority of reported cases have dealt with failure to provide reasonable accommodation to enable access to work for disabled workers. Courts generally redress the situation by requiring adequate adjustments to be made by employers (such as a reduction of working hours,⁴⁷ redeployment procedures,⁴⁸ access to parking spaces or appropriate job interviews or qualifying exams⁴⁹) or by awarding compensation for material and/or non-material damage suffered. In France, the Council of State ruled that although sufficient legislative efforts had been made to implement the Employment Equality Directive as regards access to public infrastructure, the State incurred strict liability on the ground of *de facto* inequality in access to court buildings where a plaintiff was a legal official. The facts showed that the situation exceeded the reasonable inconvenience that a disabled person would normally have to bear and impeded the complainant's professional practice. The Council awarded EUR 20 000 as compensation for non-material

⁴¹ Labour Court of Hamburg (*Arbeitsgericht Hamburg*) of 4 December 2007, 20 Ca 105/07.

⁴² Hamburg *Land* Labour Court (*Landesarbeitsgericht Hamburg*) of 29 October 2008, 3 Sa 15/08.

⁴³ Paras 43-45.

⁴⁴ See, for example, the case in Hungary of a visually impaired lawyer: <http://www.egyenlobanasmod.hu/zanza/295-2006.pdf> or in Cyprus where a speech impediment was recognised as a disability: File no. A/Π 2898/2007, A.K.I. 10/2010 of 23 February 2010.

⁴⁵ *X Endowed Primary School v Special Educational Needs and Disability Tribunal & Ors*, [2009] EWHC 1842 (Admin).

⁴⁶ A.K.I. 82/2009 of 25 June 2010, see [http://www.ombudsman.gov.cy/Ombudsman/ombudsman.nsf/All/A85BC1134AC8CAA2C225775800374FBD/\\$file/AKI82.2009-25062010.doc?OpenElement](http://www.ombudsman.gov.cy/Ombudsman/ombudsman.nsf/All/A85BC1134AC8CAA2C225775800374FBD/$file/AKI82.2009-25062010.doc?OpenElement).

⁴⁷ Cypriot equality body, File No. A.I.T. 1/2009 of 20 September 2009.

⁴⁸ *Archibald v Fife Council* of 1 July 2004.

⁴⁹ French Council of State, no 318565 of 18 November 2009.

damages.⁵⁰ Positive action may also be found to adversely affect workers who are not disabled, as shown by a dispute in Austria in December 2007. According to the Administrative High Court the duty to provide reasonable accommodation does not encompass the duty to remove civil servants with no disability from their posts in order to avoid a fellow worker with a disability being disadvantaged by the fact that he or she has become unable to serve in his or her previous post. The Court stated that such a dismissal constituted discrimination on the ground of disability.⁵¹

Sexual orientation

Prohibition of sexual orientation discrimination means that employees cannot be treated less favourably on the grounds of their sexual preference. The rule also applies in cases of perceived discrimination, where a person does not actually possess the characteristics for which he or she faces discrimination. The principle of equal treatment also concerns partners of employees engaged in a same-sex relationship, in matters related to employment and occupation. Protection is not yet provided in the fields of social protection, social advantages, education, access to and supply of goods and services including housing and access to public infrastructure. In practice, some national courts and equality bodies have been confronted by disputes falling outside the scope of the Employment Equality Directive and similarly ruled in favour of the victims by application of the principle of equal treatment on grounds of sexual orientation and other related discrimination concepts. For instance, the Dutch Equal Treatment Commission found that nightclubs' house rules denying access to men not accompanied by women particularly affected homosexual clients and constituted indirect discrimination.

It is generally believed that victims of discrimination on grounds of sexual orientation do not want to display their sexual preferences in the workplace or often fear victimisation, hence the marginal number of cases brought to court. Moreover, in some countries the wider political climate remains unfriendly or hostile with bans on events or peaceful demonstrations. Sexual orientation is not yet covered as a protected ground in EU candidate countries such as Turkey and the FYR of Macedonia.⁵² Cases of incitement to hatred have been reported in several countries, including Lithuania and Slovenia.

Three main categories of decisions can generally be found in case law throughout the EU: refusal to hire or dismissal, harassment in the workplace, and issues relating to employment benefits.

Employment conditions	9
Harassment	4
Employment benefits	3

In 2009, the Irish Equality Tribunal granted exceptional compensation of nearly EUR 50 000 to a bankman employed by a construction company who alleged that his employer not only had treated him less favourably but also victimised him by changing his conditions of employment, placing him on sick leave and ultimately making him redundant.⁵³ Sexual orientation is even more sensitive when the employer is opposed to homosexuality or bisexuality because of the publicly-declared ethos of the organisation

⁵⁰ French Council of State, Combined Court, *Mme B.*, no 301572 of 22 October 2010.

⁵¹ Administrative High Court (*Verwaltungsgerichtshof*), Ref. Nr. VwGH 2006/12/0223 of 17 December 2007.

⁵² In the three other remaining candidate countries, namely Croatia, Iceland and Montenegro, non-discrimination legislation expressly protects sexual orientation.

⁵³ The Equality Tribunal awarded EUR 14 700 as compensation for lost earnings as a result of the discrimination, EUR 10 000 as compensation for the distress and effects of the sexual harassment and EUR 25 000 as compensation for the distress and effects of the victimisation. It also ordered the construction company to have its policies relating to harassment and sexual harassment brought into line with the Code of Practice on Sexual Harassment and Harassment at Work issued by the Equality Authority and to fully acquaint all existing and new staff with the policies.

in question. Under Article 4(2) of the Employment Equality Directive, difference in treatment is permitted only on grounds of religion or belief, and cannot be used to justify discrimination on, for example, grounds of sexual orientation. In 2004, the Cathedral Chapter of the Finnish Evangelical Lutheran Church decided that an applicant was not eligible to be appointed as an assistant vicar, as she was publicly engaged in a same-sex relationship and had announced her intention to officially register this relationship. That decision was held to discriminate on grounds of sexual orientation.⁵⁴ This might not have been the case had Finnish law provided an exception based on religious belief in application of Article 4(2) of the Employment Equality Directive.

Employment benefits constitute a key issue as illustrated by the *Maruko* case, which led to a preliminary ruling by the CJEU. The Employment Equality Directive states that it applies ‘without prejudice to national laws on marital status and the benefits dependent thereon’. This provision mostly affects cohabiting homosexual couples by opposition to married couples. In practice, it means that Member States are free to rule on marital status but the prohibition of sexual orientation discrimination still applies when the state places same-sex partners in a comparable situation to married spouses by recognising legal registered partnerships.

Harassment cases typically concern an employee who is subject to humiliation or scornful comments in the workplace after revealing his or her sexual orientation to fellow workers. In recent years, more legal actions seem to have reached the courts, perhaps showing a new trend for victims to be less afraid to bring such cases.⁵⁵

A ‘slowly but surely’ approach to effective enforcement and access to justice?

The number of reported decisions has notably increased with the years since the adoption of both the Racial and Employment Equality Directives. This is a positive sign as it is ultimately for national courts to ensure the effective implementation of the Directives and adequate enforcement of national non-discrimination laws. National jurisdictions have sharpened their reasoning and understanding of EU anti-discrimination law, not only to the systematic benefit of victims of discrimination but also in balance with general human rights considerations and the cultural background and national tradition of their legal system. Yet, although judges have eventually assimilated the Directives and discrimination concepts in most countries, issues regarding effective enforcement continue to exist. We still see judges at different instances handing down contradictory rulings, running the risk of unlawful or incorrect final implementation by supreme courts.

Moreover, the number of cases in some countries remains very low, or cases focus on some grounds in particular to the detriment of others. On the one hand, on-going awareness-raising activities and information campaigns regarding remedies and support to victims must strongly be encouraged at both the national and local level. On the other hand, procedural difficulties (length of procedures, difficulty in proving discrimination, legal costs, and lack of legal assistance) that considerably affect access to justice and effective enforcement must be tackled.

⁵⁴ Vaasa Administrative Court, Ref. No. 04/0253/3 of 27 August 2004.

⁵⁵ See Dutch Equal Treatment Commission, Opinion 2010-135 of 6 September 2010 and Hungarian Equal Treatment Authority, EBH 49/2010 of January 2011.

Discrimination law, self-employment and the liberal professions

Catherine Barnard⁵⁶

Introduction

The personal scope of employment rights – that is, who benefits from employment rights – has long been a vexed issue. Neo-liberals would argue for employment rights to be given to as few people as possible because, they argue, employment rights distort the way in which the market operates. By contrast, human rights lawyers would favour giving employment rights to as wide a group as possible since employment rights form a key pillar of human rights and human rights are universal. Somewhere in between are new institutionalists who would argue that rights can be justified but only where they are seen as an input into growth. Both neo-liberals and new institutionalists would, however, agree that in order to enjoy employment rights there must be some sort of dependence by the individual on the employer. They would certainly argue that the genuinely self-employed – that is those who are *independent* of any particular employer – should not enjoy employment rights.

These different strands of thinking can be detected in various Commission documents⁵⁷ as well as in the personal scope of the social policy Directives. For example, the Transfer of Undertakings Directive 2001/23 applies to ‘employees’, as defined by national law,⁵⁸ thereby perhaps reflecting the neo-liberal approach. The Working Time Directive 2003/88 appears to have a broader scope in that it applies to ‘workers’, reflecting perhaps the new institutionalist reading of the role of law. And the two Directives on non-discrimination (Directive 2000/43 on race and ethnic origin and Directive 2000/78 on age, disability, religion and belief and sexual orientation) have the widest personal scope because they apply to ‘all persons’, reflecting a human rights approach. A human rights reading is supported by, for example, the reference to fundamental human rights in the fifth and sixth recital of the preamble to Directive 2000/78 and the third and fourth recital of Directive 2000/43. The question for us, then, is whether this wide scope of the two Directives, as well as the other Anti-discrimination Directives (considered below), includes the self-employed. This is a significant matter given the numbers of self-employed in the EU: in 2007 there were 32.5 million self-employed in the EU, 14.9% of the total employment at EU level.⁵⁹ Their spread across the Member States is shown in Figure 1.

⁵⁶ Professor of EU law and employment law at Trinity College, Cambridge.

⁵⁷ See e.g. Communication from the Commission: Towards Common Principles of Flexicurity: More and better jobs through flexibility and security, COM/2007/0359 final.

⁵⁸ Art. 2(d), although Art. 2(2) says ‘This Directive shall be without prejudice to national law as regards the definition of contract of employment or *employment relationship*’ (emphasis added) which suggests a broader personal scope.

⁵⁹ http://www.mutual-learning-employment.net/uploads/ModuleXtender/Trscontent/46/Self-employment_FL_-_TRS_08112010_final.pdf.

Abigail | 2010



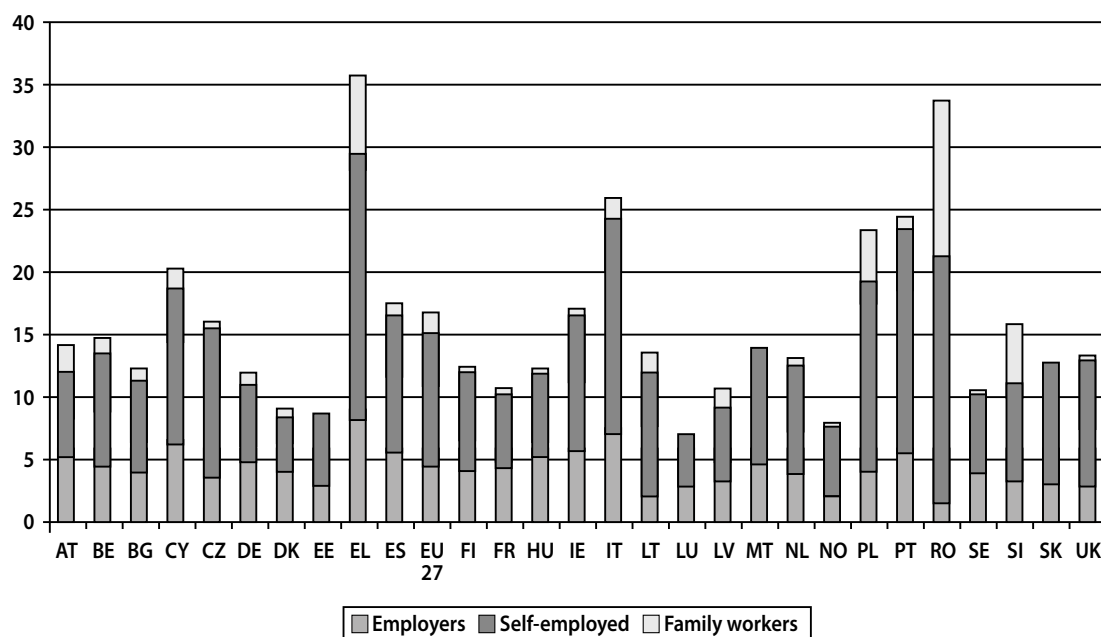
Wim | 1953



Hedy | 1967



Figure 1: Workers who are 'not employees' in the EU and Norway, 2007 (% of employment)⁶⁰



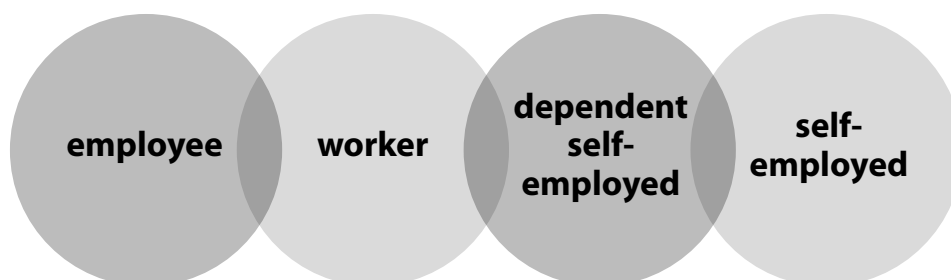
In order to consider whether the self-employed are covered by the Anti-discrimination Directives we must first to examine the meaning of the term self-employed. In order to do this we need to understand the terms with which it is usually contrasted, namely 'employees' and 'workers'.

Definition of Terms

Introduction

Traditionally, employees/workers sell their labour, while the self-employed sell a product, a product which may be produced as the result of their services. This distinction is reflected in the language of contract of service (employees/ workers) and contract for services (self-employed). The classic distinction between employees/workers and the self-employed is illustrated by the example of a chauffeur (employee/worker) and a taxi driver (self-employed). However, as figure 2 shows, even the concept self-employed can bleed into the notion of employee/worker. We shall therefore consider these concepts in turn.

Figure 2: different employment statuses



⁶⁰ Eurostat, 'Employment by sex, age groups and professional status (1000)', accessed on 12 October 2008 cited in http://www.eurofound.europa.eu/comparative/tn0801018s/tn0801018s_2.htm.

Employee v. self-employed

The distinction between employees and the self-employed is well-known to the Member States. It is a distinction that the European Foundation also draws:

A self-employed person is defined as an independent worker, who works independently of an employer, in contrast with an employee who is subordinate to and dependent on an employer.⁶¹

Taking the British case law by way of example, the classic test for distinguishing between employees and the self-employed concerns *control* – that the servant agrees that, in the performance of that service, he will be subject to the other's control in a sufficient degree to make that other master.⁶² While this formulation sounds rather anachronistic and so has been subject to certain modifications (reflecting the changing nature of control from 'how to' to 'what to'⁶³), the use of the control test has by no means died out. For example, in *Lane v. Shire Roofing*⁶⁴ the Court of Appeal of England and Wales said the test to determine whether an individual was an employee was 'who lays down what is to be done, the way in which it is to be done, the means by which it is to be done and the time when it is done'. In the absence of control, the individual is likely to be considered self-employed.

In other cases the courts have looked at the level of *integration* of the individual into the employer's business. For example, in *Stevenson, Jordan & Harrison Ltd v. Macdonald & Evans*⁶⁵ Denning LJ said that under a contract of service 'a man is employed as part of the business and his work is done as an integral part of the business; whereas under a contract for services his work, although done for the business, is not integrated into it, but is only an accessory to it'. The integration test places less emphasis on the personal 'subordination' of the employee and more upon the way in which the work is organised. However, the test may be of less use in situations where the boundaries of the organisation are diffuse or unclear, as in the case of sub-contract or agency labour.⁶⁶

The courts have also examined the *economic reality* of the situation,⁶⁷ looking to see whether the provisions are consistent with it being a contract of service (e.g. does the employer have the power to select and dismiss, is the worker paid a wage or a lump sum, does s/he have to render exclusive service, or to work on the employer's premises; does the employer own the tools and the materials; does the employer bear the primary chance of profit or risk of loss; is the work an integral part of the business?).⁶⁸ This approach shows the extent to which the courts will not just look at one single factor but instead take a multiple or 'pragmatic' approach, weighing up all the factors for and against a contract of employment and determining on which side the scales will settle.⁶⁹ This is not an easy task, as Mummery LJ noted in *Franks v. Reuters*:⁷⁰

⁶¹ <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/selfemployedperson.htm>.

⁶² *Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance* [1968] 2 QB 497, MacKenna J at p.515; *Nethermere (St.Neots) Ltd v. Gardiner* [1984] ICR 612, Stephenson LJ, p.623.

⁶³ See Viscount Simmonds in *Mersey Docks & Harbour Board v. Coggins & Griffiths Ltd* [1947] AC 1, 12.

⁶⁴ [1995] IRLR 493, 495 (Henry LJ).

⁶⁵ [1952] 1 TLR 101, 111.

⁶⁶ B.Burchell, S.Deakin, S.Honey, 'The Employment Status of Individuals in Non-Standard Employment', DTI, Employment Relations Research Series No.6, 1999, 5.

⁶⁷ This includes looking 'beyond and beneath' the documents to what the parties said and did, both at the time when they were engaged and subsequently, including evidence as to how the relationship had been understood by them: *Raymond Franks v. Reuters Limited* [2003] IRLR 423, para. 12 (Per Mummery LJ).

⁶⁸ *Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance* [1968] 2 QB 497.

⁶⁹ I.Smith, *Industrial Law*, (London, Butterworths, 2003).

⁷⁰ [2003] IRLR 423, para. 18.

Drawing a line between those who are employees (and so have statutory employment rights) and those who are not entitled to statutory employment protection has become more, rather than less difficult as work relations in and away from the workplace have become more complex and diverse.

This is particularly the case with 'atypical workers' such as homeworkers,⁷¹ agency workers,⁷² zero-hours contract workers⁷³ and other casual workers. In British labour law one test seems to have taken precedence over all of the established tests to determine whether these atypical workers are employees: the test of *mutuality of obligation*. This asks whether there is an obligation on the employer to provide work and a concomitant obligation on the individual to accept work offered. Only if such mutuality exists will the individual be an employee. In the absence of such mutuality the individual is likely to be self-employed.

This need to establish mutuality of obligation can be seen in *Carmichael*.⁷⁴ Carmichael was employed as a tour guide at a power station, working on a 'casual as required basis'. In order to claim particular employment rights she had to show she was an employee. The Employment Tribunal (the first tier court in employment matters) found that she was employed on a series of successive ad hoc contracts of service or for services and that when she was not working as a guide the employers were under no contractual obligation to the power station. The House of Lords agreed. Lord Irvine of Lairg (then Lord Chancellor) said that there was no obligation on the power station to provide casual work nor on Carmichael to undertake it. For this reason, there would be an absence of 'that irreducible minimum of mutual obligation necessary to create a contract of service'.

For a similar reason, in the earlier case of *O'Kelly*⁷⁵ the Employment Tribunal found that a 'regular casual' waiter at a hotel was not an employee and so could not claim protection from dismissal on the grounds of trade union membership. The tribunal listed nine factors which were consistent with the regular casuals being employed under a contract of employment (e.g. they provided their services in return for remuneration for work actually performed, they did not invest their own capital or stand to gain or lose from the commercial success of the business, they worked under the employer's discretion and control, wearing clothing provided by the employers, and tax and national insurance payments were deducted at source). It then listed four factors which were not inconsistent with a contract of employment (e.g. they were not provided with a written statement of terms and there were no regular hours) and finally five factors which were inconsistent with the relationship being that of an employer/employee (e.g. the engagement was terminable without notice on either side, the individuals were not obliged to accept work and the employers were not obliged to provide work, and it was the practice of the industry that casual workers were engaged under a contract for services). Despite the fact that numerically the factors favouring a finding of a contract of employment outweighed those against, and despite the fact that if O'Kelly had turned down work without good reason he would have lost his status as a regular casual, the tribunal gave overriding weight to the absence of mutuality of obligation and so found that he was not an employee.

Dependent self-employed

Individuals such as Carmichael and O'Kelly find themselves in a particularly invidious position. They may well think of themselves as employees dependent on one particular employer but the courts find that they are not and so they may well be classed as self-employed *faute de mieux* and thus deprived of ac-

⁷¹ *Nethermere (St.Neots) Ltd v. Taverna and Gardiner* [1984] IRLR 240.

⁷² *Wickens v. Champion Employment Agency* [1984] ICR 365.

⁷³ *Clark v. Oxfordshire Health Authority* [1998] IRLR 125.

⁷⁴ *Carmichael v. National Power* [2000] IRLR 43.

⁷⁵ *O'Kelly v. Trust House Forte Plc* [1983] IRLR 369.

cess to many employment rights (except possibly anti-discrimination law protection – see below). This is where the increasingly important category of ‘dependent self-employed’ fits in. The existence of this category of self-employed is also identified by the European Foundation: ‘insofar as the concept of employee implies an element of economic dependence, in that employees are dependent for subsistence paid by the employer, self-employed workers may be little different, as no less dependent economically on their work for subsistence, though paid by their clients or customers’. Such individuals are known as ‘dependent self-employed’ and may be considered ‘workers’ (see figure 2).

In the UK the legal category of ‘workers’ covers not only employees but also individuals who undertake to do or perform ‘personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual’. Again the courts have been forced to produce criteria to identify this group of individuals. In *Byrne v. Baird*⁷⁶ the court had to consider whether an individual working in the construction industry was a ‘worker’ for the purpose of claiming holiday pay under the Working Time Regulations. Mr Recorder Underhill QC recognised that, by giving rights to workers, the intention behind the Regulations was to create ‘an intermediate class of protected worker, who is on the one hand not an employee but on the other hand cannot in some narrower sense be regarded as carrying on a business’.⁷⁷ He recognised that workers enjoy protection because of their subordinate and dependent position vis-à-vis their employers and for this reason the test for workers shared much in common with the test for employee, including control and mutuality of obligation but with a lower ‘pass-mark’ so that cases which failed to reach the mark necessary to qualify for protection as employees might nevertheless do so as workers.⁷⁸

This analysis would seem to suggest that while the dependent self-employed benefit from being covered by much of labour law, the truly self-employed (namely entrepreneurs who are in business on their own account (independent self-employed)) are not. Such entrepreneurs are either individual contractors with a business of their own who take the risks of losses and the chances of profits (e.g. a one-person business such as a plumber) or individuals who do not have an identifiable business but who work as professionals for a large number of separate employers/clients (e.g. a consultant).⁷⁹

The Court of Justice’s case law on workers

The question, then, is how these national ideas of employee, worker and self-employed are reflected at EU level in the case law of the Court of Justice (CJEU). The CJEU has had few opportunities to consider the definition of these key terms in the context of the social policy directives. There is, however, abundant case law on the term ‘worker’ as used in Article 45 TFEU on the free movement of workers, a term which the Court of Justice has insisted on giving a wide EU meaning. In *Lawrie-Blum*⁸⁰ the Court said that the essential feature of an employment relationship is that ‘for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration’. The national court must decide whether a relationship of subordination exists.⁸¹ The sphere of employment⁸² and the nature of the legal relationship between employer and employee (whether or not it involves public law status or a private law contract)⁸³ are immaterial.

⁷⁶ [2002] IRLR 96.

⁷⁷ Para. 17.

⁷⁸ Ibid.

⁷⁹ See e.g. Deakin and Morris, *Labour Law*, Oxford Hart Publishing, 2009, p. 150.

⁸⁰ Case 66/85 [1986] ECR 2121, paras 16–17.

⁸¹ Case C-337/97 *Meeusen v. Hoofddirectie van de Informatie Beheer Groep* [1999] ECR I-3289, para. 15.

⁸² Case 36/74 *Walrave and Koch* [1974] ECR 1405, para. 21.

⁸³ Case 152/73 *Sotgiu v. Deutsche Bundespost* [1974] ECR 153, para. 5.

The Court has also required that a ‘worker’ be engaged in a ‘genuine and effective’ economic activity. While most activities satisfy this requirement⁸⁴—including playing professional football,⁸⁵ being a prostitute,⁸⁶ doing an apprenticeship,⁸⁷ and other types of training⁸⁸—this may not always be the case. For example, work as part of a community-based religion might not constitute an economic activity⁸⁹ nor might work not performed under ‘normal’ conditions (e.g. work undertaken as part of a drug rehabilitation programme⁹⁰). The economic activity must also not be on ‘such a small scale as to be purely marginal and ancillary.’⁹¹ Although this hurdle might raise particular difficulties for part-time workers, the Court has generally found that they are still workers.⁹² Indeed, the Court has so relaxed the criteria for being a worker that it has ruled that work seekers are also covered.⁹³

This line of case law tends to suggest that the Court will favour a finding that an individual is a worker where possible, a view confirmed in *Vatsouras*.⁹⁴ The referring court had found that the ‘brief minor’ professional activity engaged in by Mr Vatsouras ‘did not ensure him a livelihood.’⁹⁵ Nevertheless, the Court of Justice said that, ‘independently of the limited amount of the remuneration and the short duration of the professional activity, it cannot be ruled out that that professional activity, following an overall assessment of the employment relationship, may be considered by the national authorities as real and genuine, thereby allowing its holder to be granted the status of “worker” within the meaning of Article [45 TFEU].’⁹⁶

The Court of Justice’s case law on the self-employed

While Article 45 TFEU concerns free movement of workers, Article 49 TFEU gives rights of free movement to those who are self-employed wishing to establish themselves. As with Article 45 TFEU, the Treaty does not define ‘self-employed’, but in *Jany*⁹⁷ the Court explained that, unlike workers, the self-employed work outside a relationship of subordination, they bear the risk for the success or failure of their employment, and they are paid directly and in full.⁹⁸ The case concerned Czech and Polish women working as prostitutes in the Netherlands.⁹⁹ They paid rent to the owner of the premises and received a monthly income (of between FL. 1,500 and 1,800) which they declared to the tax authorities. The Court considered them to be self-employed.

Jany therefore suggests that Article 49 permits individuals to engage in a wide range of economic activities in other Member States and still be considered self-employed. As the Court put it in *Barkoci*

⁸⁴ See, e.g., Case 13/76 *Donà v. Mantero* [1976] ECR 1333, para. 12.

⁸⁵ Case C-415/93 *Union Royale Belge de Société de Football Association v. Bosman* [1995] ECR I-4921, para. 73.

⁸⁶ Case C-268/99 *Aldona Malgorzata Jany and others v. Staatssecretaris van Justitie* [2001] ECR I-8615, para. 33.

⁸⁷ Case C-188/00 *Kurz, née Yüce v. Land Baden-Württemberg* [2002] ECR I-10691.

⁸⁸ Case C-109/04 *Kranemann v. Land Nordrhein-Westfalen* [2005] ECR I-2421; Case C-10/05 *Mattern v. Ministre du Travail et de l’emploi* [2006] ECR I-3145, para. 21.

⁸⁹ Cf Case 196/87 *Steymann v. Staatssecretaris van Justitie* [1988] ECR 6159, para. 14.

⁹⁰ Case 344/87 *Bettray v. Staatssecretaris van Justitie* [1989] ECR 1621, para. 17. Cf. Case C-1/97 *Birden v. Stadtgemeinde Bremen* [1998] ECR I-7747, decided in the context of the EEC-Turkey Association Agreement, where a person employed under a job-creation scheme was considered a worker.

⁹¹ See, e.g., Case C-357/89 *Raulin v. Minister van Onderwijs en Wetenschappen* [1992] ECR I-1027, para. 10.

⁹² Case 53/81 *Levin* [1982] ECR 1035, para. 17.

⁹³ Case C-292/89 *R v. IAT, ex p. Antonissen* [1991] ECR I-745, para. 21.

⁹⁴ Joined Cases C-22/08 and 23/08 *Vatsouras v. Arbeitsgemeinschaft* [2009] ECR I-000, para. 30.

⁹⁵ Para. 25.

⁹⁶ Para. 30.

⁹⁷ Case C-268/99 *Aldona Malgorzata Jany and others v. Staatssecretaris van Justitie* [2001] ECR I-8615.

⁹⁸ Paras 34 and 70–1.

⁹⁹ The case was decided under the Europe Agreements but in this regard the Court said that the principles were the same as those under Art. 49 (para. 38).



and *Malik*,¹⁰⁰ a self-employed person could conduct ‘activities of an industrial or commercial character, activities of craftsmen, or activities of the professions of a Member State’.¹⁰¹

Learning between the provisions

In recent years the Court has drawn on its case law in the field of free movement to inform its interpretation of other provisions. For example, in *Union syndicale Solidaires Isère*¹⁰² the Court said that the concept of worker for the purposes of the Working Time Directive 2003/88 ‘may not be interpreted differently according to the law of Member States but has an autonomous meaning specific to European Union law. The concept must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration’. In the light of this provision it would seem likely that the Court will draw inspiration from its case law on Article 49 TFEU to interpret equivalent phrases in secondary legislation.

The decision in *Allonby*¹⁰³ highlights a further interesting phenomenon: the blurring of the distinction between employees and the dependent self-employed under EU law. The case concerned part-time teachers who used to be employed directly by a further education (FE) college but were told that they could continue working for the college only if they were engaged on a self-employed basis by an agency, ELS. The effect of these changes was to reduce Allonby’s pay. She claimed that her rights to ‘equal pay for male and female workers’ under Article 157 TFEU had been infringed. The question for the Court was whether the lecturers were workers. The Court began by noting that worker used in Article 157(1) TFEU had a broad, Union meaning.¹⁰⁴ Then, drawing on its free movement of workers case law under Article 45 TFEU, the Court said:¹⁰⁵

For the purposes of that provision [Article 157(1)], there must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration.

The Court said that ‘It is clear from that definition that the authors of the Treaty did not intend that the term “worker”, within the meaning of Article [157(1) TFEU], should include independent providers of services who are not in a relationship of subordination with the person who receives the services’.¹⁰⁶ However, the Court added the caveat that formal classification of a self-employed person under national law did not exclude the possibility that a person had to be classified as a worker within the meaning of Article 157(1) TFEU if his independence was ‘merely notional, thereby disguising an employment relationship within the meaning of that article’. It said that it was necessary ‘in particular to consider the extent of any limitation on their freedom to choose their timetable, and the place and content of their work’. It continued: ‘The fact that no obligation is imposed on them to accept an assignment is of no consequence in that context’.¹⁰⁷ This suggests that, in the EU context, the UK’s ‘mutuality of obligation’ requirement may be diminished in the light of the practical realities of the situation when EU employment rights are at stake.

¹⁰⁰ Case C–257/99 *R. v. Secretary of State for the Home Department, ex p. Barkoci and Malik* [2001] ECR I–6557, para. 50. This was in the context of Art. 45(3) of the Association Agreement which has wording ‘similar or identical to’ Art. 49 TFEU.

¹⁰¹ See also Case C–55/94 *Gebhard* [1995] ECR I–4165, para. 23, ‘all types of self-employed activity’.

¹⁰² See also Case C–428/09 *Union syndicale Solidaires Isère v. Premier ministre* [2010] ECR I–000.

¹⁰³ Case C–256/01 *Allonby v. Accrington & Rosendale College* [2004] ECR I–873.

¹⁰⁴ Para. 66.

¹⁰⁵ Case 66/85 *Lawrie-Blum* [1986] ECR 2121, para. 17, and Case C–85/96 *Martínez Sala* [1998] ECR I–2691, para. 32.

¹⁰⁶ Para. 68. See also, in the context of free movement of workers, Case C–337/97 *Meeusen* [1999] ECR I–3289, para. 15.

¹⁰⁷ Citing Case C–357/89 *Raulin* [1992] ECR I–1027, paras. 9 and 10.

Further, *Allonby* also suggests that the courts should be prepared to look behind the labels attached by the parties themselves to their relationship to see if the individual is in a situation of dependence such as to merit the classification of an employment relationship. Therefore, in *Quinnen v. Hovells*,¹⁰⁸ where an employer described a shop assistant as self-employed to avoid the relationship of employer and employee and the complications that accompany that relationship, the Employment Appeal Tribunal (the second tier court in the UK) said that the applicant came within the scope of the equality legislation because ‘a contract for the personal execution of work or labour was intended’ and the personal scope of the legislation was broader than ‘the ordinary connotation of employment, so as to include persons outside the master-servant relationship.’

The personal scope of the Anti-discrimination Directives

So far we have concentrated on understanding the meaning of the key terms ‘employees’, ‘workers’ and ‘self-employed’. In particular, we have seen that the terms employees and workers and even self-employed are less distinct than would first appear, and that the category ‘self-employed’ may well embrace (1) the dependent self-employed (who may be workers) and (2) genuine self-employed (independent entrepreneurs). Which of these various categories are covered by the Anti-discrimination Directives? The answer is less clear than might be expected, as is demonstrated by the divergent views taken by some of the Member States.

Article 3(1) of the two Anti-discrimination Directives 2000/43 and 2000/78, together with Article 14 of the Equal Opportunities and Equal Treatment Directive 2006/54/EC, say that the Directives apply to:

“all persons, as regards both the public and private sectors, including public bodies, in relation to (a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion”.¹⁰⁹

Articles 3(1)(b)-(d) add that the Directives also apply to access to vocational training, to employment and working conditions, and membership of, and involvement in, workers’ organisations. Article 3(1)(a) thus makes it clear that the Directives are intended to apply not only to employees and workers but to the self-employed and the liberal professions. However, the fact that the scope of the Directives is explicitly linked to ‘employment and occupation’ (Article 1 of all three Directives) indicates that there are outer limits to the reach of the Directives. This might indicate that there must be some notion of economic, if not personal, subordination and thus the Directive should be confined in its application to employees, workers and the dependent self-employed.

This view receives some support by reference to the rest of Directive 2006/54 which, in Article 1, makes no reference to self-employment, merely to ‘access to employment, including promotion, and to vocational training’ and to the earlier version of the Directive, Directive 76/207, which simply provided that ‘Application of the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts, whatever the sector or branch of activity, and to all levels of the occupational hierarchy’. Further, the detailed reference to the self-employed in Chapter 2 of Title II of Directive 2006/54 on equal treatment in occupational social security schemes might indicate that the self-employed do not benefit from the rest of the Directive. Likewise, the express reference to the self-employed in Directive 2010/41/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and the definition of self-employed workers in Article 2(a) (namely ‘all persons pursuing a gainful

¹⁰⁸ [1984] IRLR 227.

¹⁰⁹ The quote is taken from Directive 2000/78.

activity for their own account, under the conditions laid down by national law') suggests, by implication, that the other equality directives do not cover entrepreneurs.

However, others would argue that the reference to 'self-employed' covers even the independent self-employed (entrepreneurs), at least in respect of conditions for access to self-employment, and that the self-employed will also benefit from access to supply of goods and services under Article 3(1)(h) of Directive 2000/43 and under Directive 2004/113 on equal treatment of men and women in access to and supply of goods and services. Article 3 of Directive 2004/113 provides that 'This Directive shall apply to all persons who provide goods and services, which are available to the public irrespective of the person concerned as regards both the public and private sectors, including public bodies, and which are offered outside the area of private and family life and the transactions carried out in this context.'

So how have the Member States interpreted these provisions in respect of both dependent and independent self-employed?

Member State implementation and enforcement

It is striking that most Member States, in their implementation of the two anti-discrimination Directives 2000/43 and 2000/78, have broadly replicated the language of the Directives and so extended the rights not only to employees/workers but also to the self-employed, including the liberal professions (e.g. lawyers, accountants, doctors, and architects).¹¹⁰ A few Member States have not expressly given rights to the self-employed (e.g. Estonia, Greece and Lithuania) although in Greece and Lithuania this problem may well be overcome through the interpretation of the existing law and in Spain it can be addressed through references to the general principle of equal access to employment.

Some laws do expressly cover entrepreneurs. For example, in Finland the legislation prohibits discrimination in the granting of various types of support by public authorities e.g. for the purposes of starting up a business enterprise. Likewise, in Slovakia the Small Business Act guarantees equal treatment for those self-employed performing licensed trades.

Perhaps most interesting in terms of implementation is the position of the UK, Ireland and Malta, which largely follow a common pattern. Looking at the position under UK law, s. 39(1) of the Equality Act 2010 says: an employer (A) must not discriminate against a person (B) in the arrangements A makes for deciding to whom to offer employment, as to the terms on which A offers B employment and by not offering B employment. Section 83(2) then provides that:

"Employment" means –

(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;

Therefore it covers:

- applicants
- employees
- apprentices
- workers
- self-employed with a contract for personal services.¹¹¹

¹¹⁰ The following data is drawn from the European Network of Legal Experts Report in the field of non-discrimination, 2009 Country Reports (section on self-employment), state of affairs up to 31 December 2009, available on www.non-discrimination.net.

¹¹¹ The UK legislation also extends the rights of equal treatment to, for example, partners in law firms, barristers, and office holders.

For our purposes, it is the last two categories which are of importance. The concept of worker covers the dependent self-employed but, as we saw above, excludes the provision of services to a client or customer in the course of practising a profession or running a business. However, there is no such limitation in the EqA 2010, which also includes the genuinely self-employed who are in business on their own account.¹¹² However, it must be a contract which places the provider of services under some obligation to provide services personally, and where the 'dominant purpose' is the execution of personal work or labour. If the dominant purpose is the provision of services rather than the execution of personal work, the individual will not be considered as being in 'employment'.¹¹³ This introduces yet a further nuance in the definition of self-employed.

Conclusion

As the number of employment rights increase, some employers have developed an increasing range of mechanisms to try to remove individuals from the scope of the protection of the legislation. Often this takes the form of using drafting techniques to avoid the 'employee' label (e.g. describing the individual as 'self-employed', including a substitution clause in the contract with the result that it is not a contract for personal service, or making it a contractual term that there is no obligation to provide the individual with the work and no obligation on the individual to accept the work offered, thereby denying mutuality of obligation). The law has struggled to keep pace with these changes and it has often been left to the courts to adopt a purposive approach to the rule to give protection to individuals. But this goes to the core of the question of what is the legitimate scope of employment protection? Should it be to protect all individuals, as the human rights perspective might indicate, or just those who are dependent on the employer, whether as employees or dependent self-employed, as neo-liberals might argue? The latter model would exclude genuine entrepreneurs, but they are in a better position to insure against losses. They also have the added bonus of potentially large profits if the business succeeds. While the language across the Anti-discrimination Directives is not consistent, the prevailing view seems to favour the human rights approach and thus providing a broader range of protection including to the self-employed who might otherwise be excluded as a result of clever drafting techniques. Further, the Court of Justice's broad reading of the concept of worker in *Allonby* might help smooth over some of the difficulties in the grey area between workers and the self-employed, thereby providing a more solid foundation for defining the personal scope of the anti-discrimination law.

¹¹² <http://employment.practicallaw.com/6-200-4244#a62527>.

¹¹³ *Mirror Group Newspapers Limited v. Gunning* [1986] IRLR 27.

European Legal Policy Update

Roma expulsion in France

On 29 September 2010, the European Commission sent a request to France for information on an expulsion of Roma that occurred during summer 2010. The Commission requested the adoption of procedural safeguards to ensure the effective implementation of the Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States and recalled that transposition of EU law on free movement must respect the fundamental rights of EU citizens and avoid discrimination, notably on the grounds of nationality or belonging to an ethnic minority. On 19 October, the Commission announced that legal proceedings would not be pursued further to France's satisfactory answer.

Internet source:

<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/502&type=HTML>

Employment equality rules: cases closed for Sweden and Latvia

On 30 September 2010, the European Commission closed legal proceedings against Sweden and Latvia regarding incorrect implementation of the principle of equal treatment in employment on the basis of religion, belief, disability, age and sexual orientation enshrined in the Employment Equality Directive 2000/78/EC. The infringement proceedings were initiated against Latvia in December 2006 and against Sweden in March 2007.

Internet source:

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1235&type=HTML>

Equality rules: cases closed for Germany

In two reasoned opinions sent in October 2009, the Commission required Germany to fully comply with the Racial Equality Directive 2000/43/EC and the Employment Equality Directive 2000/78/EC. In response to the Commission's request, Germany presented draft laws that comply with its national jurisprudence and notified the EC of further national laws applying in this area.

On 28 October 2010, the European Commission closed infringement proceedings against Germany following the proper implementation of both Directives.

Internet source:

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1429&format=HTML&aged=0&language=EN&guiLanguage=en>

Commission adopts a strategy to create a barrier-free Europe for disabled people

On 15 November 2010, the Commission announced the adoption of a new strategy aiming at ensuring equal rights for disabled people and proposed several actions to remove obstacles in everyday life. The strategy considers the use of standardisation, public procurement and state aid rules to improve access to and supply of goods and services and the promotion of an EU market for assistive devices. The Commission also advocated measures relating to the mutual recognition of disability cards, the use of sign language and Braille when exercising electoral rights or dealing with EU institutions and the promotion of an accessible format for websites and books. In addition, awareness-raising campaigns and data collection and monitoring to improve knowledge about the situation of disabled people and the barriers they face will be put in place. The strategy will run until 2020.

Internet source:

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1505&format=HTML&aged=0&language=EN&guiLanguage=fr>

Racial equality rules: cases closed for Sweden and Latvia

On 27 June 2007, reasoned opinions were sent to 14 Member States, including Latvia and Sweden, for failure to correctly implement the Racial Equality Directive 2000/43/EC. The European Commission indicated that the material scope and definitions provided by national legislation diverged from the Directive. The Commission also identified inconsistencies in provisions designed to help victims of discrimination (such as the rights of associations to assist individuals with their cases and the amount of compensation).

On 24 November 2010, the Commission decided to close infringement proceedings against Sweden and Latvia as their national anti-discrimination legislation now adequately ensures that people receive equal treatment in the workplace, whatever their race or ethnic origin, in line with the Racial Equality Directive 2000/43/EC.

Internet source:

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1550&format=HTML&aged=0&language=EN&guiLanguage=en>

EU ratifies the UN Convention on the Rights of People with Disabilities

On 23 December 2010, the European Union ratified the UN Convention on the Rights of People with Disabilities, being the first international organisation to accede to an international treaty on human rights. The EU became the 97th party to the Convention.

Internet source:

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/4&format=HTML&aged=0&language=EN&guiLanguage=en>

European Court of Justice Case Law Update

References for preliminary rulings – Advocate General Opinions

Case C-147/08 Opinion of Advocate General Mr Niilo Jääskinen in the case Jürgen Römer v. Freie und Hansestadt Hamburg delivered on 15 July 2010
not yet reported in the Official Journal

Mr Römer, the plaintiff, entered into a registered civil partnership with his same-sex partner in 2001, after a relationship of 30 years. Subsequently, he requested a raise in his supplementary pension payments from his former employer, the Free and Hanseatic City of Hamburg (*Freie und Hansestadt Hamburg*). The City of Hamburg refused on the ground that the First Law on Retirement Pensions (*Erstes Ruhegeldgesetz*, 'RGG') distinguishes between married pensioners who are not permanently separated and all other pensioners for the purposes of calculating the amount of pension payable. A reference for a preliminary ruling was made to the European Court of Justice (CJEU) by the Labour Court (*Arbeitsgericht*) of Hamburg as Mr Römer claimed that his supplementary pension payments were less favourable than if he were married to an opposite sex partner and therefore amounted to discrimination on grounds of sexual orientation.

The first question referred sought to determine whether the challenged provisions on supplementary pension schemes are excluded from the scope of Directive 2000/78/EC as Article 3(3) stipulates that it does not apply to 'payments of any kind made by state schemes or similar, including state social security or social protection schemes'. The Advocate General (AG) recalled that Directive 2000/78/EC applies when benefits can be considered as 'pay' conferred in respect of employment. In accordance with the established case law of the CJEU, the supplementary pension scheme in question concerns a particular group of workers and is directly calculated on the basis of the total period of service completed and the last wage drawn by the employee, and thus constitutes 'pay'. The AG pointed out that the fact that the payments are made by the City of Hamburg, which is a public body, is not relevant. He then turned to recital 22 of the preamble which states that Directive 2000/78/EC is without prejudice to national laws on marital status and the benefits dependent thereon. Recalling the *Maruko* case,¹¹⁴ the AG observed that Member States retain exclusive competence in the field of marital status or of any other form of recognised civil partnership. However, although they can freely decide whether or not to allow formal recognition of same-sex relationships, they must respect EU law, including non-discrimination principles. Therefore, recital 22 does not preclude the application of anti-discrimination to the present case.

The second question asked whether there has been discrimination, either direct or indirect. In *Maruko*, the Court stated that 'a life partnership, while not identical to marriage, places persons of the same sex in a situation comparable to that of spouses so far as concerns the survivor's benefit at issue in the main proceedings'. The fact that Mr Römer's pension could have substantially risen if he were married to a woman shows that he has been treated less favourably than married pensioners. As regards indirect discrimination, Article 2(2) of the Directive forbids measures placing one person at a particular disadvantage compared with others, unless the measure is objectively justified by a legitimate aim and the means to achieve that aim are appropriate and necessary. In this respect, the AG did not consider the protection of marriage and family guaranteed by the State in Article 6 of the Basic Law to be a sufficient legitimate objective as other means less harmful to the financial interests of homosexuals could also promote the institution of marriage. As in *Maruko*, the AG left it for the national court to determine whether there has been direct or indirect discrimination.

¹¹⁴ Case C-267/06, *Maruko* [2008] ECR I- 1757. See also *European Anti-discrimination Law Review* (EADLR), issue n°6/7, p. 60.

In the absence of a breach of Directive 2000/78/EC, the referring court asked whether Article 141 TEC (now Article 157 TFEU) or EU general legal principles have been violated. The AG noted that Article 141 TEC is not relevant in the present case as it addresses discrimination on grounds of sex and not of sexual orientation. Concerning the second aspect of the question, the Court ruled in *Mangold and Küçükdeveci*¹¹⁵ that Directive 2000/78/EC merely 'gives expression to, but does not lay down, the principle of equal treatment in employment and occupation, and that the principle of non-discrimination on grounds of age is a general principle of EU law'. The AG saw no reason not to provide a similar interpretation regarding sexual orientation and concludes that the challenged provisions are in breach of that general principle.

With regard the temporal effects of EU law, the AG believed that as the principle of non-discrimination on grounds of sexual orientation is a general principle of EU law, there should not be any limitation in time. By contrast, under Directive 2000/78/EC, direct discrimination only exists the moment the situation of pensioners engaged in a civil partnership becomes comparable to married pensioners and indirect discrimination creates non-justified disadvantageous treatment the day the plaintiff enters into a registered civil partnership. The AG saw no need to limit the effects in time of the CJEU decision.

The last question asked whether the constitutional provision guaranteeing protection of family and marriage can affect the principle of non-discrimination enshrined in Directive 2000/78/EC. The AG recalled the primacy of EU law over national legislation, even constitutional, in the case of conflicts of law. In addition, protection of family and marriage, although a legitimate aim in general, cannot permit discrimination on grounds of sexual orientation.

Internet source:

http://curia.europa.eu/jcms/jcms/j_6/ (search case: C-147/08)

Joined Cases C-250/09 and C-268/09 Opinion of Advocate General Mr Bot in the case Vasil Ivanov Georgiev v. Tehnicheski universitet – Sofia, filial Plovdiv delivered on 2 September 2010
OJ C 13 from 15.01.2011, p.12

As a lecturer at the Technical University of Sofia, Mr Georgiev's employment contract automatically ceased to have effect when he reached the age of 65. However, he was allowed by the academic council to continue to work and his contract was consequently renewed three times for a one-year period in accordance with the Law on Higher Education. In 2009, the university ended the employment relationship finally and Mr Georgiev lodged two complaints, one claiming that the first renewal contract should be re-categorised as a contract of indefinite duration and the other relating to compulsory retirement at the age of 68. The Plovdiv District Court (*Rajonen sad Plovdiv*) in Bulgaria referred the two actions to the CJEU, first asking whether a provision precluding the conclusion of employment contracts of indefinite duration with professors who have reached the age of 65 is compatible with Directive 2000/78/EC. Secondly, the District Court questioned the validity of the national law providing for the compulsory retirement of professors who have reached the age of 68. Finally, the third question related to the national law allowing fixed-term contracts to be used to continue the former permanent employment relationship when a professor reaches the age of 65.

The Advocate General (AG) first decided to consider the three questions together as they in essence seek to determine whether the automatic termination of an employment contract at retirement age and the conclusion beyond that age of fixed-term contracts for a maximum of three years violate Directive 2000/78/EC. He found that professors who have reached the age of 65 face direct discrimination compared to younger professors who can still enter into a contract of indefinite duration. In addition, professors who have reached the age of 68 are forced to retire. The AG then turned to the justification test

¹¹⁵ Case C-144/04 *Mangold* [2005] ECR I-9981 and Case C-555/07, *Kucukdeveci*.

and confirmed that objectives such as alleged by the Bulgarian Government regarding the opportunity for younger staff to achieve professorial positions and the quality of teaching and research have been recognised in the past by the CJEU as legitimate in the context of social and employment policy. Recalling the established case-law on age, he considered that guaranteeing a balanced mix of ages within the body of professors constitutes a legitimate aim, in particular bearing in mind the limited number of vacant positions and the fact that careers may be rather long in the sector concerned. Moreover, national legislation does not seem to go beyond what is necessary to achieve this objective as the possibility of extending the employment relationship for a further three years has the effect of limiting the difference in treatment. In addition, when professors cease to work, they are entitled to a retirement pension to replace their employment income. In light of these considerations, the AG concluded that Bulgarian legislation does not violate Article 2(2)(a) and Article 6(1) of Directive 2000/78/EC.

Internet source:

http://curia.europa.eu/jcms/jcms/j_6/ (search case: C-250/09 or C-268/09)

References for preliminary rulings – Judgments

Case C-246/09 Susanne Bulicke v. Deutsche Büro Service GmbH, Judgment of 8 July 2010

OJ C 234 from 28.08.2010, p.13

Ms Bulicke, aged 41, applied for a vacancy for which the advertisement clearly stated a preference for candidates between 18 and 35 years of age. As her application was unsuccessful, she brought an action claiming compensation for age discrimination. The Labour Court (*Arbeitsgericht*) of Hamburg rejected her request on the basis that she had not complied with the two-month deadline for submitting a claim. This time-limit is generally applicable in employment law in the absence of any binding collective agreement. The Regional Labour Court upheld the decision but referred the case to the CJEU asking whether the time-limit as specified by the German General Law on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz*, ‘the AGG’) is compatible with the principles of effectiveness and equivalence.

Article 9 of Directive 2000/78/EC requires all Member States to adopt measures that ensure that judicial and/or administrative procedures to enforce the principle of equal treatment are available to all persons who consider themselves victims of discrimination. The CJEU recalled that, according to the principle of equivalence, procedural rules that aim to safeguard rights deriving from EU law should not be less favourable than the rules governing similar domestic actions when the purpose and cause are similar and that, according to the principle of effectiveness, national procedures should not render practically impossible or excessively difficult the exercise of rights conferred by EU law. The Court noted that it does not seem at first glance that the time-limit laid down in the AGG is less favourable than provisions concerning similar domestic actions in employment law. However, this must be verified by national courts, which have a better direct knowledge of the national procedures applicable. As regards the principle of effectiveness, the role of the procedural rule, its place in proceedings, its conduct and special features must be taken into account, as well as the basic principles of the domestic judicial system such as the principle of legal certainty. Again, according to the AG, national courts are better positioned to check whether the fixing of the point from which the time-limit starts to run does not render practically impossible or more difficult the exercise of rights conferred by Directive 2000/78/EC.

Internet source:

http://curia.europa.eu/jcms/jcms/j_6/ (search case: C-246/09)

Geert | 1961



Tracy | 1993



Monique | 1976



Birgitta | 1961



Robert | 1984



Irene | 1951



Cees | 1958



Anneke | 1949



Frits | 1961



Case C-499/08 Ingeniøforeningen i Danmark acting on behalf of Ole Andersen v. Region Syddanmark,
Judgment of 12 October 2010
OJ C 346 from 18.12.2010, p.7

Mr Andersen, aged 63, had been continuously employed for 18 years by Southern Jutland Regional Council (*Sønderjyllands Amtsråd*) before being dismissed on 22 January 2006. Upon the termination of his contract, he decided not to exercise his right to retirement but opted for the status of job seeker. He brought a claim against the Regional Council requesting payment of a severance allowance equivalent to three months' salary, which was refused on the ground that such an allowance is not payable under Danish law when the salaried worker is entitled to receive an old-age pension from a pension scheme to which the employer has contributed, even if the worker intends to seek a new job.

The trade union representing Mr Andersen alleged before the Western High Court (*Vestre Landsret*) that Paragraph 2a(3) of the Law on Salaried Employees constitutes a measure which discriminates against workers over the age of 60 and violates Articles 2 and 6 of Directive 2000/78/EC. A reference for a preliminary ruling was made to the CJEU on the interpretation of the Directive's provisions.¹¹⁶

First, the Court examined whether the Danish provision fell within the scope of Directive 2000/78/EC and ruled that by excluding a whole category of workers from entitlement to the severance allowance, it affected the conditions of dismissal of these workers for the purposes of Article 3(1)(c) of Directive 2000/78/EC. In the present case, an old-age pension is exclusively granted to salaried workers who have reached the minimal retirement age and therefore creates a difference in treatment directly on grounds of age.

However, the explanatory notes to the Law on Salaried Employees stipulate that severance allowances aim to give support to older employees who have many years of service with the same employer and who are moving to new employment. Consequently, the Court held that legitimate employment policy and labour market aims objectively and reasonably justify direct discrimination within the context of national law. Furthermore, restricting the severance allowance to workers who are not entitled to an old-age pension to which their employers have contributed is not unreasonable and inappropriate in the light of the objective of providing protection to the workers in question. Nonetheless, although the measure satisfied the appropriateness test, the Court found the restriction to go beyond what is necessary to achieve the social policy aims stated. As a matter of fact, it excludes not only all workers who will actually receive an old-age pension from their employer, but also all those who are eligible for such a pension but who intend to continue to work. Therefore, the provision is in breach of Directive 2000/78/EC.

Internet source:

http://curia.europa.eu/jcms/jcms/j_6/ (search case: C-499/08)

Case C-45/09 Gisela Rosenblatt v. Oellerking Gebäudereinigungsges, Judgment of 12 October 2010
OJ C 346 from 18.12.2010, p.9

Ms Rosenblatt's employment contract was terminated by her employer, a cleaning firm, by virtue of the applicable collective agreement on the ground that she had reached retirement age.¹¹⁷ By letter, she stated her willingness to continue working but, despite her opposition, her employment contract ended on 31 May 2008. She brought an action claiming that the automatic termination of her contract consti-

¹¹⁶ See *European Anti-discrimination Law Review* (EADLR), issue 8, p.27 and issue 11, pp. 39-40.

¹¹⁷ See the framework collective agreement for employees in the commercial cleaning sector (*Allgemeingültiger Rahmentarifvertrag für die gewerblichen Beschäftigten in der Gebäudereinigung*, 'the RTV').

tuted discrimination on grounds of age incompatible with Directive 2000/78/EC. The case was referred to the CJEU by the Labour Court of Hamburg (*Arbeitsgericht*) in Germany.¹¹⁸

The first preliminary question asked whether the adoption of collective rules regarding retirement age limits by social partners without the German General Law on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz*, 'the AGG') expressly so allowing is compatible with Directive 2000/78/EC. The second and third questions referred to the lawfulness of, on the one hand, the national legislation and, on the other hand, the collective agreement, both providing for such automatic termination clauses, if they were consistently applied to nearly all workers, regardless of the economic, social and demographic situation and the situation actually prevailing on the employment market. Finally, the fourth question sought to ascertain whether the general applicability of a collective agreement permitting employers to automatically end employment contracts at a specific fixed age is compatible with Directive 2000/78/EC, regardless of the economic, social and demographic situation and the situation actually prevailing on the employment market.

The Court first addressed the second question. According to Article 6(1) of Directive 2000/78/EC, a difference in treatment on the grounds of age is permissible where the measure is objectively and reasonably justified by a legitimate aim, including employment policy, labour market and vocational training objectives, and that the means to achieve that aim are necessary and appropriate. The AGG incorporates these principles and permits individual or collective agreements to provide for the termination of an employment contract on the ground that retirement age has been reached. The German Government claimed that such clauses mirror the political and social consensus that employment must be shared between the generations, regardless of social and demographic conditions and the situation on the employment market. Pension benefits serve as a replacement income for older workers who cease to work once they have reached retirement age. Recalling the *Palacios de la Villa* case,¹¹⁹ the Court stated that the aims described by the Government must be regarded as objective and reasonable justification for a difference in treatment on grounds of age. Taking into account the financial compensation guaranteed by the retirement pension, the flexibility of the clauses on automatic termination and the need for the worker's consent to their application, the Court found that the means appear appropriate and necessary. Therefore, the agreement implementing the clause envisaged by the national legislation must itself pursue a legitimate aim in an appropriate and necessary manner, in conformity with Directive 2000/78/EC.

The Court then examined whether the collective agreement providing for the automatic termination of the employment relationship where an employee has reached retirement age is compatible with Article 6(1) of Directive 2000/78/EC. The collective agreement in question was intended to give priority to appropriate and foreseeable planning of personnel and recruitment management over the interest of employees in maintaining their financial position. The agreement was also geared towards the aim of facilitating employment for young people, planning recruitment and allowing good management of a firm's personnel in a balanced manner according to age. Against this background, the Court held that such clauses on automatic termination may be considered as contributing to the socially-beneficial distribution of employment between the generations and therefore justified in the context of national policy. As far as appropriateness is concerned, the Court recalled that clauses on automatic termination are collectively negotiated between employers and employees' representatives, with wide discretion granted to the social partners. Consequently, the collective agreement in question may be considered as appropriate as, in the present context, the social partners are free not only to choose to pursue the aim envisaged but also to define the measures to achieve it. The Court observed that the clause on automatic termination does not preclude workers from continuing to work if they so wish and a person who has reached retirement age benefits from the provisions providing protection from discrimination

¹¹⁸ See *European Anti-discrimination Law Review* (EADLR), issue 9, pp. 33-35.

¹¹⁹ Case C-411/05, *Palacios de la Villa* [2007] ECR I-8531.

on grounds of age. In the light of those observations, it held that the means did not go beyond what was necessary to achieve the aim pursued.

Finally, the Court turned to the question of general applicability of the collective agreement. EU law does not govern the conditions under which a state may declare a collective agreement to be of general application. In other words, the fact that the collective agreement is of general application is not unlawful provided that it does not breach the provisions regarding protection from discrimination specified by Directive 2000/78/EC.

Internet source:

http://curia.europa.eu/jcms/jcms/j_6/ (search case: C-45/09)

Joined Cases C-250/09 and 268/09 Vasil Ivanov Georgiev v. Tehnicheski universitet – Sofia, filial Plovdiv, Judgements of 18 November 2010
OJ C 13 from 15.01.2011, p.12

In 2006, Mr Georgiev's employment contract as a lecturer ceased to have effect on the ground that he had reached the age of 65. However, he was offered three extensions for a fixed period of one year before the university finally ended the employment relationship when he reached the age of 68. He initiated two actions where he challenged the use of fixed-term contracts from the age of 65 and compulsory retirement at the age of 68. The Plovdiv District Court (*Rajonen sad Plovdiv*) in Bulgaria referred the two actions to the CJEU, asking in essence whether a provision under which professors who have reached the age of 68 are compulsorily retired and may continue working beyond the age of 65 only by means of fixed-term contracts renewable for a maximum of three years is compatible with Directive 2000/78/EC.

The Court, following the same reasoning as the Advocate General (AG), rapidly concluded that there had been a difference in treatment and turned to the justification laid down in Article 6 of Directive 2000/78/EC. As regards the aim of pursuing a social and employment policy specific to the field of academia and teaching careers, the Court remarked that these objectives are not evident from the national legislation and left it to the national courts to determine whether the justifications given by the Bulgarian Government correspond to the facts. Similarly to the AG, the Court recalled past rulings in order to conclude that the measure does not go beyond what is necessary to achieve the aims of employment policy alleged. It is for the national courts to verify that the means are appropriate and necessary with regard to these aims. Finally, the national courts must decline to apply the national rule if it is deemed to be contrary to Article 6 of Directive 2000/78/EC.

Internet source:

http://curia.europa.eu/jcms/jcms/j_6/ (search case: C-250/09 or C-268/09)

European Committee of Social Rights Update

Complaint no. 62/2010, International Federation of Human Rights (FIDH) v. Belgium

The complaint was lodged on September 2010. The FIDH alleges a violation of Articles 16 (the right of the family to social, legal and economic protection) and 30 (right to protection against poverty and social exclusion) of the Revised European Social Charter and the non-discrimination clause (Article E). The FIDH claims that the inadequate number of stopping sites, problems stemming from the non-recognition of caravans as dwellings, lack of compliance with the required procedures when carrying out evictions, and lack of a global and coordinated policy to combat poverty and social exclusion of Travellers, among other issues, are in breach of the housing rights of Travellers.

Complaint no. 63/2010, Centre on Housing Rights and Evictions (COHRE) v. France

The complaint was lodged on 15 November 2010. The complainant organisation alleges a violation of Articles 31 (right to housing) and Article 19§8 (guarantees concerning expulsion) of the Revised European Social Charter. The COHRE claims that the eviction and expulsion of Roma from their homes and from France during the summer of 2010 violated these provisions and constituted discrimination in the enjoyment of these rights.

Decision on the merits of Complaint no. 52/2008 Centre on Housing Rights and Evictions (COHRE) v. Croatia

The complaint, registered on 25 August 2008, relates to Article 16 of the Charter (the right of the family to social, legal and economic protection), read alone or in conjunction with Article E (non-discrimination) of the Charter, on the grounds that the ethnic Serb population displaced in Croatia during the war has been subjected to discriminatory treatment as families have not been allowed to reoccupy their former dwellings prior to the conflict, nor have they been granted financial compensation for the loss of their homes. The COHRE alleged that the Government has not made sufficient efforts to address the discrimination and housing problems faced by ethnic Serbs. The Committee ruled that by virtue of Article 16 the Government is under the obligation to take appropriate steps to provide housing and security of tenure to displaced families. Failure to implement the housing programme for displaced persons within a reasonable time-frame resulted in a breach of Article 16 read in conjunction with Article E. Moreover, the Committee concluded that the failure to take into account the heightened vulnerabilities of many displaced families, and in particular Serb families, also violated these provisions.

Decision on the merits of Complaint no. 58/2009, Centre on Housing Rights and Evictions (COHRE) v. Italy

The complaint, registered on 29 May 2009, related to Article 16 (right of the family to social, legal and economic protection), Article 19 (right of migrant workers and their families to protection and assistance), Article 30 (right to protection against poverty and social exclusion) and Article 31 (right to housing), read alone or in conjunction with Article E (non-discrimination) of the Revised European Social Charter. The COHRE alleged that the recent emergency security measures and racist and xenophobic discourse have resulted in unlawful campaigns and evictions leading to homelessness and expulsions, disproportionately affecting Roma and Sinti.

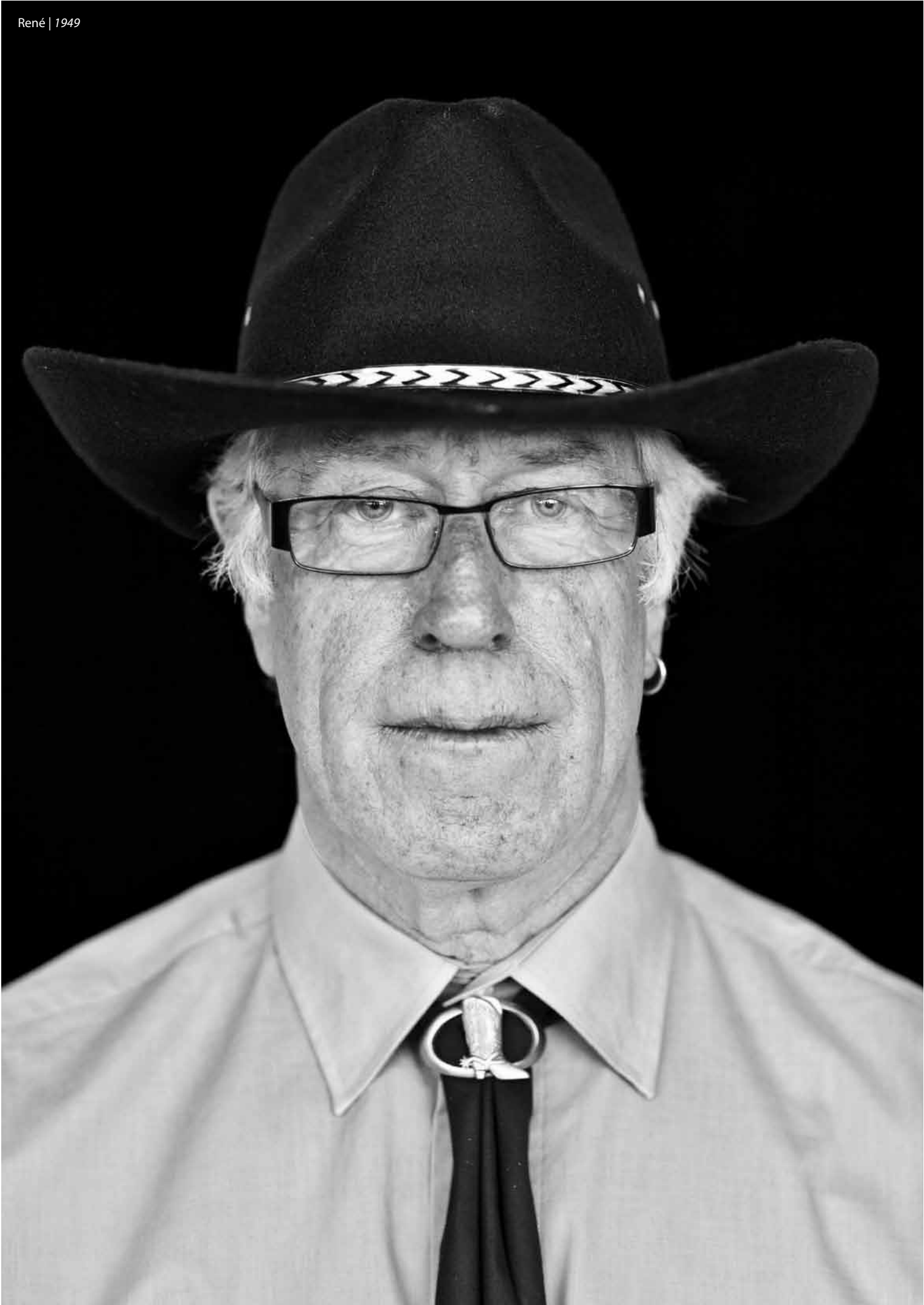
The complaint pointed out the Italian authorities' failure to provide a proper follow-up to the European Committee of Social Rights' decision on the merits of 7 December 2005 finding Italy in violation of the

right to housing of Roma and Sinti.¹²⁰ The new regressive measures in the framework of the 'Pacts for Security' adopted by the State and territorial authorities since November 2006 aggravated the situation even further. The measures in question directly targeted Roma and Sinti with insufficient positive action being taken, which resulted in discriminatory treatment. The COHRE also argued that the new security measures caused forced evictions and acts of violence against Roma and Sinti camps with little adequate alternative housing being provided. The 'Pacts for Security' generated a misperception of these vulnerable groups leading to segregation. In the first part of the decision, regarding the right to housing, the Committee held that the segregation of Roma and Sinti in camps or similar settlements, their living conditions there and the practice of eviction as well as violent acts against them constitute a violation of Article E taken together with Article 31 of the Revised Charter.

As regards the right to protection against poverty and social exclusion and the enjoyment by Roma and Sinti families of social, legal and economic protection, the COHRE claimed that Italy had failed to implement a coordinated approach to combat poverty and had systematically excluded Roma and Sinti from legal status and social benefits. In addition, the 'Pacts for Security' and the segregation of these vulnerable groups caused extreme poverty and social exclusion. The Committee endorsed the COHRE's argumentation and found a violation of Article E taken in conjunction with Article 30. Pursuant to previous decisions which establish that Articles 31 and 16 overlap with respect to several aspects of the right to housing, a violation of Article 31 is tantamount to a violation of Article 16. Moreover, the measures to identify Roma and Sinti put in place by the Italian authorities were deemed in breach of Article 16 as exclusively based on theoretical security reasons and of no use in resolving any social problem.

Finally, with regard the right to protection and assistance of migrant workers and their families, the Committee considered that the use of xenophobic political rhetoric or discourse against Roma and Sinti and their expulsion by the Italian authorities constituted a breach of Article 19 read in conjunction with Article E.

¹²⁰ Decision on the merits of Complaint no. 27/2004, *European Roma Rights Center (ERRC) v. Italy*.



News from the EU Member States, Croatia, the FYR of Macedonia and Turkey

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

Austria

Legislative developments

Province of Vienna amends anti-discrimination law

On 18 September 2010, the amendments to the Anti-discrimination Act adopted by the Province of Vienna entered into force.¹²¹ The new provisions introduce disability as a protected ground, offer protection to relatives (of whom a broad interpretation is given) of bearers of characteristics on all grounds, and explicitly extend the personal scope of protection to legal persons and the concept of disproportionate burden to all grounds.

A conciliation procedure is established, under which attempts must be made to settle discrimination cases within the Office for Combating Discrimination (*Stelle zur Bekämpfung von Diskriminierungen*). If no agreement or settlement is reached after three months, the complaint will be brought to court. The conciliation procedure is free of cost for both parties.

Finally, the Viennese Anti-discrimination Act stipulates that provincial subsidies and funding are granted only to natural or legal persons that respect the principles of non-discrimination and victimisation.¹²²

Belgium

Case law

Travel agency found to discriminate against a deaf person



A deaf man wished to book a package tour to Jordan but the travel agency refused unless he could guarantee the services of an independent personal assistant at his own expense. It was argued that his security could be jeopardised by alleged difficulties in adequately communicating with the locals. The Centre for Equal Opportunities and Opposition to Racism brought an action before the Commercial Court of Ghent claiming that less disproportionate measures, such as the use of a notepad or SMS to arrange group appointments, could sufficiently ensure the traveller's security. The Court endorsed the Centre's reasoning and sentenced the travel agency to a fine of EUR 650 for failure to provide reasonable accommodation. In addition, a conditional penalty of EUR 1 000 will apply for any new offence reported in the future and per diem if the offence continues. In addition, the travel agency had to advertise the judgment in its Ghent branch and on its own website, and to publish it in the media at its own expense.

Constitutional Court rejects a claim alleging that the employment contracts law discriminates on grounds of age



In 1981, Mr K. Goots was hired by a non-profit organisation under a permanent contract. In 2005, the organisation ended Mr Goots' employment, giving him six months' advance notice pursuant to Article 83 of the Act of 3 July 1978 on Employment Contracts.

¹²¹ Viennese Law Gazette No. 44/2010.

¹²² Para. 9/1.

Article 82 of the Act stipulates that when a permanent contract is terminated by the employer, three months' advance notice must be granted. Under the same provision, a further three months is added to the initial notice requirement at the beginning of each new five-year period of service with the same employer. When the employee's remuneration exceeds a certain annual amount, the notice period must be fixed by a judge or by an agreement between the employer and the employee. Article 83, as a derogation to Article 82, provides that an employer who ends a permanent employment contract from the first day of the month following the month during which the employee reaches 65 years of age must give six months' advance notice. Against this background, Mr Goots alleged before the Labour Court of Antwerp that Article 83 violated the principles of equality and non-discrimination of Articles 10 and 11 of the Constitution on the ground that it established different notice periods based on age. The Court sent a reference for a preliminary ruling to the Constitutional Court.

The Constitutional Court noted that the difference in treatment for employees dismissed after reaching the age of 65 was based on an objective criterion and pursued a legitimate social aim. The derogation envisaged by the law protects older employees of retirement age. Application of Article 82 would otherwise require relatively long notice periods and employers would have to plan dismissals of older employees several years in advance. Article 83 therefore allows shorter notice periods for employees who will benefit from a retirement pension in any case. Recalling Article 6 of the Employment Equality Directive 2000/78/EC, the Court concluded that Article 83 was reasonably justified within the context of national law and did not violate the principles of equality and non-discrimination.¹²³

Internet source:

<http://www.const-court.be/>

Former Prime Minister and Federal Minister of Equal Opportunities convicted of failure to implement situation testing

Mr Abdel Ani Sarrokh, a man of Moroccan origin, was denied entry to a nightclub three times, whereas his girlfriend of European background was allowed in. Under the Federal Anti-discrimination Act of 25 February 2003, situation testing was in theory accepted in court as proof of discrimination. In practice, the Belgian Government never adopted regulations setting out the conditions for situation testing to be admitted as evidence in discrimination cases, and the provision was removed from the new Anti-discrimination Act of 10 May 2007 that replaced the 2003 Act.

Following a civil action disputing the failure to adopt concrete provisions governing situation testing pursuant to the law, a civil court in Brussels acquitted the Prime Minister, as head of government, and sentenced the Federal Minister of Equal Opportunities, competent in the matter, to a symbolic fine of one euro as compensation for failure to implement the 2003 Act. The Court of Appeal of Brussels overturned the decision at first instance and awarded the sum of EUR 3 000 to the plaintiff. In addition, the State was sentenced to pay EUR 3 074 in court costs and EUR 1 300 as a contribution towards lawyers' fees for failure to adopt the appropriate implementing regulations. Such a failure infringed Article 108 of the Constitution regarding the Government's executive powers.

Update on the ban on a mathematics teacher for wearing a headscarf at school¹²⁴

A mathematics teacher initiated legal actions against a school's decision to dismiss her for wearing a headscarf on the school's premises and against regulations issued by the Charleroi City Council regarding the same matter. Before the Council of State (*Conseil d'Etat*, the supreme administrative court), she first alleged that the City Council had exceeded its powers conferred by the law and could therefore not adopt



¹²³ Judgment 2010/107, no. 4810 of 30 September 2010.

¹²⁴ See *European Anti-Discrimination Law Review* (EADLR), issue 11, p. 51.

a regulation prohibiting teachers from displaying any conspicuous religious, political or philosophical symbol at school. The Council of State recalled that the three Belgian Language Communities are responsible for the organisation of education pursuant to the Constitution. It follows that local authorities are permitted to elucidate deriving Community decrees. The City Council was therefore duly entitled to clarify teachers' duties in the context of the principle of neutrality¹²⁵ by prohibiting the wearing of any conspicuous religious, political or philosophical sign at school. In line with ECtHR case law, the term 'law' must be given wide interpretation which implies that sub-statutory rules, such as internal regulations adopted by city councils, fall under the definition of 'law'. Finally, the measure contested pursued the legitimate purpose of establishing the principle of neutrality in local secondary schools in order to respect the freedom of conscience of students. As the measure established a restriction for teachers only, it was deemed to be proportionate to the legitimate aim pursued.

In the second place, the mathematics teacher alleged a violation of the principle of equality and non-discrimination on grounds of religion. The Council of State recalled that Article 11 of the French Community Decree of 12 December 2008 on the Fight against Certain Forms of Discrimination permits differences in treatment based on religion or belief for public or private ethos-based organisations. According to that law, organisations can also require staff members to act in good faith and with loyalty to the organisation's ethos. The Council of State held that the provision was applicable in the present case precisely because the plaintiff worked in schools where the principle of neutrality applied. In the light of these observations, the Council of State found that none of the grounds for annulment were established and therefore rejected the claim.

Internet source:

<http://www.raadvst-consetat.be/arr.php?nr=210000&l=fr>

CY

Cyprus

Policy development

Code of conducts on disability issued by the equality body



In September 2010, the equality body published a 'Code of Good Practice on Discrimination on the Ground of Disability in Employment and Occupation'. The Code aims to assist employers and employees in avoiding disability discrimination in the workplace. The 30-page document describes the relevant legislative framework in simple language, illustrated by real and fictitious examples derived from the case law of the equality body, the ECtHR and EU national courts. The Code is divided into six chapters: chapter 1 presents the aims and legal status of the Code; chapter 2 provides a guide on how to avoid discrimination, an overview of the social dimension of discrimination, and explores the importance of cooperating with people with a disability to solve problems and avoid future problems; chapter 3 describes rights and obligations under the law; chapter 4 lists the different types of unlawful discrimination, explaining direct and indirect discrimination, harassment, instructions to discriminate, victimisation, exceptions and positive action; chapter 5 deals with the reasonable accommodation obligation; and chapter 6 presents complaint procedures, the competent bodies, sanctions provided by the law and the shift of the burden of proof.

Internet source:

http://www.no-discrimination.ombudsman.gov.cy/sites/default/files/kodikas_gia_diakriseis_logo_anapirias_ergasia.pdf

¹²⁵ French Community Decree of 31 March 1994 defining the principle of neutrality in education, *Moniteur Belge*, 18 June 1994.

Speech impediment constitutes disability according to the equality body

A successful applicant to the position of assistant clerk was dismissed a week after she started work at a hospital on the ground that she was not sufficiently efficient. Investigations showed that the hospital authorities believed that the complainant's speech impediment could cause communication difficulties in daily contact with the public. However, they claimed that efforts were made to relocate her to a post where she would not deal with the public.



The equality body¹²⁶ held that a speech impediment amounts to disability according to national legislation as well as to the CJEU ruling in the *Chacon Navas*¹²⁷ case, where disability was defined as a disadvantage owing to a physical, intellectual or psychological illness which restricts the participation of a person in professional life for a long period of time. In the light of these observations, the equality body concluded that the complainant's dismissal constituted discrimination on grounds of disability, as the hospital authorities failed to provide reasonable accommodation. As the plaintiff had remained unemployed in the meantime, the equality body invited both parties to a consultation prior to issuing final recommendations which suggested remedies to damage suffered.

The equality body finds discrimination on grounds of disability against a worker posted far away from her place of residence

The mother of a ten-month-old child with a disability lodged a complaint to the equality body claiming that she was discriminated against when she was posted to teach in a school far away from her place of residence. She had previously complained to the Commission for the Education Service, invoking a regulation which entitles the Commission to transfer teachers upon request for reasons of pregnancy or to take care of a child of less than 12 months of age. She claimed that her child's condition required regular therapy sessions, justifying her transfer. The Commission failed to provide an answer in response to both the mother and the equality body's requests.



The equality body¹²⁸ recalled the *Coleman* case,¹²⁹ stating that the prohibition of discrimination on grounds of disability enshrined in the Employment Equality Directive 2000/78/EC and national transposition legislation¹³⁰ is not restricted to workers with a disability but extends to workers who, although they do not suffer a disability themselves, are responsible for the care of a person with a disability. The equality body also referred to Article 3B(1) of the Law on Persons with Disabilities, which stipulates that nothing shall preclude more favourable treatment in employment even if at first sight this appears discriminatory towards other workers as the difference in treatment may aim to prevent or balance a disadvantage due to disability. It follows that more favourable treatment may be extended to the carers of persons with a disability without violating the principle of equality. As it appeared that the Commission had adopted the same attitude in similar cases involving pregnant women and the main carers of babies by not taking into account the specific nature of their situation, the equality body held that its practices violated the principle that two unequal things must not be treated equally. Finally, the equality body declared its intention to issue a recommendation and hence invited the two parties to a consultation, in accordance with the procedure prescribed by law.

¹²⁶ File no. A/Π 2898/2007, A.K.I. 10/2010 of 23 February 2010.

¹²⁷ Case C-13/05, *Chacon Navas*, [2006] ECR I-6467.

¹²⁸ File no. A.K.I. 82/2009 of 25 June 2010.

¹²⁹ Case C-303/06, *S. Coleman v. Attridge Law and Steve Law*, [2008] ECR I-5603.

¹³⁰ Law on Persons with Disabilities N. 127(I)/2000.



Internet source:

[http://www.ombudsman.gov.cy/Ombudsman/ombudsman.nsf/All/A85BC1134AC8CAA2C225775800374FBD/\\$file/AK182.2009-25062010.doc?OpenElement](http://www.ombudsman.gov.cy/Ombudsman/ombudsman.nsf/All/A85BC1134AC8CAA2C225775800374FBD/$file/AK182.2009-25062010.doc?OpenElement)

Open University admission policy found to discriminate against younger applicants

An applicant to the Open University¹³¹ filed a complaint against the point-based system for admission, alleging that he was excluded on grounds of age. Although he later withdrew his claim, the equality body decided to investigate in its own right since the case seemed to constitute indirect discrimination. Admission to the Open University is based on several criteria, including the number of years which have elapsed since an applicant's final school certificate. In the course of investigations, the Open University openly admitted that this policy aimed to favour older applicants, believing that younger applicants had more opportunities to be admitted to traditional universities. Against this background the equality body found the admission policy to discriminate against younger candidates. In particular, it was held that the differential treatment could not be justified on the ground that younger applicants had greater educational opportunities, as no evidence existed for this. In addition, the body's report stressed that the case did not fall under the exception provided for in Directive 2000/78, which specifically refers to labour market policies.



Exemption procedure for religious education class deemed to be discriminatory

A complaint against the procedure followed by the Ministry of Education for exemption from attendance at religious instruction classes in state schools was brought to the attention of the equality body. The case concerned an exempted student belonging to the Jehovah's Witnesses who had to remain in the school courtyard instead of being engaged in a special project as prescribed by the Ministry's instructions. In addition, the student's parents had to sign a declaration that the school would not be held liable for any incident occurring in the courtyard.



On 7 November 2010, the equality body issued a non-binding report¹³² where it first pointed out that the school regulations established an exemption only for students who were not of Christian Orthodox faith. The equality body recalled that religion and belief constitute sensitive personal data that should not be revealed unless there is an objective and reasonable justification pursuing a legitimate aim, which was in these circumstances not the case. Being forced to reveal religious convictions is contrary to the principle of freedom of thought, conscience and religion, guaranteed by the Constitution and by international conventions ratified by Cyprus (e.g. the ECHR and Protocol 12). The equality body stressed the vagueness and uncertainty of the exemption from school activities such as national celebrations, church-going and processions, which also contravened the above-mentioned principle.

In addition, the equality body noted the stigmatisation of the student as a result of her isolation from her other classmates and the delay of several months after the Ministry's instructions were issued before the exemption became effective. It concluded that the school's failure to attach sufficient importance to the student's circumstances had resulted in unfavourable treatment on the grounds of religion'. The equality body therefore recommended that the school regulations be amended so as to avoid disclosure of religious beliefs and reasons of conscience in the future. It advocated the use of a special exemption request form, which explicitly states that there is no obligation to reveal religious beliefs, to be completed by parents. Finally, it was suggested that school employees involved in the exemption procedure should be trained to avoid further stigmatisation.

¹³¹ The Open University is a state educational institution offering open and distance education from the perspective of life-long learning.

¹³² Ref. no. A.K.R. 135/2009.

Czech Republic

Policy development

Election of the new Ombudsman

At the end of the second round of elections for the new Czech Ombudsman, the leading political parties agreed on a common candidate. The Chamber of Deputies selected the new Ombudsman from among four candidates (two candidates were proposed by the Senate and two by the Czech President, Václav Klaus). Mr Pavel Varvařovský, proposed by the Senate, was finally nominated by the Chamber of Deputies in September 2010. He immediately declared his intention to strengthen the powers of the Ombudsman as he believes that additional powers are needed, such as independent legal standing before the Constitutional Court and the possibility of proposing repeals and changes of legislative provisions.

Case law

Perpetrators of an arson attack on a Roma family convicted for racially motivated attempted murder



In April 2009, three members of a Roma family in Vítkov were seriously wounded by a fire set to their house in the middle of the night. Natalie, a child of nearly two, suffered from burns on 80% of her body. Her life was saved by hospital staff, but she will bear the consequences of her injuries for the rest of her life, including pain and physical disfigurement. Later, four right-wing extremists were identified by the police as the perpetrators of the crime, and charged with racially motivated attempted murder.

The Regional Court of Ostrava found all four men guilty and sentenced them to 20 to 22 years of imprisonment. It also awarded CZK 9 500 000 (approximately EUR 413 043) to Natalie as compensation for non-material damage.

Denmark

Policy developments

Danish government issues a new action plan to combat discrimination on grounds of racial and ethnic origin



On 5 July 2010, the Government issued an 'Action plan for equal treatment and respect of the individual irrespective of racial or ethnic origin' ('*Handlingsplan om etnisk ligebehandling og respekt for den enkelte*'). This new initiative updates the 2003 Government Action plan to promote equal treatment and combat racism. The plan advocates multi-pronged, coordinated and targeted activities that combine on-going and new measures aiming to combat unequal treatment on grounds of racial or ethnic origin and promoting diversity and equal opportunities. The plan includes actions for the promotion of equal opportunities in the fields of employment and education by, for instance, breaking down barriers preventing ethnic minority groups from finding work. It also contains initiatives to combat discrimination in cultural and leisure activities such as the introduction of sanctions against holders of licenses for night life activities who engage in discrimination. Finally, initiatives that promote mutual dialogue, participation in commu-

nities and active citizenship and that enhance the respect of individuals, diversity and a diverse society are encouraged.

Case law

The Board of Equal Treatment finds discrimination on grounds of racial and ethnic origin

On 17 September 2010, the Board of Equal Treatment convicted the owner of a wine store of discrimination on grounds of racial and ethnic origin. He was accused of having said 'You can just return to the damn country you come from' to a participant in a meeting held in his shop who was of Latin American background. The Board argued that the statement was clearly ethnically motivated, which resulted in a degrading environment affecting the claimant's dignity. However, it took into account the fact that it was an isolated act, as the defendant seemed to have lost his temper because of the small number of participants attending his meeting. The claimant was awarded compensation of DKK 1 000 (approximately EUR 133).



France

FR

Legislative developments

Update on the bill incorporating the Equal Opportunities and Anti-Discrimination Commission (HALDE) within a new public institution

In June 2010, the Senate discussed a proposal relating to the 'Defender of Rights',¹³³ a new institution envisaged after the revision of Article 71-1 of the Constitution.¹³⁴ On 18 January 2011, the National Assembly confirmed the amendments brought forward by the Senate and passed the bill on the Defender of Rights and the institutional act (*loi organique*) setting up the new institution. Its role will be to ensure that the State and bodies exercising state prerogatives respect individual rights and liberties.

Mr Pierre Morel-A-L'Huissier was appointed as rapporteur to conduct further consultations and to prepare a new consolidated version of the text. On 1 February 2011, the bills will be submitted again to the Senate for a vote after second reading. A joint commission of the Senate and the National Assembly is expected to review the bills by the end of February 2011.

The Defender of Rights will integrate the Equal Opportunities and Anti-Discrimination Commission (*Haute Autorité de Lutte contre les Discriminations et pour l'Égalité*, HALDE) within its structure, which means that HALDE's competences and staff will be merged into the new institution. The incorporation of HALDE will be effective one month after the adoption of the law. At the time of writing, this is scheduled for early May 2011.

According to the institutional act, the Defender of Rights will have legal personality and be appointed by the President of the Republic. Claimants, as well as NGOs (Article 5), Members of Parliament and parliamentary institutions (Article 7), will be able to directly address complaints to the Defender of Rights. The Defender of Rights will also be able to intervene in his own right (Article 4). His scope of competence covers all claims relating to access to and functioning of public services, as well as complaints regarding children's rights, wrongful use of violence by the security forces and discrimination cases. Article 4, para-

¹³³ Draft proposal no.610 on the Defender of Rights of 9 September 2009.

¹³⁴ See *European Anti-Discrimination Law Review* (EADLR), issue 11, p. 55.

graph 3 of the institutional act, as amended by the National Assembly, expressly provides competence with regard to private persons in discrimination cases.

As far as combating discrimination and promotion of equality is concerned, the Defender of Rights will intervene as a collegial body (Article 12 bis). Powers of investigation will be comparable to the ones currently exercised by HALDE (Articles 15, 16, 17, 18). Questions of legislative interpretation will continue to be referred to the Council of State (Article 24). The introduction of the possibility to request an order from a judge in a case of non-compliance is intended to improve the effectiveness of investigation procedures (Article 17 bis and Article 18 paragraphs II and III). The bill creates a collective action procedure before administrative courts that can be initiated by the Defender of Rights (Article 24 bis). The bill otherwise maintains HALDE's powers.¹³⁵ At second reading, the National Assembly reintroduced the existing competence of research and promotion of good practices and equality (Article 26 bis) into the text. The Defender of Rights will continue to report annually on discrimination to the parliament and governmental institutions (Article 27 II). From these observations, it is clear that all requirements for specialised bodies set out in the Anti-Discrimination Directives are satisfied.

The bill presents a number of difficulties, such as the fact that the commission reviewing complaints can only make recommendations, which can be overturned by the Defender of Rights. In addition, in contrast to HALDE, the Defender of Rights will be able to select the claims to be subjected to investigation and intervention (Article 20). It omits the power to assist the Government during international negotiations relating to discrimination. Finally, the Defender of Rights does not have a consultative committee representing civil society stakeholders as it is presently the case under HALDE.

Internet source:

http://www.assemblee-nationale.fr/13/dossiers/defenseur_droits.asp

<http://www.assemblee-nationale.fr/13/projets/pl2574.asp>

<http://www.assemblee-nationale.fr/13/ta/ta0596.asp>

<http://www.assemblee-nationale.fr/13/ta/ta0595.asp>

Law prohibiting the concealment of an individual's face in public spaces adopted



In September 2010 the Senate passed at second reading a law prohibiting the wearing of garments covering an individual's face in public spaces. In October 2010, the Constitutional Council ruled that the law conformed with Article 10 of the Declaration of Rights of the Citizen that protects freedom of conscience. According to the Council, the law ensures a proportionate balance between safeguarding public safety and public order and protecting women's freedom and equality. However, it is specified that the prohibition cannot apply to places of worship open to the public as freedom of religious expression would be violated.

Article 1 of the Law prohibits the concealment of the face in public spaces. Public spaces are defined as public streets and places open to the public or given over to public services, such as shopping centres, theatres, restaurants and museums. Article 2, paragraph 2 introduces exemptions for health and job-related reasons; performance of sports, carnivals or theatrical displays; or for wearing police or motorbike helmets.

Article 3 makes concealing the face a crime punishable by a fine of EUR 150 and/or attendance of a course on the French Republic's values. The latter will come into force six months after the adoption of the law, following a massive awareness-raising campaign. More severe sanctions will apply to individuals

¹³⁵ See Article 21 bis (mediation), Article 22 (right to impose 'criminal settlements' whereby the perpetrator must pay a fine or face prosecution), Article 23 and 23 bis (right to pursue disciplinary action), Article 26 (right to present observations to court) and Article 25 (right to make recommendations regarding legislative and regulatory amendments).

coercing a third person to wear garments hiding the face (a one-year prison sentence and a fine of EUR 30 000). The sentence will be doubled if pressure is brought to bear on someone under the age of 18.

The law is due to enter into force in spring 2011.

Internet source:

http://www.assemblee-nationale.fr/13/dossiers/voile_integral.asp

http://www.senat.fr/lc/lc201/lc201_mono.html

http://www.assemblee-nationale.fr/13/dossiers/dissimulation_visage_espace_public.asp

<http://www.senat.fr/leg/pjl09-675.pdf>

<http://www.senat.fr/petite-loi-ameli/2009-2010/700.html>

Case law

State held strictly liable for failure to provide access to court buildings to disabled members of legal professions

Ms B., a wheelchair user, complained against the State for failure to provide adequate accommodation, claiming that she could not access some court buildings under the Bethune Bar's jurisdiction where she exercises her profession as a lawyer. In particular, she raised the fact that court personnel had to lift her up to access the court building or organise hearings in the parking lot.



In accordance with the Law on the Rights of Disabled Persons of 11 February 2005, the State adopted on 17 May 2006 a decree specifying that all public infrastructure must be accessible by 1 January 2015. Consequently, the trial and appeal courts ruled that since the deadline for the completion of accessibility works was not until 2015, the State could not be held liable for failure to provide adequate accommodation.

In appeal, the Council of State reproached the lower courts for having focused on the deadline imposed by the decree without taking into account the specific obligation towards lawyers imposed on the State (as prescribed by the Employment Equality Directive 2000/78/EC). The lower courts should have verified whether *de facto* inequality could render the State strictly liable. The Council subsequently ruled that sufficient legislative efforts had been made and that the State could not be held liable on the ground of insufficient transposition of Directive 2000/78/EC. However, the State could be held strictly liable on the ground of *de facto* inequality in access to court buildings as Ms B. was an officer of the court (*auxiliaire de justice*). The facts showed that the situation exceeded the reasonable inconvenience that a disabled person would normally be obliged to bear and that the difficulties resulting from this situation impeded her professional practice. The Council awarded Ms. B. EUR 20 000 as compensation for non-material damage.

Internet source:

<http://www.conseil-etat.fr/cde/node.php?articleid=2151>

The Constitutional Court upheld limitations on the right to stop of Roma and Travellers

The 2000 'Besson Law'¹³⁶ obliged French territorial *départements* to adopt schemes for accommodating Travellers, including the obligatory provision of stopping places by municipalities. In 2008, 93 departmental schemes had been adopted under the law, but at the time of writing only 21 165 stopping sites for Roma and Travellers have been provided, whereas the authorities themselves recognise that 41 840 are needed.¹³⁷ In addition, many mayors have adopted decrees prohibiting the parking of motor homes and preventing stopping on private land.



¹³⁶ Law no. 2000-614 on the Accommodation of the Travelling Population.

¹³⁷ NGOs consider that 60 000 are needed.

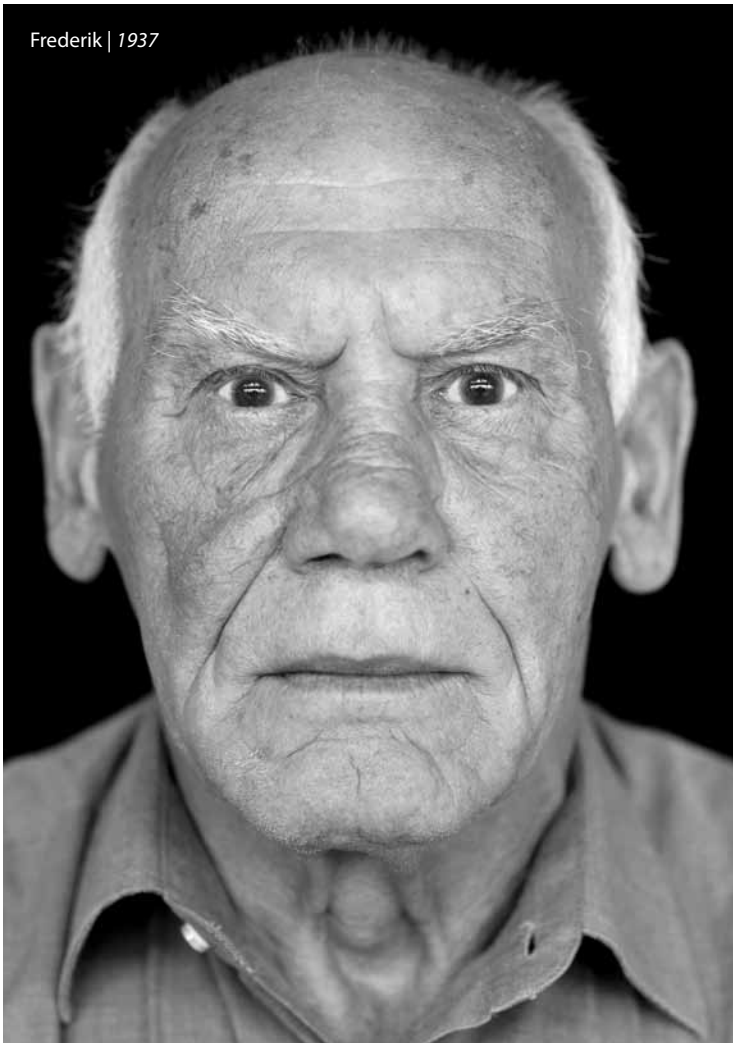
Loïs | 2007



Esther | 1980



Frederik | 1937



Pearl | 1977



Against this background, Parliament amended the Besson Law in 2003 and introduced Articles 9 and 9-1 allowing motor homes not parked in official stopping places to be removed in municipalities where accommodation schemes had been implemented or where the small population did not justify the adoption of an accommodation scheme. In the latter case, Roma and Travellers are permitted to stop on private land provided that the mayor has not adopted a specific regulation prohibiting them from so doing.

Two Travellers' NGOs¹³⁸ initiated a legal action alleging discrimination on grounds of racial and ethnic origin that violated their freedom of movement enshrined in the Constitution.

According to the Constitutional Court, Article 6 of the Declaration of the Rights of the Citizen of 1789 does not preclude derogations to the principle of equality or the adoption of specific regulations to address specific situations for reasons of general interest provided that the difference in treatment is directly linked with the purpose of the legislation. In the present case, considering that the provisions in question applied to all Travellers who had chosen a way of life that is different from that of non-Travellers, the Court held that the distinction was 'based on objective and rational considerations that directly related to the purpose of the legislature to accommodate Travellers in conditions compatible with public order and the rights of others.' They did not therefore constitute racial discrimination and did not oppose the principle of equality.

As regards freedom of movement, limitations to the right to stop were justified by protection of public order and were deemed to be proportionate to that objective.

Internet source:

<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2010/2010-13-qpc/decision-n-2010-13-qpc-du-09-juillet-2010.48598.html>

FYR of Macedonia

MK

Legislative developments

Comprehensive anti-discrimination law enters in force

On 1 January 2011, the implementation phase of the first comprehensive legislation on anti-discrimination ('Law on Prevention of and Protection against Discrimination') adopted by the Assembly of the Republic of Macedonia in April 2010 started. However, several important implementation issues, such as the composition of the equality body and the body's budget, remain disputed. Moreover, in addition to the many existing contradictory provisions on anti-discrimination in various laws, the new comprehensive law did not provide any transition provisions to adjust the legal system and adequately prepare it for implementation. Issues such as competence to decide on discrimination cases or definitions of grounds of discrimination are also issues expected to arise in the future.

Members appointed to the Committee on Protection against Discrimination

Pursuant to the new Anti-discrimination Law establishing a Committee on Protection against Discrimination as the equality body, the parliament proceeded to nominate the Committee by adopting Decision No. 07-5222/1 on 27 December 2010. However, some members of opposition political parties expressed deep concerns regarding the nomination procedure, alleging that a number of appointees lack a suf-

¹³⁸ FNASAT – *Fédération nationale des associations solidaires avec les tsiganes et gens du voyage* – and UNISAT – *Union nationale des institutions sociales d'action pour les tsiganes*.

ficient background in non-discrimination and are subject to conflicts of interest as they will continue working for ministries.

A number of rejected candidates announced that a complaint will be filed to the Administrative Court.

Internet source:

<http://www.sobranie.mk/?ItemID=2547F32CBD6B7D409453ACB1CAB201A3>

<http://www.sobranie.mk/ext/materialdetails.aspx?Id=f865c40a-05b5-491c-a49d-79fc5ff85318>

DE

Germany

Case law

The Federal Constitutional Court reviews the CJEU's exercise of powers in the *Mangold* ruling



On 26 April 2006, the Federal German Labour Court (*Bundesarbeitsgericht*) convicted a company which had concluded fixed-term employment contracts with workers who had reached the age of 52. By virtue of the principle of the primacy of EU legislation, the Court applied the *Mangold* ruling where the European Court of Justice (CJEU) held that Section 14.3 of the Part Time and Fixed Term Employment Act (*Teilzeit- und Befristungsgesetz*) violated EC law.¹³⁹ The case was brought to the attention of the Federal Constitutional Court, where the company sought to have the *Mangold* case declared *ultra vires*. The claimant alleged that the CJEU exceeded the powers conferred by the treaties by developing a new doctrine of general EU principle of age discrimination as, in his view, there was no such principle in the EU legal order. He also claimed that the application of *Mangold* to his own case amounted to a violation of his fundamental rights of freedom of profession (Article 12 of the Basic Law) and general freedom of action (Article 2.1 of the Basic Law). In addition, he argued that the Federal Labour Court's failure to refer his case to the CJEU for a preliminary ruling violated his right to judicial protection enshrined in Article 101.1 of the Basic Law.

The Federal German Constitutional Court (*Bundesverfassungsgericht*) rejected the complainant's claim and ruled that even if it were assumed that there had been a breach of EU law, that violation would not be serious enough to justify the disregard of the ruling. Only an obvious violation of powers which would have the consequences of significantly reshaping the EU institutional structure at the expense of the Member States could allow the Court to review a judgment of the CJEU. With regard to Article 101.1, the Court held that there were insufficient reasons for the Federal Labour Court to request a preliminary reference from the CJEU.

Internet source:

www.bverfg.de

¹³⁹ 7 AZR 500/04.

*Case law***UN Human Rights Committee recognises forced illegal eviction and demolition of housing of a Roma family**

In summer 2006, Antonios Georgopoulos, Chrysafo Georgopoulou and their seven children temporarily left the Roma settlement of Riganokampos in the city of Patras to carry out seasonal work and to visit relatives in Agrinio. During their absence, the lodgings of all residents not present at that period were demolished by the Municipality, which alleged 'cleaning operations'. The Municipality informed the family that they would be granted subsidies for renting a new apartment and gave them EUR 200 as compensation for the destruction of their housing and belongings. The family further claimed that the forced relocation and the demolition were illicit in the absence of any judicial or other decision that could be subject to judicial review. They decided to build a new house in the same settlement but were prevented from doing so by a police patrol and a bulldozer. The case was brought to the attention of the UN Human Rights Committee competent for the enforcement of the International Covenant on Civil and Political Rights (ICCPR).



In a view issued on 14 September 2010, the Committee held the Roma family's allegations regarding arbitrary and unlawful eviction and demolition of their home affecting their family life and enjoyment of their rights as a minority to be sufficiently established. The Committee concluded that the demolition of the Roma family's housing and the prevention of construction of a new home in the Roma Riganokampos settlement amounted to a violation of Article 17 (arbitrary or unlawful interference), Article 23 (family) and Article 27 (minority rights) read alone and in conjunction with Article 2, paragraph 3 (effective remedies) of the ICCPR. In the light of these findings, it was not necessary to examine the Roma family's allegation regarding a breach of Article 7 (cruel, degrading or inhuman treatment) and Article 26 (non-discrimination) alone and read in conjunction with Article 2, paragraphs 1, 2 and 3. At the time of writing, no further procedure had been initiated at the national level regarding sanctions and compensation.

Internet source:

<http://cm.greekhelsinki.gr/index.php?sec=192&cid=3709>

http://cm.greekhelsinki.gr/uploads/2010_files/georgopoulos_v_greece_views_2010.pdf

http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC49Merits_en.pdf

Hungary

*Policy developments***The UN Human Rights Committee expresses concerns regarding the Equal Treatment Authority's independence**

In October 2010, the UN Human Rights Committee examined the fifth Hungarian Country Report at its 100th session. In a shadow report, the Hungarian Helsinki Committee (HHC) drew the UN Human Rights Committee's attention to the Equal Treatment Authority's insufficient human and material resources and also stressed that the Authority's president can be removed at any time by the Prime Minister without any justification, thereby severely compromising the Authority's independence. The HHC provided an example that occurred shortly after the formation of the new Government in May 2010 where the Au-

thority's first president appointed in 2005 was dismissed as of 15 September 2010 for no obvious reason. His professional merits had never been called into question.

In its concluding observations, the HRC declared that it was 'concerned at the inadequate human and material resource allocation to this body [the Equal Treatment Authority], considering the exponential increase in its workload since its establishment. The [HRC] is further concerned at the lack of security of tenure of the President of the Equal Treatment Authority's Office following Government Decree No. 362/2004 (XII.26), which gives power to the Prime Minister to relieve the President of his duties without justification (Article 2)'. The HRC recommended that '[Hungary] should ensure that the financial and human resource allocation to the Equal Treatment Authority is adequate to enable it to effectively discharge its mandate. [Hungary] should take all necessary steps to ensure the security of tenure of the President of the Equal Treatment Authority's Office in order to guarantee its independence'.

Internet source:

<http://www2.ohchr.org/english/bodies/hrc/hrcls100.htm>

Case law

The Supreme Court awards compensation to Roma segregated pupils



In 2006, the Debrecen Court of Appeal held further to an *actio popularis* claim that the Local Council of Miskolc in northern Hungary had violated the principle of equal treatment by financially and administratively merging seven schools without concurrently redrawing the catchment areas. Under Hungarian law, catchment areas are residential areas from which all pupils of a given school come. This policy resulted in discrimination on grounds of ethnic origin and the segregation of Roma children at school as it prevented them from enrolling at predominantly non-Roma schools. The situation remained unchanged, and in 2007 a new action was initiated by five Roma pupils. The plaintiffs claimed that the segregation violated their inherent personal rights protected by the Penal Code and requested compensation for non-pecuniary damages. The case was brought to the attention of the Supreme Court after the lower courts rejected the claim on the basis that no non-material damages could be proven.

On 2 June 2010, the Supreme Court overruled the decisions of the lower courts, stating that segregation *de facto* always entails non-material damages and awarded HUF 100 000 (EUR 370) as compensation to each plaintiff.

Internet source:

http://cfcf.hu/miskolc-karteritesi-per_hu.html

A bank is found to discriminate on grounds of age



A 78-year-old man submitted a complaint to the Equal Treatment Authority when a bank refused him a credit card although he satisfied all the conditions. During the proceedings, the bank argued that the actual reasons for rejection could no longer be brought forward because information that did not relate to the bank's clients was automatically removed. However, the Equal Treatment Authority's investigations showed that within a period of 6 months prior to the present case, all candidates older than 72 with a monthly income exceeding HUF 60 000 (EUR 220) were refused a credit card.

The Equal Treatment Authority recognised a violation of the principle of equal treatment on grounds of age.¹⁴⁰ It ordered the termination of the unlawful practice, imposed a fine of HUF 5 000 000 (EUR 18 200) and published the decision on its website.

¹⁴⁰ Decision no. 188/2010.

Internet source:

<http://www.egyenlobanasmod.hu/zanza/188-2010.pdf>

Non-pecuniary damages awarded to a visually impaired person who could not enter a shop with his dog

On 8 October 2009, a visually impaired client could not shop in a store as his guide dog was denied access by the security guard and the head cashier. Represented by the Hungarian Helsinki Committee, he brought a complaint to the Budapest Metropolitan Court claiming that this was in breach of his right to equal treatment. He requested the Court to order the respondent to refrain from any future violation, to pay HUF 500 000 (EUR 1 700) as compensation for non-material damages and to publish an apology in a national daily paper.



The Metropolitan Court found discrimination on grounds of disability in access to goods and services and awarded the amount requested as compensation for non-material damages.¹⁴¹ The Court prohibited any future violation and asked the defendant to apologise but in a private letter. On 7 December 2010, the Metropolitan Appeals Court upheld the decision rendered at first instance.

Internet source:

http://www.helsinki.hu/dokumentum/FB_itelet_2010_03_18.pdf

Harassment based on sexual orientation recognised at the workplace

The complainant revealed his sexual orientation to his immediate superior in the course of a friendly conversation outside the workplace. The latter then shared this information with the complainant's co-workers and repeatedly made scornful remarks and humiliating jokes behind his back. The complainant talked to his employer about these incidents and mentioned that he was thinking of terminating his employment contract unless the situation improved. As the employer failed to redress the situation, the work relationship ended by mutual agreement.



Before the Equal Treatment Authority, the company claimed it could not be held liable for the behaviour of its employees. The Equal Treatment Authority recalled that the offender's intention is not necessarily required to establish harassment. By failing to take appropriate and sufficient action to stop harassment, the company had violated the requirement of equal treatment. In the light of these findings, the Equal Treatment Authority imposed a fine of HUF 2 000 000 (EUR 7 150) and ordered the publication of the decision on its website for six months.

Internet source:

<http://www.egyenlobanasmod.hu/zanza/49-2010.pdf>

¹⁴¹ Decision no. 40.P.26.486/2009/5 of 18 March 2010.

*Case law***A teacher is awarded EUR 12 697 by the Equality Tribunal for discrimination on grounds of religion in access to employment**

 religion
or belief

In Ireland, graduates in the main Catholic teacher-training colleges are given a religion certificate on graduation, once they have completed a certificate course. Ms McKeever applied for a job in Knocktemple national school, Virginia, in May 2007. She was subsequently contacted by the principal and the chairperson and offered a permanent post. This offer was later withdrawn, following a phone call in which Ms McKeever was questioned about holding the Catholic certificate. Initially, Ms McKeever was told by the chair of the school board that her failure to produce a certificate would not be a problem as 'she would be teaching fourth class, which was not involved in Communion or Confirmation'.

The Equality Officer in the case¹⁴² concluded that a school board meeting in July 2007 was advised by the chairperson that the complainant did not have the religious certificate. The officer concluded that not only was the complainant's religion discussed but it influenced the board of management in withdrawing the offer that had been made. This amounted to discrimination on grounds of religion. He awarded compensation of EUR 12 697 as redress, the maximum allowed in relation to access to employment. Ms McKeever has secured a permanent post in another school.

Internet source:

<http://www.equalitytribunal.ie/index.asp?locID=181&docID=2470>

School admission policy discriminates against the Traveller community

 racial
or ethnic
origin

In a case taken by the Irish Traveller Movement Law Centre, the Equality Tribunal has found a school's admission policy indirectly discriminatory against Travellers and has ordered the school to offer a place to the complainant.¹⁴³

The school prioritised applicants where they had a sibling who had attended the school, or were the child of a past pupil, or had close family ties with the school. The complainant argued that this prioritisation disproportionately affected members of the Traveller community and amounted to indirect discrimination. He argued that as a member of the Traveller community, his father was statistically much less likely to have attended second level education.

The Equality Tribunal reviewed the evidence and noted that Travellers of the complainant's father's generation were most unlikely to have attended post-primary school. Having weighed up the statistics, they concluded that the policy of giving priority to sons of former pupils put the complainant at a particular disadvantage. They proceeded to find that this blanket priority was not necessary to pursue the stated aim of fostering family loyalty to the school and was disproportionate.

The Tribunal ordered that the High School immediately offers a school place to the complainant and that it reviews its admission policy.

Internet source:

http://www.pila.ie/download/pdf/equality_trib_judgement_mary_stokes_on_behalf_of_son_john.pdf

¹⁴² DEC-E2010-189.

¹⁴³ DEC-S2010-056.

*Policy developments***A group of experts proposes a new model of legislation for Roma and Sinti**

In preparation for the conference 'The legal status of Roma and Sinti in Italy' organised by the European Commission and aiming at mapping out and discussing current problems faced by the Roma and Sinti communities, a group of experts prepared a draft bill on 'Protection and equal opportunities of the Roma and Sinti minorities', which was also discussed and reviewed during a series of meetings with representatives of the main Italian Roma and Sinti organisations.



The draft differs greatly in structure and content from all the bills which have been presented in the past to the parliament as they were usually very short and they were either limited to including the Roma among protected linguistic minorities or they tried to create a 'right to nomadism' assuming that this is a characteristic of Roma culture. The new draft instead offers comprehensive treatment without taking any definition of the alleged cultural characteristics of the Roma as a departure point. For instance, the proposal rejects the creation of a 'right to nomadism' but introduces tools aimed at avoiding discriminatory practices based on 'perceived nomadism' or use of specific forms of housing. In other words, the suggested approach primarily starts from the experience of discriminatory practices against Roma and introduces not only a prohibition clause but also tools to give effect to the rights of people perceiving themselves as Roma or Sinti. The draft caused intense discussions among Roma and Sinti organisations and on 15 July 2010 it was presented in a hearing before the Senate's Special Commission on Human Rights. At the time of writing, it was also being discussed in workshops with various political actors (most recently in the Province of Rome on 5 October 2010). The authors of the draft were envisaging a series of exchanges with Members of Parliament and Roma groups to improve further the text.

Internet source:

<http://www.juragentium.unifi.it/it/forum/rom/pdl.pdf>

Lithuania

*Legislative developments***Draft law establishing civil liability for public propaganda of homosexual relations**

On 12 November Parliament permitted the draft law specifying civil liability for public propaganda of homosexual relations to proceed further. The draft law envisages administrative liability with a fine ranging from LTL 2 000 to 10 000 (EUR 580 to 2 896).



Both Parliament's Legal Department and the Department of EU Law under the Government noted that such a provision would breach the principle of non-discrimination and that the term 'propaganda' was not clear. Pursuant to the Statute of the Parliament, the draft law was to be discussed by parliamentary committees and voting was scheduled to take place on 16 December 2010. At the time of writing, it was doubtful that the draft would reach the committee due to negative feedback.

Internet source:

http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=383747&p_query=&p_tr2=



Legislative developments

Proposed amendment to the justification clause laid down in the General Equal Treatment Act (GETA)

One of the main issues discussed by Parliament at the time of the adoption of the General Equal Treatment Act (GETA) was the freedom of religious and political institutions and schools founded on a particular religious belief or conviction to select their personnel in accordance with their ethos, hence creating a difference in treatment. The compromise reached introduced the 'sole fact provision' to various articles of the GETA. According to this concept, differences in treatment are not permitted if established solely or exclusively on grounds of political opinion, race, sex, national, hetero- or homosexual orientation or marital status. In other words, additional circumstances are necessary for the distinction to be lawful. This formulation is not in line with the Employment Equality Directive, which does not allow 'additional circumstances' unless they coincide with the organisation's ethos. In addition, the law does not define these additional circumstances.

The concept was in particular introduced in the article allowing various organisations to create a distinction when there is a genuine occupational requirement for a staff member to subscribe to the organisation's convictions. However, the provision differs considerably from the wording of Article 4(2) of the Directive as the need for a genuine, legitimate and justified occupational requirement was not included.

In 2008, the European Commission initiated an infringement procedure,¹⁴⁴ calling for *inter alia* the exception clause to be brought into line with the wording of the Employment Equality Directive. In reaction, the Government announced that it would submit a bill to Parliament in autumn 2010.¹⁴⁵ However, the Government announced that the proposal would not substantially change the current situation. Several Members of Parliament (from the Liberal Democrat and Green Parties) therefore introduced their own bill that completely removed the sole fact provision in order to conform to the Directive. At the time of writing, there was no sign of progress, mainly due to the cabinet crisis preceding the formation of the new government.

Internet source:

<https://zoek.officielebekendmakingen.nl/kst-32476-3.html>

Policy developments

New Dutch government intends to stop positive action and diversity programmes

The Coalition Agreement concluded in autumn 2010 between the Liberals (VVD) and the Christian Democrats (CDA) explicitly provides that the new Government, in its forthcoming term of office, will terminate all activities and programmes concerning positive action and diversity policies on grounds of racial and ethnic origin and gender. Candidates will consequently be hired on the basis of their merits only, with no diversity strategy being applied in the future. In other words, policies which explicitly invite women and people from minorities to apply and give them preference as long as they are under-represented (provided that they are equally qualified for the job) will no longer apply. Such programmes and policies

¹⁴⁴ Letter dated from 31 January 2008 (nr. 2006-2444), with reference to the infringement procedure of 18 December 2006, Infringement No 2006/2444.

¹⁴⁵ See the letter of the Ministry of Interior and Kingdom Affairs of 29.09.2009, *Tweede Kamer* 2009-2010, 28 481, nr. 7 and *Tweede Kamer* 2009-2010, 22 112, nr. 962.

were rarely applied to the private sector so the agreement will probably affect the recruitment procedures for private employees to a lesser extent. Pursuant to equal treatment legislation, the derogation provision stipulating that there is no discrimination when unequal treatment is the result of positive action programmes is only applicable in the case of racial or ethnic origin, gender and disability.¹⁴⁶ It is not clear whether the Government intends to amend this legislation and take out the exception, at least in the case of gender and racial and ethnic origin (as the Coalition Agreement does not mention disability).

Internet source:

<http://www.rijksoverheid.nl/regering/het-kabinet/regeerakkoord>

Criminal law applied in a racial discrimination case

In 2009, three store managers and one member of the HR department of a supermarket chain decided not to appoint anybody of Moroccan background in stores located in main railway stations. There were several pieces of evidence of this policy, both in the form of oral statements and written correspondence. After complaints were made by an anti-discrimination bureau, the Public Prosecutor of the District Court of The Hague decided to initiate a criminal procedure relying on Article 137g of the Criminal Code. This provision stipulates that intentional discrimination on grounds of racial origin in the course of professional, occupational or commercial activities constitutes a criminal act. The maximum sanction is six months imprisonment or a maximum fine of EUR 6 700.¹⁴⁷

The Public Prosecutor required a fine of EUR 750 and an additional conditional fine of EUR 500. The Court held that there was sufficient proof of serious intentional discrimination on grounds of racial origin.¹⁴⁸ However, it ordered a fine that will only be imposed if the perpetrators commit a similar crime within a period of two years. The Court justified the conditional sanction by the absence of a previous criminal record and the fact that the defendants had not shown general discrimination or hostility towards Moroccans in the past. Moreover, the general management of the company also disciplined the defendants although no guidance or support about how to deal with this issue was given.

Internet source:

<http://www.rechtspraak.nl/default.htm>

Harassment of a homosexual employee

A male employee of a firm selling kitchens encountered constant jokes regarding his sexual orientation from the assistant manager and fellow employees and decided to bring a complaint to the Equal Treatment Commission. He also mentioned that the assistant manager stroked his leg while he was standing close to the photocopying machine. The Equal Treatment Commission confirmed that anti-discrimination legislation also covers harassment, for which there is a shift of the burden of proof.¹⁴⁹ Although some facts put forward by the plaintiff were refuted, it was generally established that a disrespectful environment was created by certain gestures and behaviour, such as hands being waived in a camp manner during meetings, which affected his dignity. The Equal Treatment Commission concluded that the employer did not fulfil his duty to provide working conditions free of discrimination, in particular as he failed to protect the claimant against harassment and did not treat his complaints with sufficient seriousness. Instead, the employer chose not to renew the complainant's temporary contract. That decision was also judged

¹⁴⁶ Article 2(3).

¹⁴⁷ Article 429*quater* also covers unintentional discrimination in the same area, but in this case there are several grounds (race, religion, conviction, gender and sexual orientation). The possible sanction is a maximum of two months' imprisonment or a maximum fine of EUR 6 700.

¹⁴⁸ District Court of The Hague, LJN BN9971, LJN BN9983, LJN BO0022 and LJN BO0019 of 11 October 2010.

¹⁴⁹ ETC Opinion 2010-135 of 6 September 2010.

racial
or ethnic
origin

sexual
orientation

discriminatory as it seemed to be motivated by the fact that complaints were brought to the attention of the Equality Treatment Commission.

Internet source:

<http://cgb.nl/oordeel/2010-135>

Poland

PL

Legislative developments

Update on the new anti-discrimination law¹⁵⁰

The 'Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment' ('*Ustawa o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania*') was passed by the lower house of the Polish parliament (*Sejm*) on 29 October 2010.

At the time of writing, the Act was being debated in the upper house of Parliament (Senate). If amendments are adopted, the text will need to go back to the *Sejm* for approval. The final adoption of the Act requires the President's signature (the President may also veto the Act or submit it for constitutional review to the Constitutional Tribunal).

So far, Poland has transposed the EC Anti-discrimination Directives mainly in the field of employment. A number of important gaps still remain, such as the non-implementation of the Racial Equality Directive beyond employment and the failure to establish a specialised body. These failures have already generated a number of actions initiated by the European Commission, including two referrals to the European Court of Justice (in May 2009 and May 2010).

Internet source:

http://bip.kprm.gov.pl/kprm/dokumenty/61_3646.html

Romania

RO

Legislative developments

Joint committees of the Senate propose amending the provisions on the burden of proof

A draft proposal to amend the Anti-discrimination Law has been submitted to the Senate. The Head of the Senate's Legal Committee put forward several amendments, including a new definition of the burden of proof, which were approved in a report by the Joint Legal and Human Rights Committees. In the context of the institutional crisis caused by numerous delays in appointing members of the Steering Board of the National Council for Combating Discrimination (NCCD) that had occurred between August 2009 and April 2010, the proposal also includes a clear schedule for nominations upon expiry of terms of appointment.

The new wording for the burden of proof reads as follows: 'the person concerned has the obligation to prove facts which allow the presumption of the existence of direct or indirect discrimination, and the

¹⁵⁰ See *European Anti-Discrimination Law Review* (EADLR), issue 11, p. 69.

person against whom a complaint has been filed *can invoke in his/her defence any means of evidence to prove* that the alleged facts do not amount to discrimination’.

In appearance the amended language does not significantly change the legal provision as it was already obvious from the current formulation that the defendant would supply the necessary evidence in any case.¹⁵¹ However, it is remarkable that the changes refer solely to the burden of proof before the national equality body and not before the courts. At the time of writing, the proposal was still pending and no further information regarding the timeframe for adoption was available.

Internet source:

<http://webapp.senat.ro/pdf/10L462CR.pdf>

Government supports a proposal requiring use of the term ‘Gipsy’ instead of ‘Roma’ in official documents

In 2000, the Ministry of Foreign Affairs issued a memorandum establishing that the term ‘Roma’ must be used together with the terms ‘Romanies/Gypsies/Roma’ in all official correspondence with international organisations. Consequently, the authorities used the term ‘Roma’ in all official documents.

Following the decisions to return Roma from France and Italy that were made in summer 2010, the Romanian President, Mr Traian Băsescu, declared in September 2010 that the decision regarding the use of ‘Roma’ (‘Rom’) instead of ‘Gypsy’ (‘Tigan’) was wrong as it created confusion between Roma and Romanians and misled many Europeans.¹⁵² A Member of the European Parliament¹⁵³ as well as a Romanian Senator of the Liberal Democrat Party subsequently called for an official decision on this matter.

A draft law was submitted to the Chamber of Deputies. There was a great deal of negative feedback from the national equality body, the Ministry for Culture, the Ministry of Foreign Affairs, the National Agency for Roma, Roma NGOs and human rights groups, which held that the proposal violated the Roma minority’s right to self-identification.¹⁵⁴ In spite of these protests, the Government endorsed the draft proposal on 2 December 2010, arguing that the current use of the term ‘Roma’ leads to confusion.

The NCCD had previously criticised a similar initiative brought forward by a Romanian newspaper, *Jurnalul Național*, which in March 2009 coordinated a citizens’ petition aiming to impose use of the term ‘Gypsy’.¹⁵⁵ In its position, the NCCD recalled the international standards for the protection of national and ethnic minorities and underlined the right of the Roma minority to self-identification.



¹⁵¹ The current Article 20 (6) of the Anti-discrimination Law provides: ‘the person concerned has the obligation to prove the existence of facts which allow a presumption of the existence of direct or indirect discrimination and the person against whom a complaint was filed has the duty to prove that the facts do not amount to discrimination.’

¹⁵² See: <http://www.mediafax.ro/social/guvernul-este-de-acord-cu-schimbarea-denumirii-de-rom-in-tigan-7773030> (last accessed on 7 December 2010).

¹⁵³ The initiative of the MEP, Mr Bodu, was reported in: <http://www.9am.ro/stiri-revista-presei/Politica/200887/PDL-cere-la-PE-inlocuirea-termenului-rom-cu-tigan.html> (last accessed on 7 December 2010).

¹⁵⁴ See <http://www.hotnews.ro/stiri-esential-8052317-guvernul-analizeaza-oportunitatea-schimbării-denumirii-denumirii-rom-tigan.htm> (last accessed on 7 December 2010).

¹⁵⁵ Information regarding the campaign of the *Jurnalul Național* is available at: <http://www.jurnalul.ro/campaniile-jurnalul/jurnalul-national/propunere-jurnalul-national-tigan-in-loc-de-rom-145427.html> (last accessed on 7 December 2010). For the press release issued by the National Council for Combating Discrimination on 3 March 2009, see: <http://www.cncd.org.ro/presa/pagina-5/> (last accessed on 7 December 2010).

On 2 February 2011, the Senate's Human Rights Committee and Equal Opportunities Committee in a joint session issued a favourable report with ten votes for and three against.¹⁵⁶ The draft was, however, later rejected at a plenary session of the Senate. At the time of writing, the future of the proposal was uncertain.

Internet source:

http://www.cdep.ro/pls/proiecte/upl_pck.proiect?cam=2&idp=11279

Case law

National equality body issues a warning against the Minister of Foreign Affairs accused of racist remarks

In February 2010, the Romanian Minister of Foreign Affairs, Mr Teodor Baconschi, declared after a meeting with the French State Secretary for European Affairs, Mr Pierre Lellouche: 'We have some natural physiological problems of criminality within some Romanian communities, especially among communities of Romanian citizens of Roma ethnicity.'¹⁵⁷ The statement was considered racist by a number of NGOs, which filed a complaint to the National Council for Combating Discrimination (NCCD) against both the Minister and Ministry of Foreign Affairs. In addition, a coalition of NGOs working to combat discrimination joined the initiative of a Roma rights NGO, *RomaniCRISS*, to protest in the streets and to bring an action to the national equality body.

On 23 November 2010, the NCCD held that the declaration made by Mr Baconschi amounted to discrimination. However, it did not sentence him to an administrative penalty as prescribed by law in Article 26 of Ordinance 137/2000 on the Prevention and Punishment of All Forms of Discrimination as his intention to discriminate was not established. Instead, the NCCD issued a recommendation urging him to pay more attention to equality and anti-discrimination in the future.

Internet source:

<http://cncd.org.ro/noutati/Comunicate-de-presa/Precizare-privind-solutionarea-dosarului-in-cazul-Baconschi-95/>



New Education Code adopted

The Education Code¹⁵⁸ published in the Official Gazette on 10 January 2011 provides for the structure and functioning of state, private and religious (confessional) education.

The new Education Code includes provisions relating to the principles of national education, the structure of the education system, the organisation of education, education in the languages of national minorities, private and confessional education, special educational needs and the status of teaching staff. Article 3 of the Code reaffirms the 'the recognition and the guarantee of rights of persons belonging to national minorities, the right to preserve, develop and express ethnic, cultural, linguistic and religious identity' as well as the principle of 'ensuring equal opportunities'.

¹⁵⁶ Media reporting of voting in the joint session of the two parliamentary committees available at: <http://www.hotnews.ro/stiri-politic-8264249-senat-raport-favorabil-pentru-proiectul-legii-inlocuire-termenului-rom-tigan.htm> (last accessed on 3 February 2011).

¹⁵⁷ '*Avem niste probleme fiziologice, naturale, de infractionalitate in sanul unora dintre comunitatile romanesti, in special in randul comunitatilor cetatenilor romani de etnie roma.*' Following public outcry, parts of the statement were removed from the press release on the Ministry's website, available at: <http://www.mae.ro/index.php?unde=doc&id=42249&idInk=2&cat=4> (last accessed on 29 September 2010). The complete statement was, however, presented to the NCCD.

¹⁵⁸ Law 1/2011.

Article 2 stipulates that Romanian and EU/EEA citizens and minors who have been granted protection in Romania have an equal right to access to education and vocational training in the national education system. The prohibition of discrimination on grounds of ‘race, nationality, ethnicity, language, religion, social category, beliefs, sex, sexual orientation, age, disability, non-contagious chronic disease, HIV status, membership of a vulnerable group category as well as any other criterion’ formerly mentioned in Article 9 of the previous draft was replaced by a vaguer principle of equality generally defined as the absence of discrimination in access to education. Only discrimination in tertiary education is expressly prohibited in Articles 118 and 202. In addition, while the previous Code defined segregation in education in Articles 5(48) and 8, such provisions have disappeared from the present law. Education in the language of national minorities is envisaged in Article 10 and Article 45 *et seq.* Primary education in their mother tongue is guaranteed to national minorities, and classes in the languages of national minorities are organised for secondary pupils upon request of their parents or guardians.

Article 12 and Article 48 *et seq.* of the Code deal with support to pupils with special educational requirements and specific arrangements.

Religious instruction is provided during primary, secondary and vocational education for the 18 state-recognised religions, and is guaranteed irrespective of the number of pupils attending a class. The Code maintains in Article 18 the current procedure under which parents or a legal guardian can file a written request for exemption. Only the 18 state-recognised religious denominations can sign partnerships with the Ministry of Education to provide religious instruction as requested by pupils, a mechanism that has been contested in the past.¹⁵⁹

Internet source:

http://www.cdep.ro/proiecte/2010/500/80/7/leg_pl587_10.pdf

SK

Slovakia

Case law

Regional Court of Prešov overrules a district court’s decision in a Roma segregation case

In 2008, eight Slovaks of Roma ethnic background brought an action against the Town of Sabinov and the Ministry of Construction and Regional Development alleging housing discrimination and segregation on grounds of ethnicity. The Town of Sabinov moved several Roma families to a settlement where only Roma lived. Their new place of residence was totally isolated from the rest of the town and equipped with very poor infrastructure. The plaintiffs urged the District Court to recognise a breach of the principle of equal treatment and to order the provision of better infrastructure, such as a bus connection between the town and the new place of residence or the establishment of a shop selling basic goods. They also required the defendants to pay EUR 3 319.39 to each of them as compensation for damage suffered. On 15 June 2009 the District Court of Prešov held that the Ministry of Construction and Regional Development and the Town of Sabinov had violated the principle of equal treatment and ordered the defendants to pay to each of the plaintiffs EUR 1 000.

On appeal, the Regional Court overruled the District Court’s decision, arguing that although the facts of the case had been correctly established, the District Court had incorrectly interpreted the law. The Regional Court, relying on Section 9 of the Anti-discrimination Law, held that there was no provision which

¹⁵⁹ Liga PROEUROPA, EDUCAȚIA RELIGIOASĂ ÎN ȘCOLILE PUBLICE, Editura Pro Europa, Târgu-Mureș 2007 available at: <http://www.proeuropa.ro/educatie.html> (last accessed on 15 September 2009).

conferred on a court the power to declare a violation of the principle of equal treatment. In addition, the fact that the Ministry of Construction and Regional Development awarded subsidies for the apartments given in compensation, following a request from the Town of Sabinov, meant that the Ministry was not considered to be in breach of any national or international legal provision. The Court also held that, given the fact that the plaintiffs only claimed a violation of the principle of equal treatment without opposing relocation to replacement apartments, the Town of Sabinov could not be held liable for breach of the principle of equal treatment. The Court did not deal with the remaining claims, especially with regard to the compensation for non-material damage of EUR 1 000 that was awarded to each of the plaintiffs. The legal representative of the Roma plaintiffs has referred the case to the Supreme Court.

racial
or ethnic
origin

SI

Slovenia

Case law

Attackers of a gay friendly café convicted

On 25 June 2009 a group of men dressed in black hoods, caps and masks carrying torches, stones and pieces of asphalt went to the Open Café in Ljubljana, which is known as being gay-friendly. At that moment the bar was hosting a literature evening in the context of the Pride parade. While the men attacked the café, three of them screamed 'pedri' and 'pedri hudičevi' ('faggots' and 'devil's faggots'). A man standing outside the bar suffered from several bodily injuries. One window was broken and a torch was thrown into the bar. Three of about eight perpetrators were identified and prosecuted, while the others remain unidentified.

The District Criminal Court of Ljubljana convicted the three defendants of public incitement of hatred, violence or intolerance, in accordance with Article 297, paragraphs 1 and 4, of the Criminal Code, read in conjunction with Article 20. The offenders were sentenced to six months or one year of prison. The Court did not accept the argument that they were only expressing their opinion regarding the public display of sexual orientation. It found the attack, aggravated by hate speech, to be well organised and prepared in advance. The judgment is not yet final as the defendants have filed an appeal to a higher court.

Spain

ES

Legislative developments

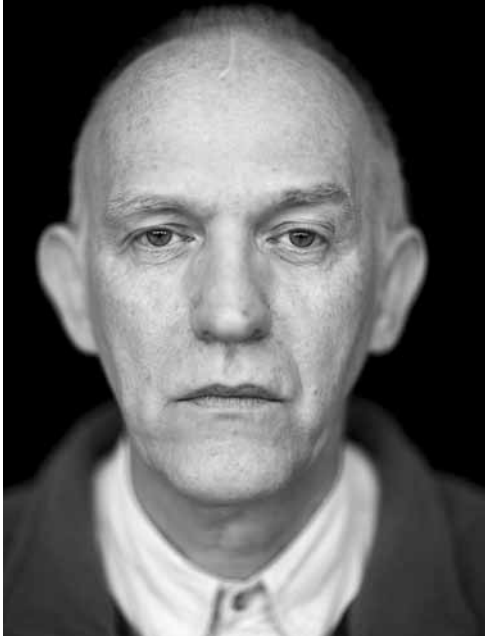
Bill for a new comprehensive anti-discrimination law to be adopted

The transposition of the two EC Anti-discrimination Directives has been unsatisfactory and incomplete for a number of reasons.¹⁶⁰ In January 2011, the Government presented a new comprehensive anti-discrimination bill, due to be adopted in April 2011. The bill will replace existing legislation including various provisions of Law 62/2003 of 30 December 2003 transposing Directives 2000/43 and 2000/78. The new specialised body will be appointed within three months of the adoption of the Law and the authority's statutes will be passed within six months.

sexual
orientation

¹⁶⁰ See Cachón, L., *Report on Measures to Combat Discrimination Directives 2000/43/EC and 2000/78/EC, Country Report 2009*, European Network of Legal Experts in the Non-discrimination Field.

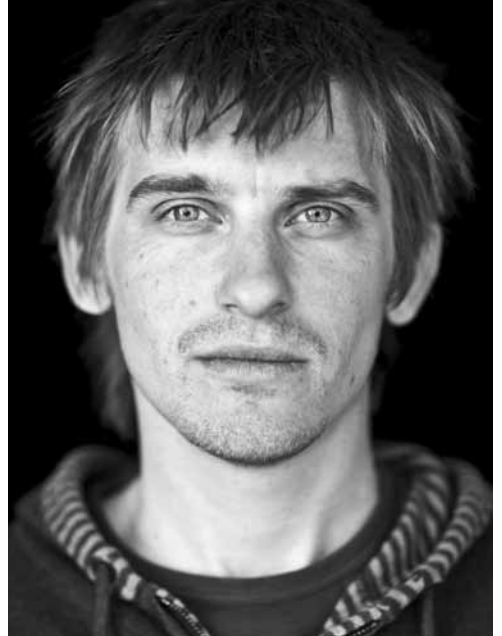
Harmen | 1953



Anne | 1985



Nathanaël | 1985



Esther | 1986



Brad | 1964



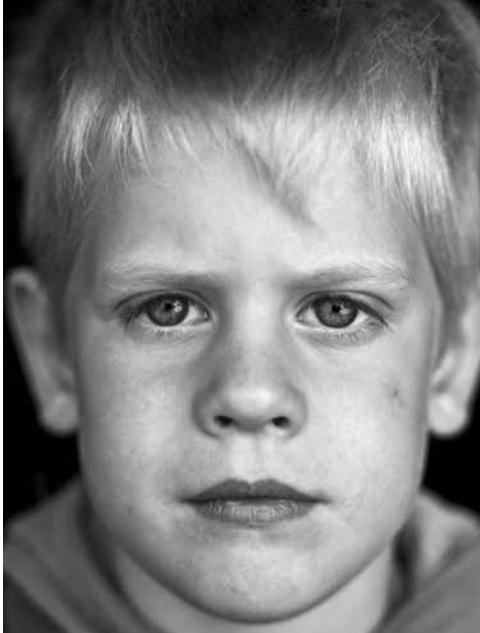
Lisanne | 1993



Koen | 1982



Nathan | 2006



Rebecca | 1991



The preliminary title of the bill includes all grounds enshrined in Article 14 of the Constitution. In other words, all grounds covered by the Directives, as well as disease, sexual identity, language and 'any other personal or social condition or circumstance' will be protected. According to the draft law, 'this Law shall apply to all areas of political, economic, cultural and social life,' and reference is made to all fields covered by the two Anti-discrimination Directives.

The first chapter of Title I defines all concepts of discrimination in a manner consistent with the Directives (including direct discrimination, indirect discrimination, harassment, and discrimination by association). The bill also defines multiple discrimination and assumed discrimination. The second chapter governs the prohibition of discrimination in all fields of the Directives and includes media and advertising.

Chapter I, Title II provides measures relating to judicial protection and administrative action against discrimination, including the possibility for agreements to be declared invalid or terminated, and redress, prevention, and compensation of material and non-material damages. Rules regarding burden of proof are established in accordance with the Directives. The bill envisages the participation of non-discrimination organisations in civil, administrative and labour legal proceedings. The public authorities will be compelled to act in cases of discrimination, meaning that they will have to initiate administrative proceedings, investigate the circumstances of the case, take appropriate and proportionate measures and immediately communicate the facts to the competent administrative body. A special prosecutor for promoting and coordinating the proceedings will be appointed.

Chapter II sets out the authorities' mandate to promote the right to equal treatment and non-discrimination by establishing, for example, the obligation to develop a 'Strategy for Equal Treatment and Non-discrimination' and positive action. In addition, they will have to collect and systematise statistical data on discrimination.

Title III creates the 'Equal Treatment and Non-discrimination Authority'. Once established, the Authority will comply with the requirements for national specialised bodies provided in the Directives. The bill hence establishes an independent body that complies with the wording of the Directives and sets out the legal basis for the effective performance of its duties. Beyond the obligations specified by the Directives, the draft proposal also includes mediation, investigation of discrimination cases on the Authority's own initiative, intervention in litigation, provision of training, and so on. The Authority will have jurisdiction on all grounds of discrimination, which implies that the two existing bodies (dealing with racial and gender discrimination) will disappear. The bodies for disabled people, Roma and immigrants will remain as they are consultative bodies. The Head of the Authority will be appointed by the Government for six years and cannot be removed during his term of office.¹⁶¹ Public administrations and individuals will have to collaborate in investigations of potential discrimination cases on request. In addition, organisations with social interests, public administrations and associations for the defence of the principle of equal treatment will play a participatory role within the Authority.

Title IV sets out rules governing violations and sanctions, an area which formerly constituted one of the main breaches of the Directives as sanctions were only provided for discrimination against disabled people and, in case of racial/ethnic discrimination, in the field of employment only.

Internet source:

<http://www.msps.es/normativa/proyectos/home.htm>

¹⁶¹ Except in cases defined by the law such as resignation, permanent disability or legal conviction.

Sweden

Legislative developments

Constitutional changes affecting non-discrimination clauses

Swedish constitutional law is composed of four different statutes, namely the Instrument of Government, the Act of Succession to the Throne, the Freedom of the Press Act and the Fundamental Law on Freedom of Expression (*Regeringsformen*, *Successionsordningen*, *Tryckfrihetsförordningen* and *Yttrandefrihetsgrundlagen*, respectively). Parliament may amend or revise the statutes, but all proposed changes must be passed twice, with a general election being held between the two votes. On 24 November 2010, Parliament voted for the second time on new constitutional rules that entered into force on 1 January 2011. Important changes relate to the discrimination field.

The Sami people are explicitly mentioned in the Instrument of Government (Chapter 1, Article 2). Public authorities shall promote the possibilities for Sami people and other ethnic minorities, language-based minorities and religious minorities to preserve their culture and societal life. The previous law merely made a recommendation to public authorities and the Sami people were not expressly mentioned.

Article 12 of the Instrument of Government prohibits discrimination against individuals belonging to minorities on the grounds of race, colour or ethnic origin and on the grounds of sexual orientation.

Case law

Ombudsman rules on the wearing of the niqab at school

An ethnic Swede who had converted to Islam was not allowed to follow a vocational training programme as she was wearing a niqab that allegedly made it difficult for the teacher to see her face. On 30 November 2010 the Equality Ombudsman recalled that such a prohibition amounts to indirect discrimination on grounds of ethnic origin or religion unless it is based on an objective justification. It follows that although this is the case for chemistry experiments where safety regulations require specific clothing, a general ban on the niqab is not lawful. The education provider could have tried less intrusive measures. In this case, a compromise was found between the student and the education provider as she was allowed to sit in the front row of the class and then remove her niqab so that male students could not see her face.

Since a practical solution was found, the Equality Ombudsman decided not to bring the case to court.

Internet source:

http://www.do.se/Documents/pdf/forlikningarochdomstolsarenden/Beslut_%202009_103.pdf

United Kingdom

Legislative developments

Implementation of Equality Act

The Equality Act 2010 (Commencement No 4, Savings, Consequential, Transitional, Transitory and Incidental Provisions and Revocation) Order 2010, which came into force on 1 October 2010, brought into



effect many of the provisions of the UK's long-awaited Equality Act 2010. The Act now replaces, for most purposes, the predecessor legislation (namely the Race Relations Act 1976, Disability Discrimination Act 1995, Equality Act 2006, Employment Equality (Sexual Orientation) Regulations 2004, Employment Equality (Religion or Belief) Regulations 2003, Employment Equality (Age) Regulations 2006 and Equality Act (Sexual Orientation) Regulations 2007). However, the powers of the Equality and Human Rights Commission are still laid out by the Equality Act 2006, and the public duty provisions of the Race Relations Act 1976 and Disability Discrimination Act 1995 continue to apply pending the implementation (expected in April 2011) of the general public duty, which is expected to apply across all six grounds and gender.

The Equality Act 2010 will, when fully implemented, regulate age discrimination across the material scope of the Act (that is, in relation to goods, facilities and services, public functions, housing, etc.) as is currently the case for all the other protected grounds. However, the implementing regulations that have just come into force exclude the provisions on age discrimination, meaning that age will continue to be regulated (as at present) only in relation to employment and occupation (broadly defined as including third level education). It remains to be seen when the other provisions on age discrimination will be brought into force.

Internet source:

http://www.legislation.gov.uk/ukxi/2010/2317/pdfs/ukxi_20102317_en.pdf

http://www.legislation.gov.uk/ukpga/2010/15/pdfs/ukpga_20100015_en.pdf

Downgrade of positive obligations to promote equality imposed on public bodies

The Equality Act 2010 introduces a new general public duty that replaces the existing positive duties imposed on public authorities to pay 'due regard' to the need to eliminate unlawful discrimination and harassment and (broadly) promote substantive equality. The new positive duty is expected to be implemented in April 2011. The new coalition Government has, however, decided not to implement the provisions of the Act imposing specific equality-related obligations on public authorities in relation to their public procurement functions. Public authorities will be required to set specific, relevant and measurable equality outcome objectives in order to comply with the general duty. The current 'specific duties' which impose a variety of obligations regarding information gathering, consultation and impact assessment of policies are to be replaced, however, with specific duties which are likely to be significantly diluted. Public consultations on these new specific duties were held by the Government Equalities Office and closed on 10 November 2010. The Government's thinking was set out in the consultation document which stated, *inter alia*, that: 'Engaging with people from the protected groups is something most public bodies should do from time to time in order to carry out the general duty. We therefore do not think a specific duty to carry out prescribed types of engagement work is needed – public bodies should have the flexibility to decide for themselves when and how to engage with citizens. But, in line with our drive for greater transparency, we do propose that public bodies should be open about how they have engaged with people as part of their work towards fulfilling the aims of the Equality Duty. Similarly, part of normal decision-making for public bodies involves assessing (insofar as is relevant and proportionate) the impact they are having on equality. We do not think a specific duty, outlining a particular process or prescribed set of forms to assess impact, is necessary or useful. But we do believe that transparency about the results of such assessments, and the data that underpins them, is important'.

Internet source:

http://www.equalities.gov.uk/pdf/402461_GEO_EqualityAct2010ThePublicSectorEqualityDuty_acc.pdf

