

In this Issue:

- In the face of diversity: public procurement to promote social objectives
- The implications of the Charter of Fundamental Rights for European non-discrimination law
- European Legal Policy Update
- CJEU/ECtHR Case Law Update
- European Committee of Social Rights Update
- National Legal Developments

European Anti-discrimination Law Review

No. 16 - 2013



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

The content of this publication has been drafted by the European Network of Legal Experts in the Non-discrimination Field and does not necessarily reflect the opinion or position of the European Commission Directorate-General for Justice.

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

The seven-year Programme targets all stakeholders who can help shape the development of appropriate and effective employment and social legislation and policies across the EU-27, EFTA-EEA and EU candidate and pre-candidate countries.

The mission of PROGRESS is to strengthen the EU contribution in support of Member States' commitments and efforts to create more and better jobs and to build a more cohesive society. To this effect, PROGRESS will be instrumental in:

- providing analysis and policy advice on PROGRESS policy areas;
- monitoring and reporting on the implementation of EU legislation and policies in PROGRESS policy areas;
- promoting policy transfer, learning and support among Member States on EU objectives and priorities; and
- relaying the views of the stakeholders and society at large.

For more information see: <http://ec.europa.eu/progress>

Website of the European Network of Legal Experts in the Non-discrimination Field: www.non-discrimination.net.

Editorial Board:

Isabelle Chopin (Executive Editor)

Thien Uyen Do (Managing Editor)

The editors can be contacted at: info@migpolgroup.com

Production:

Human European Consultancy
Maliestraat 7
3581 SH Utrecht
The Netherlands
www.humanconsultancy.com

Migration Policy Group
Rue Belliard 205, box 1
1040 Brussels
Belgium
www.migpolgroup.org

To order a free copy by post please visit: www.non-discrimination.net/order.htm

© **Photography and design:** Ruben Timman / www.nowords.nl

The information contained in this sixteenth issue of the Review reflects, as far as possible, the state of affairs on 15 January 2013.

ISBN 2-930399-70-8

Country information in this Review has been provided by:

Dieter Schindlauer (Austria), Emmanuelle Bribosia (Belgium), Margarita Ilieva (Bulgaria), Lovorka Kušan (Croatia), Corina Demetriou (Cyprus), Pavla Boučková (Czech Republic), Pia Justesen (Denmark), Vadim Poleshchuk (Estonia), Rainer Hiltunen (Finland), Sophie Latraverse (France), Biljana Kotevska (FYR of Macedonia), Matthias Mahlmann (Germany), Athanasios Theodoridis (Greece), András Kádár (Hungary), Orlagh O'Farrell (Ireland), Chiara Favilli (Italy), Anhelita Kamenska (Latvia), Tonio Ellul (Malta), Rikki Holtmaat (Netherlands), Else Leona McClimans (Norway), Łukasz Bojarski (Poland), Manuel Malheiros (Portugal), Romanița Iordache (Romania), Janka Debrecéniová (Slovakia), Neža Kogovšek (Slovenia), Per Norberg (Sweden), Dilek Kurban (Turkey), Aileen McColgan (United Kingdom).

Contents

7 Introduction

11 In the face of diversity: public procurement to promote social objectives

Thien Uyen Do

24 The old wine and the new cask: The implications of the Charter of Fundamental Rights for European non-discrimination law

Renáta Uitz

37 European Legal Policy Update

38 Court of Justice of the European Union Case Law Update

43 European Committee of Social Rights Update

44 European Court of Human Rights Case Law Update

49 News from the EU Member States, Croatia, the FYR of Macedonia, Iceland, Liechtenstein, Norway and Turkey

50 Austria

51 Belgium

53 Bulgaria

54 Croatia

54 Cyprus

56 Czech Republic

57 Denmark

57 Estonia

59 Finland

60 France

62 FYR of Macedonia

63 Germany

65 Greece

66 Hungary

67 Ireland

68 Italy

69 Latvia

71 Malta

71 The Netherlands

74 Norway

77 Poland

78 Portugal

79 Romania

81 Slovakia

81 Slovenia

83 Sweden

84 Turkey

85 United Kingdom



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. The Network covers all 27 EU Member States, one acceding country (Croatia) and candidate countries (the Former Yugoslav Republic of Macedonia, Iceland and Turkey). The EEA countries (Liechtenstein and Norway) have also been part of the Network since January 2012. There is one national expert per country.

The aim of the Network is to monitor 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 annual country reports, a comparative analysis of anti-discrimination law, the *European Anti-discrimination Law Review* and various thematic reports. Full information about the Network, its reports, publications and activities can be found on its website: www.non-discrimination.net.

This is the sixteenth issue of the *European Anti-discrimination Law Review* produced by the European Network of Legal Experts in the Non-discrimination Field. Thien Uyen Do, Legal Policy Analyst at MPG and Editor of the *European Anti-Discrimination Law Review*, contributes with an article on the use of public procurement to enhance and promote equal treatment. Renàta Uitz, ground coordinator for the Network and professor at the Central European University in Hungary, comments on and analyses the impact of the Charter of Fundamental Rights on the non-discrimination principle.

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, the case law of the European Court of Human Rights and decisions of the European Committee of Social Rights. At the national level, the latest developments in non-discrimination law in the EU Member States, the four accession candidate countries and the two EEA countries can be found in the section on News from the Member States, Croatia, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Norway and Turkey. These sections have been prepared and written by the Migration Policy Group (Isabelle Chopin and Thien Uyen Do) on the basis of information provided by the national experts and their own research. The Review provides an overview of the latest developments in anti-discrimination law and policy (the information reflects, as far as possible, the state of affairs as of 15 January 2013).

In 2013 a new update of the comparative analysis, *Developing anti-discrimination law in Europe – the 27 Member States, Croatia, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Norway and Turkey compared* will be released, with information on Iceland, Liechtenstein and Norway included for the first time. In addition, a thematic report on housing discrimination authored by Julie Ringelheim and Nicolas Bernard and a thematic report on the case law of the Court of Justice of the European Union regarding the two anti-discrimination directives written by Colm O’Cinneide will be published. Two thematic reports on reasonable accommodation beyond disability and on measures to combat discrimination beyond employment are in preparation.

In November 2013, the Network together with the European Network of Legal Experts in the Field of Gender Equality will organise a legal seminar involving representatives of the Member States, candidate countries and EEA countries, equality bodies and their own members. The legal seminar will deal with the six grounds of discrimination protected at the EU level and involve approximately 200 participants.

Isabelle Chopin
Piet Leunis

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

Meet ordinary people in this Review,
facing discrimination.

Members of the European Network of Legal Experts in the non-discrimination field

Project Director	Piet Leunis, Human European Consultancy	piet@humanconsultancy.com
Content Manager & Deputy Coordinator	Isabelle Chopin, Migration Policy Group	ichopin@migpolgroup.com
Project Management Assistant	Andrea Trotter, Human European Consultancy	andrea@humanconsultancy.com
Researcher & Editor	Thien Uyen Do, Migration Policy Group	utdo@migpolgroup.com

Executive Committee:

Lilla Farkas, Migration Policy Group (racial and ethnic origin)	lfarkas@migpolgroup.com
Mark Freedland, Oxford University (age)	mark.freedland@sjc.ox.ac.uk
Isabelle Rorive, Free University Brussels (religion and belief)	irorive@ulb.ac.be
Christa Tobler, Universities of Leiden and Basel (European law)	r.c.tobler@law.leidenuniv.nl
Renáta Uitz, CEU Legal Studies (sexual orientation)	uitzen@ceu.hu
Lisa Waddington, Maastricht University (disability)	lisa.waddington@maastrichtuniversity.nl

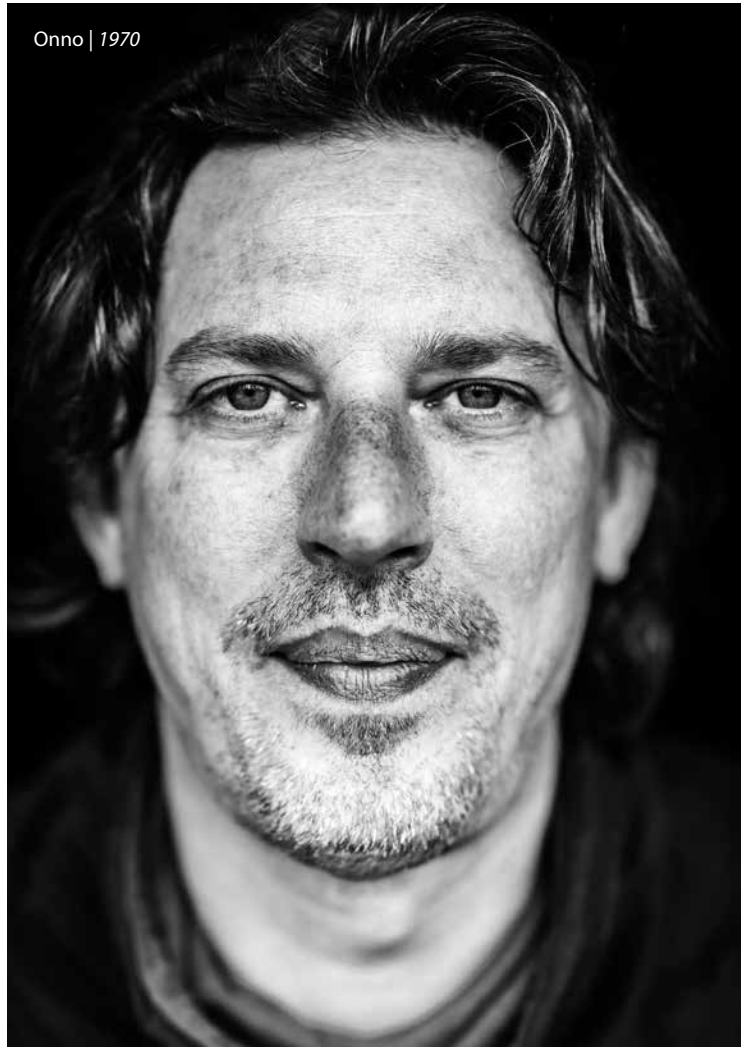
Country Experts

Austria	Dieter Schindlauer	dieter.schindlauer@zara.or.at
Belgium	Emmanuelle Bribosia	ebribo@ulb.ac.be
Bulgaria	Margarita Ilieva	margarita.ilieva@gmail.com
Croatia	Lovorka Kušan	lovorka.kusan@zg.t-com.hr
Cyprus	Corina Demetriou	oflamcy@logos.cy.net
Czech Republic	Pavla Boučková	poradna@iol.cz
Denmark	Pia Justesen	pj@justadvice.dk
Estonia	Vadim Poleshchuk	vadim@lichr.ee
Finland	Rainer Hiltunen	rai@iki.fi
France	Sophie Latraverse	sadral@yahoo.fr
FYR of Macedonia	Biljana Kotevska	biljana@studiorum.org.mk
Germany	Matthias Mahlmann	Matthias.mahlmann@rwi.uzh.ch
Greece	Athanasios Theodoridis	nastheo@yahoo.gr
Hungary	András Kádár	andras.kadar@helsinki.hu
Ireland	Orlagh O'Farrell	Orlagh_ofarrell@yahoo.com
Iceland	Guðrún Guðmundsdóttir	gudrun.dogg.gudmundsdottir@samband.is
Italy	Chiara Favilli	chiara.favilli@tin.it
Latvia	Anhelita Kamenska	angel@humanrights.org.lv
Liechtenstein	Wilfried Marxer	wm@liechtenstein-institut.li
Lithuania	Gediminas Andriukaitis	gediminas@lchr.lt
Luxembourg	Tania Hoffmann	tania.hoffmann@gabbana-hoffmann.lu
Malta	Tonio Ellul	tellul@emd.com.mt
Netherlands	Rikki Holtmaat	h.m.t.holtmaat@law.leidenuniv.nl
Norway	Else Leona McClimans	mcclimans@advokatfroland.no
Poland	Łukasz Bojarski	L.Bojarski@hfhr.org.pl
Portugal	Manuel Malheiros	manuelmalheiros@hotmail.com
Romania	Romanița Iordache	reiordache@gmail.com
Slovakia	Janka Debrecéniová	debreceniovao@oad.sk
Slovenia	Neža Kogovšek	neza.kogovsek@mirovni-institut.si
Spain	Lorenzo Cachón Rodríguez	lcachon@terra.es
Sweden	Per Norberg	per.norberg@jur.lu.se
Turkey	Dilek Kurban	dilek.kurban@tesev.org.tr
United Kingdom	Aileen McColgan	aileen.mccolgan@kcl.ac.uk

Judith | 1993



Onno | 1970



Ria | 1950



Becky | 1989



In the face of diversity: public procurement to promote social objectives

Thien Uyen Do²

Socially responsible public procurement allows contracting authorities to factor in social considerations when they purchase goods or services with a view to promoting and achieving social objectives. The possibility of taking social considerations into account in public procurement was initially recognised by the Court of Justice of the European Union (CJEU) in 1988³ and later by the 2004 public procurement directives. Such considerations may include, for example, social inclusion including integration of workers with disabilities, accessibility, design for all, compliance with social and labour rights, promotion of migrant-owned businesses, equal opportunities and non-discrimination.⁴ Yet many voices are calling for a greater involvement of both the public and private sectors in promoting equal opportunities.⁵ According to the European Commission, only 17 countries⁶ out of the EU 27 and EEA countries refer to social objectives during public procurement, mostly with regard to working conditions, and merely 45% of all contracting authorities include social considerations in the process of awarding public contracts.⁷ Earlier this year, the UK Equality and Human Rights Commission published a handbook on how to better mainstream equality considerations in public procurement, including training modules and case studies.⁸

Responsible public procurement appears as a way to achieve a comprehensive approach to equality and diversity as it allows public authorities to contribute to high social standards in business and to send a strong message that partners and economic operators cannot ignore.⁹ It forces them to achieve social objectives if they want to be competitive and, ultimately, business-driven mentalities will be shaped in such a way that social considerations are systematically endorsed. Finally, discussions around the use of public procurement as a positive measure to enhance equality and diversity are particularly interesting in

² Thien Uyen Do is Legal Policy Analyst at the Migration Policy Group and Researcher/Managing Editor of the *European Anti-discrimination Law Review*.

³ Case 31/87, *Beentjes*, 20 September 1988.

⁴ Traditionally, international trade has developed upon the principle of non-discrimination as the foundation of a multilateral trading system (with the most-favoured nation and national treatment rules included as WTO principles) which precludes discrimination against trading partners as well as goods, services, trademarks, copyrights and patents on grounds of nationality or main place of business. EU law, including public procurement, was also originally based upon the principle of non-discrimination based on nationality. However, as economic integration has progressed, the EU has created a set of rules on non-discrimination to prevent its citizens from facing discrimination on grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation and gender.

⁵ According to Eurobarometer, 88 per cent of the EU population supports the integration of social considerations into public procurement even if this would lead to more expensive public contracts. See also the results of the public consultation held by the Commission in 2011 on the modernisation of public procurement: <https://circabc.europa.eu/faces/jsp/extension/wai/navigation/container.jsp>.

⁶ Austria, Belgium, the Czech Republic, Denmark, Finland, France, Germany, Italy, Lithuania, Luxembourg, the Netherlands, Norway, Poland, Slovakia, Spain, Sweden and the UK.

⁷ Commission Staff Working Paper, Evaluation Report – Impact and Effectiveness of EU Public Procurement Legislation, SEC(2011) 853 final, 27 June 2011, p. 82.
http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/er853_1_en.pdf.

⁸ *Buying better outcomes. Mainstreaming equality considerations in procurement. A guide for public authorities in England*, Equality and Human Rights Commission, March 2013.

⁹ In 2009, the public sector spent over EUR 2,100 billion on goods, services and works – amounting to around 19% of EU GDP, according to the Commission. See Commission Staff Working Paper, Evaluation Report – Impact and Effectiveness of EU Public Procurement Legislation, SEC(2011) 853 final, 27 June 2011.

the light of the proposal for a new directive on public procurement¹⁰ and the EU Accessibility Act¹¹ which are currently in preparation.

This article aims to provide an overview of what is permitted under EU law and presents some good practice from Member States to reflect the huge potential that public procurement offers in promoting equality. Promising measures, such as the requirement for a diversity label or the additional award criteria clause, are also examined. Finally, mention will be made of accessibility and reserved contracts.

Link between equality and public procurement

The EU anti-discrimination directives, adopted in 2000, provide for a legal framework for equal treatment, prohibiting discrimination on grounds of racial and ethnic origin, religion and belief, age, disability and sexual orientation and setting minimum standards on protection against discrimination. To ensure full equality in practice going beyond a mere prohibition, Article 5 of Directive 2000/43/EC and Article 7 of Directive 2000/78/EC also allow Member States to adopt positive action. For instance, the low employment rate among individuals from disadvantaged groups or lack of accessibility for people with disabilities often reveal a difference in treatment.

‘Social considerations’ is a generic term encompassing a wide range of concerns which can be addressed with public procurement, including compliance with and promotion of non-discrimination rules, social inclusion, employment opportunities, decent work, compliance with social and labour rights, environmental issues, etc. According to the Commission, it also covers the concept of preferential clauses and positive action.¹²

Social considerations, including equality and diversity, may therefore be taken into account for the purposes of:

- promoting employment of individuals from disadvantaged groups (migrant workers, ethnic minorities, religious minorities, etc.) and workers with disabilities;
- supporting integration, for example by giving access to invitation to tender to migrant-owned businesses;
- promoting accessibility in order to ensure equality of opportunity, provided that it does not distort the market.¹³

In other words, the use of public procurement to promote equality and diversity may take three forms:

- a general non-discrimination measure to eliminate obstacles to employment or to ensure effective enforcement of non-discrimination legislation;
- targeted insertion measures to reserve a portion of employment opportunities to workers from ethnic minorities or workers with disabilities;
- active promotion measures to be adopted by public and private purchasers both internally and externally (in their relationships with partners and suppliers).

¹⁰ Proposal for a Directive of the European Parliament and of the Council on public procurement, COM(2011) 896 final, 2011/0438 (COD), 20 December 2011.

¹¹ See European Accessibility Act: legislative initiative to improve accessibility of goods and services in the Internal Market: Roadmap, European Commission Directorate General for Justice, June 2011. http://ec.europa.eu/governance/impact/planned_ia/docs/2012_just_025_european_accessibility_act_en.pdf.

¹² Interpretative Communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement, COM(2001) 566 final, 15 October 2001.

¹³ See Migration Policy Group, *Integration dossier no. 1 – Using public procurement as an element of diversity and equality policies*, European Web Site on Integration, 2011. http://ec.europa.eu/ewsi/UDRW/images/items/docl_25452_98436449.pdf.

Thus far, widespread integration of social considerations into public procurement has been very limited, mainly because it is considered likely to increase the legal and technical complexity of public procurement. This perception has ultimately led contracting authorities to simplify the tender process to the detriment of social objectives. Moreover, difficulty in attracting offers has been observed,¹⁴ perhaps due to the lack of experience of tenderers or fear of tendering for public contracts incorporating social objectives. Confusion between positive action, which aims to eliminate obstacles for certain disadvantaged groups, and positive discrimination, which is tantamount to preferential treatment forbidden under EU law, still exists. In addition, in some countries, such as France, domestic interpretation has been narrower than the standards set at EU level actually allow for, which has prevented contracting authorities from systematically including social considerations in public contracts.

In the light of these observations, the following section examines what is permitted under EU law with regard to the inclusion of the social objectives of promoting diversity and equality in public procurement and provides some examples of national good practice.

1. EU legal framework on public procurement

The first EC provisions on public procurement were adopted in 1971 in the context of the abolition of obstacles to the fundamental freedoms, cornerstones of the European project (freedom of establishment and to provide services). Currently, Directive 2004/17/EC¹⁵ specifically covers water, energy, transport and postal services whereas Directive 2004/18/EC applies to public works contracts, public supply contracts and public service contracts.¹⁶ These directives apply to contracts whose estimated value, net of VAT, is at least equal to the threshold established by the Commission and revised every two years.¹⁷ They set a common framework, but the rules envisaged are not exhaustive as they do not harmonise all aspects of existing domestic procedures.

In a first Green Paper published in 1996,¹⁸ the Commission recognised that '[State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law] may be called upon to implement various aspects of social policy when awarding their contracts, as public procurement is a tool that can be used to influence significantly the behaviour of economic operators'. The CJEU had, however, already ruled in 1988 that it was permissible to achieve social aims using public procurement, provided that they were linked to the subject-matter of the contract.¹⁹ The subsequent directives on public procurement adopted in 2004 incorporated the CJEU's ruling. In addition, in a 2001 interpretative communication,²⁰ the Commission specified that 'It is especially during the execution of the contract, that is, once the contract has been awarded, that public procurement can be used by contracting authorities as a means of encouraging the pursuit of social objectives. Contracting authorities can require the successful tenderer to comply with contractual clauses relating to the manner in which the contract is to be performed, which are

¹⁴ Commission Staff Working Paper, Evaluation Report – Impact and Effectiveness of EU Public Procurement Legislation, SEC(2011) 853 final, 27 June 2011, p. 83.

¹⁵ Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ L 134, 30 April 2004, pp. 1-113.

¹⁶ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134, 30 April 2004, pp. 114-240.

¹⁷ According to the Commission, only 1/5 of total public expenditure on goods and services is covered by the EU Directives. See Commission Staff Working Paper, Evaluation Report – Impact and Effectiveness of EU Public Procurement Legislation, SEC(2011) 853 final, 27 June 2011, p. vii.

¹⁸ Green Paper – Public Procurement in the European Union: Exploring the Way Forward, COM(96) 583, 27 November 1996.

¹⁹ Case 31/87, *Beentjes*, 20 September 1988.

²⁰ *Ibid.*

compatible with Community law.' Yet in its 2011 Green Paper, the Commission went one step further and recognised that 'For standard goods and services, it is already in many cases possible to set high environmental or social standards in technical specifications or contract performance conditions while awarding the contract on the criterion of the lowest price. In this way, contracting authorities can obtain products and services complying with high standards at the best price. However, using criteria that relate to the environment, energy efficiency, accessibility or innovation in the award phase rather than only in the technical specifications or as contract performance conditions can have the benefit of prompting companies to submit bids that go further than the level set in the technical specifications and thereby promote the introduction of innovative products on to the market. It could also be useful to apply such criteria in the award phase in cases where there is uncertainty as to the products or services available on the market.'²¹

Social considerations may therefore be included at any of the four stages of the public procurement procedure, which are:

- definition of the subject-matter and technical specifications,
- selection/exclusion of contractors,
- award to the most economically advantageous tender (MEAT), and
- performance of the contract.

Concretely, when and how to include social considerations in public procurement significantly depends on the objectives that the contracting authorities want to achieve and the type of measures envisaged to reach them. The validity of social considerations cannot hence be considered *in abstracto* but must be examined on a case by case basis, in the light of EU and national legislation.

In any event, there must be a link with the subject-matter of the contract. In accordance with the principle of transparency, all factors must be defined and clearly spelled out in the contract notice and the technical specifications. To ensure effective competition, public procurement criteria and conditions must be given sufficient publicity.

In the UK, public authorities are under a duty to pay due regard to equality,²² which means that they must ensure that equality is guaranteed and promoted in their day-to-day work, in shaping policy and delivering services and in relation to their own employees and partners. This duty to pay due regard requires public authorities to eliminate unlawful discrimination, harassment, victimisation and any other conduct prohibited by anti-discrimination legislation, to advance equality of opportunity and to foster good relations between people with a protected characteristic and others. Consequently, public authorities must comply with the equality duty when undertaking procurement at all stages, including reviews of their procurement policies and contractors' performance. Although the duty applies to public authorities only, equality obligations may be transferred to the contractor when a public service is contracted out and may be carried out at the performance stage of the contract.

Subject-matter of the contract and technical specifications

The subject-matter of a contract means 'what product, service or work the contracting authority wants to procure',²³ while technical specifications are the characteristics of the product, service or work in ques-

²¹ Green Paper on the modernisation of EU public procurement policy – Towards a more efficient European Procurement Market, COM(2011) 15 final, 27 January 2011, p. 37.

²² Section 149 of the Equality Act.

²³ *Buying social – A guide to taking account of social considerations in public procurement*, European Commission Directorate-General for Employment, Social Affairs and Equal Opportunities and Directorate-General for the Internal Market and Services, October 2010.

tion. Contracting authorities have wide room for manoeuvre to take social considerations into account in public procurement. They may introduce social considerations into the technical specifications for the subject-matter, provided that there is a link. Therefore, requirements regarding recruitment of members of protected groups or use of a specific social label could not be considered as technical specifications within the meaning of the directives.²⁴ Public authorities could, for instance, require information newsletters on their services to be published in Braille to accommodate people with visual impairment, but not that a certain number of members of protected groups be employed or a specific social label be obtained. In any event, compliance with EU rules and principles must be ensured and potential interested tenderers must not be favoured or eliminated.

a) Variant

As a means to promote social objectives, contracting authorities may authorise tenderers to submit variants incorporating social considerations in addition to their standard offer. In other words, the contracting authority allows potential suppliers to submit one 'neutral' offer meeting the requirements of the good or service to be purchased and one socially responsible bid, which will both be assessed using the same set of award criteria. The contract notice must indicate whether or not variants are permitted as any submission of variants would be void without such prior notification. Technical specifications must stipulate the minimum social requirements and how to submit variants. For instance, in the context of setting up a canteen for a public body, tenderers may submit, in addition to their standard offer, a variant allowing the preparation of meals to suit religious diets.

A systematic reference to variants in all contract notices could send a strong message to all economic operators that it makes good business sense to achieve social objectives, and it would also encourage the development of innovative solutions and good practices. Finally, the use of variants is particularly useful when public authorities do not know how and at which stage – for instance, in the event that lawfulness remains uncertain – to include social considerations matching their needs.

Selection/exclusion criteria

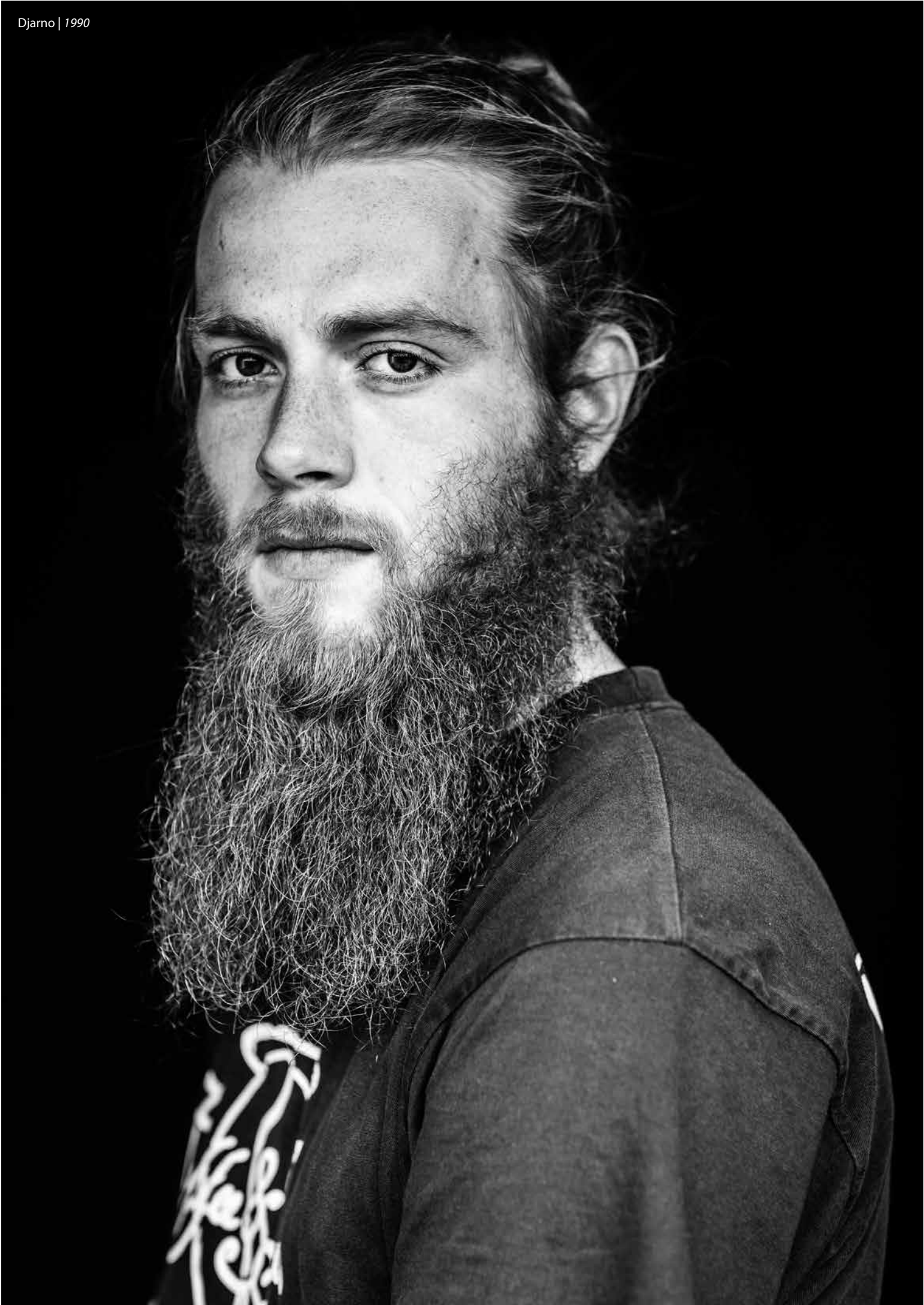
Selection criteria look at the tenderers' capacity, whereas exclusion criteria examine objective personal reasons which may exclude them. At this stage, contracting authorities assess and select potential suppliers based on their technical abilities (Article 48 of Directive 2004/18/EC) and financial or economic standing (Article 47 of Directive 2004/18/EC), for which evidence is requested.

i Technical ability

Equality and diversity can be considered in public procurement when looking at tenderers' technical ability to perform a contract when these issues are relevant to the contract. The UK's toolkit on equality in public procurement provides the following example: a local authority wants to provide information on its services and wishes to reach the widest population. It decides to outsource a helpdesk providing information services not only in English but also in the languages of the ethnically diverse local community. Consequently, the supplier must show evidence that they can meet the language requirement.²⁵ Similarly, a project setting up a community centre to enhance social inclusion may require previous experience in addressing equality and diversity, in particular a sound understanding of the traditions and religious beliefs of different groups.

²⁴ *Ibid.*, p. 29.

²⁵ Office of Government Commerce, *Make Equality Count*, p. 14. <http://base-uk.org/sites/base-uk.org/files/%5Buser-raw%5D/11-06/procurementequalityogcfinal.pdf>.



ii Exclusion for violation of equality and non-discrimination legislation

The list of exclusion criteria established in Directive 2004/18/EC is exhaustive (Article 45). Member States may decide, among other factors relating to the tenderer's personal situation, to exclude tenderers from the procurement process if they have been found guilty of grave professional misconduct. In its 2001 interpretative communication, the Commission confirmed that candidates or tenderers who have been found in breach of national social legislation, including that relevant to the promotion of equality of opportunities, may be excluded.²⁶ Along these lines, the Scottish Government requires that contractors will not discriminate within the meaning of the Race Relations Act and will promote equal treatment internally and throughout the whole supply-chain.²⁷ A breach of the Race Relations legislation may render an economic operator ineligible to tender. Any tenderer who has been the subject of adverse decisions finding them in breach of the Race Relations legislation will be evaluated according to the circumstances, for instance by taking into account any remedial measures and their current approach to race relations. In Portugal, repeated breach of anti-discrimination provisions on the grounds of disability may lead to a ban on submitting offers for public contract awards.²⁸ Similarly, in Spain public contracts cannot be concluded with suppliers who have been convicted for violation of the Act on the integration of people with disabilities into the labour market.

Exclusion for a previous breach of anti-discrimination legislation is of course much more difficult or even impossible in countries where judgments are not made public, as for instance in Italy where there is no systematic publication of decisions by either judges or the equality body.²⁹

iii Pre-selection questionnaire

Pre-selection questionnaires containing an equality module can be used to assess the suitability of potential tenderers prior to the submission of their proposal.

Kent County Council, UK, requires potential suppliers to complete a diversity questionnaire. Any potential suppliers who have broken the law or been found guilty of misconduct may be disqualified from the tender process.

The City of Paris announced that a pre-selection questionnaire would be used as of 2012 and all tenderers would complete a detailed survey on their equal treatment policies. The mechanism incorporates a monitoring tool created by the municipality, and contractors are under the obligation to provide a report on the changes implemented in their policies and practices six months before the end of the contract. The City of Paris wished to use this experiment to identify and stimulate an exchange of good practice as tenderers are compelled to continuously review their own diversity and non-discrimination policies.

Award criteria

Contracting authorities assess tender proposals based on award criteria. Although there is no explicit mention in the current directives of social considerations in the award phase, it is possible to award a con-

²⁶ The proposal for a new directive on public procurement explicitly mentions breach of social, labour and environment legislation as exclusion criteria (Articles 54 and 66).

²⁷ See <http://www.scotland.gov.uk/Topics/Government/Procurement/policy/Race>.

²⁸ See Labour Code, Arts. 85(1) and (3) and 548 to 555.

²⁹ Isabelle Chopin and Thien Uyen Do, *Developing Anti-discrimination Law in Europe – The 27 EU Member States, Croatia, Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Norway and Turkey compared*, European Network of Legal Experts in the Field of Non-discrimination, European Commission Directorate General for Justice, October 2012.

tract to the most economically advantageous tender taking into account social considerations, provided that the award criteria:³⁰

- show a link with the subject-matter of the contract;
- are adequately specific and objectively quantifiable;
- are notified in the contract information notice;
- comply with EU law.

i Use of labels

In the *EVN AG and Wienstrom* case³¹ on the supply of electricity, the CJEU recognised that an award criterion relating solely to the production process, and not only to the characteristics of the product, was valid. In the light of this ruling and according to the public procurement directives, contracting authorities may specify certain characteristics in terms of performance or functionality on the basis of existing labels, provided that these characteristics are demonstrably linked to the subject-matter of the contract, and they can freely determine the weight given to such award criteria. Under Directive 2004/18/EC, labels must be defined and granted on the basis of objectively verifiable criteria, using a procedure in which all stakeholders can participate, and the label must be accessible and available to all interested parties.³²

The CJEU has further specified in the recent *Commission v the Netherlands*³³ decision how to use labels in public procurement. The award of a public contract may be subject to the requirement that a product or a service is environmental-friendly or socially responsible, based on criteria clearly formulated in the technical specifications by reference to the characteristics sought. Contracting authorities must use detailed specifications, rather than requiring that certain products or services must bear a specific label. If the required characteristics are met by a particular label, it can be accepted as proof of fulfilment of these requirements. Moreover, economic operators which do not possess a specific label may prove equivalence to it by any appropriate means.

In addition, as the new proposal for a directive on public procurement explicitly recognises the use of social labels,³⁴ contracting authorities could choose to use detailed technical specifications to promote a label (or an equivalent accreditation procedure³⁵) which measures tenderers' equality and diversity policies, provided that there is a link with the subject-matter of the contract. This is particularly interesting in the light of the French Diversity Label. Although French contracting authorities have never yet used a diversity or equality label when awarding public contracts, this is an original approach that is worth reflecting on. In France, the Diversity Label aims to establish a standard for diversity in recruitment and human resource management in both the public and private sectors. Public and private employers must meet a certain number of objective criteria concerning the recruitment and career management of their employees. The label, created in 2008 by the State, covers the prevention of all types of discrimination recognised by law, in particular relating to the origin of persons, age, disability, sexual orientation, religion, membership of trade unions and associations, political opinions, etc.³⁶ As of 1 January 2013, 381 legal entities (large corporations, SMEs, ministries, cities and public institutions) have obtained the label,

³⁰ See cases C-31/87 *Beentjes*, 20 September 1988; C-225/98 *Commission v French Republic*, 26 September 2000; and C-513/99 *Concordia Bus*, 17 September 2002.

³¹ C-448/01, *EVN AG and Wienstrom GmbH v Republic of Austria*, 4 December 2003.

³² Article 23.

³³ C-368/10, *Commission v The Netherlands*, 10 May 2012.

³⁴ Article 41, Proposal for a Directive on public procurement COM(2011) 896 final.

³⁵ The rapporteur Marc Tarabella has suggested including 'certificates of a third party verified standard' in Article 41 of the proposal. Draft Report on the proposal for a directive of the European Parliament and of the Council on public procurement, COM(2011) 896 –C7-0006/2012 – 2011/0438 (COD), 3 May 2012, Committee on the Internal Market and Consumer Protection.

³⁶ Gender discrimination is covered by a distinct label.

with 817,000 employees or agents concerned in total. Three different versions of specifications have been established to take into account the nature and specificities of applicants, in particular SMEs. Requirements therefore differ for organisations with fewer than 50 employees, organisations with more than 50 employees and the public administration. Thus far, the label has been granted to big companies with as many as 279,000 employees, but also to smaller structures with 12 employees.

The Diversity Label is granted for four years by a committee composed of representatives of the competent ministries (the Ministry of the Interior, the Ministry for Employment and Labour, the Ministry for the Budget, Public Accounts, the Civil Service and State Reform, and the Ministry of Housing and Urban Affairs), employers' organisations, trade unions and experts appointed by the national association of HR directors. There is a mid-term evaluation which encourages employers to continuously enhance and promote diversity and equal treatment. The label imposes stringent obligations, such as the creation of an equality and diversity commission and an advice and complaints unit within companies, appropriate training and awareness-raising measures and evaluation mechanisms. However, the introduction into French public contracts of a diversity label or any equivalent certificate meeting high standards must not prevent foreign tenderers from submitting a bid, as this would constitute a violation of general EU principles. Consequently, the idea of a European certification procedure leading to a diversity label that is based on the French model should be explored so as to avoid the exclusion of foreign bids as well as in order to promote diversity and equality in public procurement throughout the EU. In addition, in the absence of harmonisation, suppliers may face a range of different levels of requirement for social standards, entailing the risk that they would have to create different mechanisms to protect and promote equal treatment and diversity.³⁷

ii Additional award criteria

Where two or more bids are equal based on the value-for-money criterion, it is possible to use additional award criteria relating to social considerations, including equality and diversity, to determine which offer is best. The CJEU has introduced this possibility of using additional award criteria with no link to the subject-matter of the contract where two economically equivalent tenders exist and the condition is in line with all the fundamental principles of EU law. The criterion, which may be a 'social criterion', must be announced in the contract information notice and may not have any direct or indirect impact on those submitting bids from other Member States. This option should be considered when incorporating social criteria into public procurement in order to send a strong message to economic operators. If contracting authorities consistently formulated the same 'additional criterion' relating to anti-discrimination/diversity and put it in all contract information notices, even if they were not applied in practice, this could act as a powerful incentive for tenderers to take that extra step to make sure they win the contract.

Contract performance

Conditions relating to performance of the contract are criteria that the successful bidder must respect when carrying out contractual duties once it has been awarded the tender. Pursuant to Article 26 of Directive 2004/18/EC, 'Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with [EU] law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations.'

³⁷ Commission Staff Working Paper, Evaluation Report – Impact and Effectiveness of EU Public Procurement Legislation, SEC(2011) 853 final, 27 June 2011, p. 85.

In Sweden, pursuant to the Ordinance on Anti-Discrimination Clauses in Public Procurement Contracts,³⁸ suppliers must comply with the Anti-discrimination Act when they sign services or work contracts exceeding EUR 85,000 for a minimum of eight months with one of the 30 largest public authorities.³⁹ The Swedish Anti-discrimination Act prohibits discrimination on grounds of gender, transgender identity or expression, ethnic origin, religion or belief, disability, sexual orientation and age in the fields of employment, goods and services and public appointments. Suppliers must present an equality plan describing the equality and non-discrimination policy within their company as well as in their supplying practice.

2. Accessibility and reserved contracts

On 15 November 2010, the European Commission announced the adoption of a new strategy, running until 2020, aiming to remove the economic and social barriers that prevent people with disabilities from enjoying their rights and proposed several actions to ensure their full participation in all areas of life.⁴⁰ The strategy aims to encourage the use of standardisation, public procurement and state aid rules to improve access to and the supply of goods and services and the promotion of an EU market for assistive devices.

Public procurement may be used to promote the interests of people with disabilities in two ways: i) contracting authorities may want to purchase accessible goods and services to promote and enhance accessibility and such requirements are included in the contract notice, or ii) contracting authorities may reserve the right to participate in public tenders to sheltered workshops or specify that contracts must be performed within the context of sheltered employment programmes.

i Accessible goods and services

'Accessibility' means that people with disabilities have equal access to the physical environment (including buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces), information and communications technologies and systems (ICT), and other facilities and services open or provided to the public, both in urban and in rural areas (Article 9 of the UN Convention on the Rights of Persons with Disabilities). Yet the current situation in many Member States shows that full accessibility is far from being achieved. For instance, French Law No 2005-102 of 11 February 2005 on the equal rights and opportunities, participation and citizenship of people with disabilities guarantees accessibility to people with disabilities and aims to ensure by 2015 a continuous chain of access, including in public buildings, public transport, railway stations, pavements, kerbs and ramps. However, an official report issued in March 2013 outlined that the deadline was not going to be met due to the huge financial burden imposed by these adjustments and the lack of political impetus.⁴¹

³⁸ 2006/260. See also: Compendium of practice on non-discrimination/equality mainstreaming, European Commission, Directorate General for Justice, 2011, p. 38.

http://ec.europa.eu/justice/discrimination/files/compendium_mainstreaming_equality_en.pdf.

³⁹ Similarly, the City of Copenhagen introduced in 2008 a mandatory social 'clause' in all public contracts exceeding half a million DK (approximately EUR 67,000) following an audit which showed that it purchased good and services to 15,000 suppliers for a total of DKK 6.5 billion.

⁴⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, European Disability Strategy 2010-2020: A renewed commitment to a barrier-free Europe, COM(2010) 636 final, 15 November 2010.

⁴¹ See Campion, Claire-Lise, *Réussir 2015 – Accessibilité des personnes handicapées au logement, aux établissements relevant du public, aux transports, à la voirie et aux espaces publics*, Sénat, Mars 2013. See also Conseil General de l'Environnement et du Développement Durable, Inspection Générale des Affaires Sociales, Contrôle Général Economique et Financier, *Rapport sur les modalités d'application des règles d'accessibilité du cadre bâti pour les personnes handicapées*, 2012.

According to the Commission, the problems identified mostly concern the use of trains and other modes of transport, shops, restaurants, financial services (including ATMs), cultural services and products such as books. In June 2011 the Commission therefore committed itself to submitting a proposal for an EU Accessibility Act, which should be published in the course of 2013,⁴² to combat the inadequate supply of accessible goods and services on the EU market. The act would cover public authorities procuring goods and services and manufacturers or suppliers of goods and services. To complement this act, on 3 December 2012 the Commission adopted a proposal for a directive on the accessibility of websites of public sector bodies.⁴³

ii Exception to positive discrimination – reserved contracts

Preferential treatment in favour of certain groups of economic operators which may tender is unlawful, except in the case of sheltered workshops or sheltered employment programmes, as prescribed by Directive 2004/18/EC. Under Article 19, Member States may use a reserved contracts clause to favour businesses where ‘most of the employees concerned are handicapped persons who, by reason of the nature or the seriousness of their disabilities, cannot carry out occupations under normal conditions’. Such a reservation is allowed only if there is specific national legislation. In addition, at least 50% of the employees of such sheltered workshops or sheltered employment programmes must be persons with disabilities, meaning those who cannot carry out occupations under normal conditions.

In Bulgaria, the Integration of Persons with Disabilities Act reserves the status of ‘specialised’ enterprises and cooperatives of people with disabilities for businesses where at least 20% of employees have permanent visual impairments, at least 30% of employees have permanent hearing impairments, or at least 30% of employees have other permanent disabilities.⁴⁴ Pursuant to the Public Procurement Act, such enterprises may be granted exclusive entitlement to bid for certain public contracts determined by the contracting authorities. In July 2011, there were 130 sheltered enterprises, employing 2,119 persons with disabilities.⁴⁵ Similarly, the law on public procurement in Lithuania allows contracting authorities to specify that only social enterprises employing people with disabilities can take part in public procurement.

Conclusion

Public procurement constitutes a promising tool to enhance equality and diversity in society, if used. Contracting authorities should take a firm stance on this issue, but they should initially favour a gradual approach in order to progressively shape business behaviours and achieve social objectives, in particular equality and diversity in the workplace and along the supply chain. A variety of possible measures, which may be applied alone or combined, currently exist to encourage economic operators to be more socially responsible. However, one of the biggest challenges observed in practice remains the complexity of public procurement and the fear of either requiring (or, in the case of the tenderer, of submitting) social measures which would ultimately be invalidated by domestic courts or the CJEU. Narrow interpretation and limitations introduced by national judges also prevent contracting authorities from including social

⁴² See European Accessibility Act: legislative initiative to improve accessibility of goods and services in the Internal Market: Roadmap, European Commission Directorate General for Justice, June 2011. http://ec.europa.eu/governance/impact/planned_ia/docs/2012_just_025_european_accessibility_act_en.pdf.

⁴³ COM(2012) 721 final, of 3.12.2012, <http://ec.europa.eu/digital-agenda/en/news/proposal-directive-european-parliament-and-council-accessibility-public-sector-bodies-websites>.

⁴⁴ Art. 28 (1).

⁴⁵ Data provided by the Agency for Persons with Disabilities on 13 July 2011. In 2005, there were 91 ‘specialised’ cooperatives and enterprises in Bulgaria, employing 14,573 people. A significant number of sheltered workplaces have had to close because products could not meet market quality standards.



considerations in public contracts. In a communication on European judicial training, the Commission stressed the need to train judges and prosecutors, as well as legal practitioners, to ensure uniform and effective enforcement and respect of EU law.⁴⁶ Consequently, the competent authorities should provide EU-wide training, as well as national training, involving contracting authorities but also economic operators, on how to adequately use social criteria in public procurement and to exchange good practice throughout the EU.

In addition, when performing a contract in compliance with anti-discrimination legislation, the contracting authorities have yet to define how and when evaluation should take place. Answers to these questions will have significant consequences as evaluation can take various forms: self-assessment, evaluation by the contracting authority or by a third public authority such as the public procurement regulatory authority, the equality body or ombudsman, audit by an external organisation, etc. Moreover, the type of sanctions applied (fines, exclusion, etc.) plays an important role in effective enforcement and should be carefully chosen. Lastly, greater opportunities for exchanges of good practice at European level are needed to improve and expand socially responsible public procurement.

⁴⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Building trust in EU-wide justice: a new dimension to European judicial training, COM(2011) 551 final.

The old wine and the new cask: The implications of the Charter of Fundamental Rights for European non- discrimination law

Renáta Uitz

General overview

A quick look at the multiple layers of EU non-discrimination law

EU anti-discrimination law has evolved in several stages.⁴⁷ While resting on the provisions of the Treaties, European anti-discrimination law has been characterised by the interplay of jurisprudence on general principles of EU law and on the equality directives.⁴⁸ As a landmark development in the early 2000s, the currently operative Article 19 (ex Article 13) directives on non-discrimination were enacted in two waves. They in part replace the old equality directives and in part expand their scope of application.⁴⁹ After the Lisbon Treaty, the proper incorporation of the EU Charter of Fundamental Rights, as well as the arrival of the European Convention on Human Rights, add further layers to this regime.⁵⁰ In January 2013 the European Court of Human Rights (ECtHR) already rendered two judgments in cases where domestic proceedings had been conducted under transposed EU anti-discrimination directives.⁵¹

The EU Charter is a unique instrument of human rights protection. It is the youngest bill of rights in Europe, with the most comprehensive non-discrimination and equality clauses of its genre. Yet its application is limited to the institutions of the Union and 'the Member States only when they are implementing Union law' (Article 51(1)). Also, the level of protection offered by the Charter is established with reference to the Union's international obligations, to the European Convention on Human Rights, and to the constitutions of the Member States (Article 53). Thus, the application and impact of the Charter is highly dependent on several additional factors ranging from the Treaties of the Union to the jurisprudence of the ECtHR.

⁴⁷ See e.g. Mark Bell, 'The Principle of Equal Treatment: Widening and Deepening' in: Paul Craig and Gráinne de Búrca, eds. *The Evolution of EU Law*, Oxford, 2nd ed., 2011, at 611-639.

⁴⁸ Some of the old directives are Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions; Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes; Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women; and Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex.

⁴⁹ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ('Racial Equality Directive'); Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('Framework Employment Equality Directive'); Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services ('Goods and Services Directive').

⁵⁰ On the 'four alternate European rights' frameworks and approaches' see Claire Kilpatrick, 'The Court of Justice and Labour Law in 2010: A New EU Discrimination Law Architecture', (2011), *Industrial Law Journal*, Volume 40, 280-301, at 300-301.

⁵¹ *Eweida and others v the United Kingdom*, nos. 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013 (religious discrimination) and *Horváth and Kiss v Hungary*, no. 11146/11, 29 January 2013 (discrimination against Roma children in public education).

This article reflects on the impact of the EU Charter on the equality jurisprudence of the CJEU. The arrival of the Charter presents a unique opportunity: the Charter has the potential to become a consolidating force, infusing EU anti-discrimination law with a human rights perspective.⁵² There have been several notable attempts by the Court of Justice and the Attorneys General to exploit the Charter in discrimination cases. Still, in the light of recent developments it is yet to be determined whether the Charter indeed is capable of providing a much-awaited 'authoritative foundation'⁵³ for EU non-discrimination law.

Such a period of hesitation is not unusual for EU law. As Gráinne de Búrca has showed, the development of EU human rights law is best understood not in terms of straight progress, but as the interplay between mobilising and resistant actors.⁵⁴ Thus, the currently ongoing search for the role and place of the Charter in the European anti-discrimination regime is worthy of closer attention precisely due to the field's multi-layered nature and its interconnectedness with other fields of European law.

The difference the Charter may make: The sparks of a constitutional revolution in EU non-discrimination law

The Charter of Fundamental Rights admittedly brings a new layer to EU law as a whole. The Charter may be regarded more modestly as the 'culmination' of the formalisation of general principles of EU law (T. Tridimas),⁵⁵ or more daringly, as 'a new stage in the process of European integration' (K. Lenaerts).⁵⁶

When applying the Charter, the CJEU may certainly take the opportunity to reconsider elements of its jurisprudence. This prospect of rethinking by no means meets unequivocal approval,⁵⁷ partly due to the unexpectedly radical constitutional developments experienced recently in non-discrimination cases. The transformative potential of EU non-discrimination law (with and without reference to the Charter) has been made strikingly apparent in recent years. In the *Test-Achats* judgment,⁵⁸ the CJEU first found that 'Articles 21 and 23 of the Charter state, respectively, that any discrimination based on sex is prohibited and that equality between men and women must be ensured in all areas. Since Recital 4 to Directive 2004/113 expressly refers to Articles 21 and 23 of the Charter, the validity of Article 5(2) of that directive must be assessed in the light of those provisions.'⁵⁹ Thereupon, the CJEU essentially invalidated an exemption in the Goods and Services Directive itself (Article 6(3)) for a violation of the principle of equal treatment.

In the equally controversial and significant *Mangold* judgment⁶⁰ – which is notorious for its potential to open the way to investing directives with horizontal direct effect – the CJEU derived the general principle of non-discrimination on the ground of age without reference to the Charter. Similarly, in more recent judgments on non-discrimination the appeal of the Charter is fading as the Court is returning to more traditional approaches to interpretation under the directives. In a recent age discrimination case, *Tyrolean Airways*, where the referring national court phrased its questions expressly and prominently under the Charter, the Court chose to respond under the Framework Employment Equality Directive and

⁵² See Christopher McCrudden and Haris Kountouros, 'Human Rights and European Equality Law', in Meenan, ed., *Equality Law in an Enlarged European Union*, at 73-166.

⁵³ Bell, *The Principle of Equal Treatment*, at 628.

⁵⁴ Gráinne de Búrca, 'The Road Not Taken: The European Union As A Global Human Rights Actor', (2011) *American Journal of International Law*, Volume 105, 649-693, at 651.

⁵⁵ Takis Tridimas, *The General Principles of EU Law*, Oxford, 2nd ed., 2007, at 12.

⁵⁶ Koen Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights', *European Constitutional Law Review* (2012) Volume 8, 375-403, at 375.

⁵⁷ For a strongly critical voice see AG Cornides in an academic contribution in Jakob Cornides, 'Three Case Studies on "Anti-Discrimination"', (2012) *European Journal of International Law*, Volume 23, at 517-542, esp. 534-535.

⁵⁸ Case C-236/09, *Association belge des Consommateurs Test-Achats v Conseil des ministres* (Grand Chamber).

⁵⁹ Reference to the Charter *ibid.*, at para. 17.

⁶⁰ Case C-144/04, *Mangold v Helm* (Grand Chamber).

the principle of non-discrimination on grounds of age.⁶¹ In this case, the Court found that differences in counting years of service with different airlines within the same group for the purposes of promotion do not constitute indirect age discrimination under the Directive.⁶² In another recent age and disability discrimination case in a redundancy setting, *Odar*,⁶³ while AG Sharpston at least made a brief reference to the Charter in the justification analysis,⁶⁴ the Court did not mention the Charter, but decided the case solely under the Framework Employment Equality Directive.

Protected grounds in the Charter and the Article 19 directives

Key differences between the Charter and the Article 19 directives

The Charter offers protection to more identity traits than the grounds covered by Article 19(1) TFEU and the Article 19 directives. Article 19(1) TFEU and the ensuing directives prohibit discrimination on the specific grounds of gender (sex),⁶⁵ race or ethnic origin,⁶⁶ religion or belief, disability, age, and sexual orientation.⁶⁷ In addition to the grounds covered by the Article 19 directives, Article 21(1) of the Charter expressly protects the traits of social origin, genetic features, language, political or other opinions, membership of a national minority, property or birth. Unlike Article 19(1) TFEU, the list of protected grounds in Article 21(1) of the Charter is open ended. Also, the Charter's scope of application is significantly broader than that of the directives. The relevance of these differences depends on the extent to which the Court is willing to give effect to the provisions of the Charter in non-discrimination law, as the EU has currently no legal basis in the treaties to legislate on these additional grounds.

The CJEU 'reading in' new grounds of protection

An open-ended list of protected grounds in a non-discrimination clause is known to invite, or at least to permit, courts to afford protection to new identity traits not specifically included in the clause. The CJEU is well-known for reading the grounds in treaty provisions and in the non-discrimination directives generously, so as to provide meaningful protection to an individual's rights. For instance, the prohibition of sex discrimination covers pregnancy and maternity as well as gender identity due to the efforts of the Court. Yet in its more recent decisions, the CJEU has not seized the opportunity to broaden the scope of protection even on grounds listed in the directives. In the *Tyrolean Airways* case, the Court refused to include years of service within the concept of age discrimination, despite admitting that the challenged rules of the collective agreement may affect a certain group adversely along the lines of age.⁶⁸

The special case of discrimination on the basis of nationality and language

The Treaties and directives do not cover all the grounds which are listed in the Charter. For instance, nationality⁶⁹ and language are seemingly closely connected to race or ethnicity (i.e. traits covered by both Article 19(1) TFEU and the Racial Equality Directive). Indeed, in the words of the ECtHR, 'ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious

⁶¹ Case C-132/11, *Tyrolean Airways v Betriebsrat Bord*, at paras. 20-21.

⁶² *Ibid.*, at para. 29.

⁶³ Case C-152/11, *Odar v Baxter*.

⁶⁴ *Ibid.*, at para. 57.

⁶⁵ Art. 1, Goods and Services Directive; Art. 1, Recast Directive.

⁶⁶ Art. 1, Racial Equality Directive.

⁶⁷ Art. 1, Framework Employment Equality Directive.

⁶⁸ *Tyrolean Airways*, at para. 29.

⁶⁹ Art. 21(2) of the Charter prohibits discrimination on the basis of nationality with certain reservations. This is the mirror provision of Article 18 TFEU.

faith, shared language, or cultural and traditional origins and backgrounds.⁷⁰ This conception of ethnicity also draws on ECRI's General Policy Recommendation no. 7 on national legislation to combat racism and racial discrimination.⁷¹ Despite this apparent connection, Article 18 TFEU prohibits nationality-based discrimination 'within the scope of application of the Treaties, and without prejudice to any special provisions contained therein.' The scope of protection is that of freedom of movement in employment⁷² and in access to services,⁷³ and not as an autonomous ground of protection in non-discrimination law.⁷⁴ Nationality based discrimination is expressly exempted from the scope of the directives,⁷⁵ while language is not a protected ground under the directives (despite being protected in national laws).⁷⁶

The Opinion of AG Jääskinen and the recent judgment of the CJEU in *Las*,⁷⁷ a case which presents a problem of language discrimination, follow this traditional framework. The case concerns the validity of a Belgian law which requires employment contracts to be only in one of the official languages. The CJEU found that the single language requirement imposed a disproportionate limitation on freedom of movement. In his Opinion, AG Jääskinen even explained that there was no serious direct or indirect discrimination issue in the case to be considered. He noted that 'there is plainly no direct discrimination in this case, since the legislation at issue is applicable to employers and employees regardless of their nationality.'⁷⁸ As for indirect discrimination, he found that 'it is inherent in any requirement relating to knowledge or use of a language and may be justified for the same reasons as those relied on in relation to a language barrier.'⁷⁹ Interestingly, the only reference to the Charter was made by the intervening Greek Government, yet not on account of language discrimination, but in order to protect diversity (Article 22, Charter).⁸⁰ Thus, grounds such as nationality or language added by the Charter in a new formulation do not seem to have entered into autonomous existence in the case law so far.

The Charter and the Article 19 directives in the broader context of EU non-discrimination law

Sources of non-discrimination law beyond the Treaties, the Charter and the directives

In order to fully appreciate the differences in scope of the Charter and the directives, their intricate relations need to be explored further.

Firstly, it is common knowledge that there is more to European non-discrimination law than meets the eye with the Treaty provisions, the Article 19 directives and their national transposing legislation. The non-discrimination directives were enacted several decades ago by the Court developing the general principles of equal treatment and non-discrimination. This body of jurisprudence on general principles has drawn not only on several articles of the Treaties, but – most importantly – on the constitutional traditions common to the Member States. These general principles apply over and across very broad areas of EU law, way beyond the reach of the Article 19 directives. When applying the non-discrimination

⁷⁰ *Timishev v Russia*, nos. 55762/00 and 55974/00, 13 December 2005, at para. 55.

⁷¹ See *Timishev*, at para. 34.

⁷² See Art. 45 (2) TFEU and Case C-281/98, *Angonese v Cassa di Risparmio di Bolzano SpA*.

⁷³ Art. 61 TFEU.

⁷⁴ Bell, *The Principle of Equal Treatment*, at 613-614. On nationality discrimination in general, see Evelyn Ellis and Philippa Watson, *EU Anti-discrimination Law*, Oxford, 2nd ed, 2013, at 400-402.

⁷⁵ Art. 3(2) of the Racial Equality Directive and Art. 3(2) of the Framework Employment Equality Directive.

⁷⁶ See Thien Uyen Do, '2011: A Case Odyssey into 10 Years of Anti-Discrimination Law', (2011) *European Anti-discrimination Law Review* Volume 12, 11-20, at 15.

⁷⁷ Case C-202/11, *Las v PSA Antwerp*.

⁷⁸ *Las*, AG Opinion, at para. 39.

⁷⁹ *Ibid.*, at para. 39.

⁸⁰ *Ibid.*, at para. 56. This reference was in addition to Art. 165 TFEU and Art. 3(3)(4) TEU.



directives, and especially when reviewing national legislation transposing the directives, the CJEU relies on its jurisprudence on the general principle of non-discrimination and the principle of equal treatment. The Charter is a relatively recent instrument complementing and codifying these widely used primary sources of EU law, and has to coexist with the general principles that already exist in CJEU jurisprudence.

Secondly, the Charter of Fundamental Rights had a difficult start as a functioning legal instrument. The early years of the Charter were marred by its unclear legal status. This shortcoming was remedied by its inclusion with the Treaty of Lisbon among the founding instruments of the Union, having the 'same legal status as the Treaties' (Article 6(1), TFEU). Yet in practice even with its legal status clarified, questions surround the exact scope of the Charter, its impact on the application of EU law, its relationship to the European Convention on Human Rights, and – ultimately – on the protection it affords to individuals whose fundamental rights it means to protect.⁸¹ For instance, Article 51(1) limits the application of the Charter 'to the Member States *only when they are implementing Union law*' (emphasis added). In February 2013, the Grand Chamber of the Court interpreted this restriction to mean that '[s]ince the fundamental rights guaranteed by the Charter must therefore be complied with *where national legislation falls within the scope of European Union law*, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter' (emphasis added).⁸² As the 'scope of EU law' is arguably broader than the manner in which Member States 'implement Union law,' this recent judgment indicates that the Court is actively engaging with the questions surrounding the Charter's scope of application. Such developments have a unique resonance in the non-discrimination field.

To begin with, the scope of the Charter is closely tied to the Union's powers as defined in the Treaties (Article 51(2)). Charter rights which are based on treaty rights 'shall be exercised under the conditions and within the limits defined by those Treaties' (Article 52(2)). Thus, the Charter's fate is tied to the fate of the Treaties with many strings. In contrast, the scope of application of the Article 19 directives is much more limited. The Racial Equality Directive has by far the broadest application, covering not only employment but also social protection (including social security and healthcare), social advantages, education and access to and supply of goods and services (Article 3). The Framework Employment Equality Directive applies to employment discrimination (Article 3) on the ground of religion or belief, disability, age and sexual orientation, while the Goods and Services Directive extends protection against sex discrimination beyond the traditional spheres of employment, but not as far as in the Racial Equality Directive.

Furthermore, it is commonly understood that the non-discrimination directives are different from other EU measures in one crucial aspect: addressing discrimination based on personal characteristics in individual cases – and independently of the objectives of market integration – is the very essence ('autonomous objective') of the directives.⁸³ Thus, depending on how it is applied in the future, the Charter may reinforce the autonomous objective of the non-discrimination directives. The Charter's relative weakness in the non-discrimination field, however, may result in more technical decisions which are not that sensitive to human rights considerations.

The relationship of written and unwritten sources on equality and non-discrimination

In the European non-discrimination matrix, questions about the relationship of treaty provisions, general principles, the constitutional traditions of the Member States and directive provisions are unavoidable.

⁸¹ Recently see Lenaerts, *Exploring the Limits of the EU Charter of Fundamental Rights*.

⁸² Case C-617/10, *Åklagaren v Hans Åkerberg Fransson* (Grand Chamber), at para 21.

⁸³ See Dagmar Schiek, Lisa Waddington and Mark Bell, eds. *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law*, Hart, 2007, at 3. Also Helen Meenan, 'Introduction', 3-37, in: Helen Meenan, ed., *Equality Law in an Enlarged European Union, Understanding the Article 13 Directives*, Cambridge, 2007, at 11.

The unwritten general principle of equality or non-discrimination derives from the principle of the rule of law, and has constitutional status.⁸⁴ According to Takis Tridimas the twin principles of equality and non-discrimination have a dual function: as a matter of public law, they protect the individual from European and national authorities, while as a matter of substantive law they are meant to facilitate the integration and the workings of the internal market.⁸⁵

The non-discrimination directives are traditionally viewed as complementary to treaty provisions, like the first equal pay directive was regarded as complementary to the old Article 119 EC, now Article 157 TFEU on equal pay even in the early periods of EU law.⁸⁶ Indeed, the preambles of all non-discrimination directives refer to Article 6 TEU and the general principles of EU law as well as the principle of equal treatment as enshrined in secondary law. In addition, as far as the more recent directives are concerned, Recital 4 of the Goods and Services Directive and Recital 5 of the Recast Directive refer explicitly to Articles 21 and 23 of the Charter of Fundamental Rights on non-discrimination. With the exception of the Recast Directive, the non-discrimination directives open with a recital referring to the foundational principles of the Union and to respect of fundamental rights protected by the European Convention and 'as they result from the constitutional traditions common to the Member States as general principles of community law.' At the same time, in the preamble of the Charter equality (next to human dignity, freedom and solidarity) is enlisted as a founding value of the Union.

With the circle of written references to equality as a principle and founding value thus completed, questions about the formal relationship of the various sources of EU non-discrimination law vis-à-vis each other are all the more important, as the various written instruments 'enshrining,' 'formalising' or 'giving effect' to the principle of equality and non-discrimination appear to have different scopes of application. When these written instruments and unwritten principles are interpreted with reference to each other, unexpected consequences may result which affect the very foundations of EU constitutional law.

The constitutional storm arising from non-discrimination law

As already mentioned, the CJEU in its more recent judgments has started using the various sources of EU non-discrimination law in new ways, triggering questions about the constitutional fundamentals of EU law. In *Test-Achats* and *Mangold*, the Court and the Attorneys General saw the relationship between the treaty provisions, the Charter provisions and the unwritten general principles somewhat differently.

In *Test-Achats* AG Kokott identified the issue as whether the challenged article of the Goods and Services Directive (an exemption from the requirement of gender equality in insurance) violated fundamental rights in EU law, as expressed in the Charter.⁸⁷ She referred to the provisions of the Charter as laying down specific prohibitions of discrimination previously developed by the Court of Justice.⁸⁸ In contrast, the CJEU involved the Charter in its analysis not as a prominent source of legal obligations, but because Recital 4 in the preamble of the Goods and Services Directive made express reference to it.⁸⁹ In the reading of the CJEU, the fate of the exemption in the Directive depended on whether it stood in the way of the coherent achievement of the Directive's intended objectives.⁹⁰ While ultimately leading to the invalidity

⁸⁴ Tridimas, *The General Principles of EU Law*, at 4-6.

⁸⁵ *Ibid.*, at 7.

⁸⁶ Philippa Watson, 'Equality Between Europe's Citizens: Where Does the Union Now Stand?', (2012) in *Fordham International Law Journal* Volume 35, 1426, at 1433.

⁸⁷ *Test-Achats*, AG Opinion, at para 4.

⁸⁸ *Ibid.*, esp. at paras. 28 and 49.

⁸⁹ *Test-Achats* at para. 17.

⁹⁰ *Test-Achats* at para. 21.

of the exemption, the principle of coherence enforced by the CJEU⁹¹ with reference to Recital 4 of the Directive was far less radical than the approach based on the Charter recommended by AG Kokott.

In another case of constitutional significance, *Mangold*, the Court defined the relationship of the Framework Employment Equality Directive and the general principles differently, and without reference to the Charter. According to *Mangold*, 'the sole purpose of the Directive is "to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation", the source of the actual principle underlying the prohibition of those forms of discrimination being found [...] in various international instruments and in the constitutional traditions common to the Member States.'⁹² The Court thereby identified a general principle of prohibition of age discrimination, and used it to invalidate a national rule contravening the new general principle before the expiration of the transposition deadline set in the Framework Employment Equality Directive. This approach raised harsh criticism in academia as well as among the Attorneys General not only on account of the newly acknowledged general principle of prohibition of discrimination on grounds of age, but also due to the potential horizontal direct effect it appeared to grant to directives. The question, however, ultimately became the following: if general principles transfer rights to individuals directly, what is the point of having the non-discrimination directives in the first place?⁹³

Reconstruction after the storm

The CJEU settled these questions in *Kücükdeveci*⁹⁴ to the effect of confirming an independent general principle of non-discrimination on the ground of age.⁹⁵ In this case the Court made a faint reference to the Article 21(1) of the Charter.⁹⁶ The Court also repeated that the Framework Employment Equality Directive 'merely gives expression to, but does not lay down, the principle of equal treatment in employment and occupation' (emphasis added),⁹⁷ adding that it is the task of the national court 'to provide, within the limits of its jurisdiction, the legal protection which individuals derive from European Union law and to ensure the full effectiveness of that law, disapplying if need be any provision of national legislation contrary to that principle.'⁹⁸

Thus, the CJEU essentially seems to have retreated to its earlier position on not affording horizontal direct effect to directives. It also appears to have returned to using the general principle as a means of judicial review,⁹⁹ without giving further thought to the role the Charter could perform in this process. Indeed, in *Mangold* and *Kücükdeveci* the CJEU remained somewhat ambivalent as to whether the general principle of non-discrimination had been violated because it found a violation of the Directive. As Robert Schütze notes: 'From a constitutional perspective, the threshold for the violation of a general principle ought to be higher than that for a specific directive.'¹⁰⁰

⁹¹ On the principle of coherence and its parallel German constitutional jurisprudence, see Felipe Temming, 'Case note - Judgment of the European Court of Justice (Grand Chamber) of 1 March 2010: ECJ finally paves the way for unisex premiums and benefits in insurance and related financial service contracts', (2012) *German Law Journal*, Volume 13, 105-123, at 111.

⁹² *Mangold*, at para. 74.

⁹³ Ellis and Watson, *EU Anti-discrimination Law*, at 128.

⁹⁴ Case C-555/07 *Kücükdeveci v Swedex* (Grand Chamber).

⁹⁵ *Ibid.*, at para. 21.

⁹⁶ *Ibid.*, at para. 22. See Kilpatrick, *The Court of Justice and Labour Law in 2010*, at 285 (Charter not a cornerstone).

⁹⁷ *Kücükdeveci*, at para. 50.

⁹⁸ *Ibid.*, at para 51.

⁹⁹ Ellis and Watson, *EU Anti-discrimination Law*, at 128-129. Also Kilpatrick, *The Court of Justice and Labour Law in 2010*, at 285 *et seq.*

¹⁰⁰ Robert Schütze, *European Constitutional Law*, Cambridge, 2012, at 337.

The search for the role of the Charter vis-à-vis the non-discrimination directives and the general principles is clearly not over yet. In a recent Opinion in the *Belov* case,¹⁰¹ AG Kokott brought the Charter back into the picture to find that ‘the prohibition of discrimination based on racial and ethnic origin is a general principle of EU law, which is enshrined in primary law in Article 21 of the Charter of Fundamental Rights and is merely fleshed out in Directive 2000/43 – just like, for example, the prohibition of discrimination based on age or sexual orientation in Directive 2000/78 and unlike, for instance, the entitlement to paid annual leave.’¹⁰² It is too early to tell what will follow from this observation as the CJEU found the *Belov* case inadmissible, and therefore did not enter discussion of the merits.

It is possible that the Court will repeat its formulation on general principles and directives from *Küçükdeveci* with the addition of a reference to the Charter. One possible development in this respect that is feared by commentators and Attorneys General alike¹⁰³ is the gradual development of a separate general principle for every protected ground. Such an approach would contribute to further fragmentation, leading to different justification tests (or different standards of review) across the various grounds.¹⁰⁴

The impact of the Charter in non-discrimination cases beyond the Article 19 directives

There are a number of recent and pending cases before the CJEU which have a non-discrimination component yet which are governed not by the Article 19 directives but by another branch of European law. It is worth reviewing references to the Charter in these cases to see whether the patterns traced in cases under the non-discrimination directives are also prevalent in adjacent fields of EU law.

As already mentioned, in her Opinion in *Belov*, AG Kokott emphasised the applicability of the principle of equal treatment across the board and especially in unequal relations similar to employment where ‘legal relationships are characterised by a structural imbalance between the parties.’¹⁰⁵ The case concerned discrimination against Roma consumers in their access to electricity. Although the Racial Equality Directive arguably applies to electricity as a service (Article 3(1)(h)), AG Kokott used her Opinion to potentially infuse the application of directives on the energy sector with the general principle of non-discrimination.¹⁰⁶ Her comprehensive approach, relying on the Charter and general principles, seems to run counter to some recent judgments and AG opinions where the CJEU and the Attorneys General appeared to resort to more traditional (and somewhat more fragmented) legal solutions.

Among other examples, the *Kenny* case¹⁰⁷ stands out as an illustration of a more conservative approach towards the Charter. The case involved a challenge against a difference in pay between men and women performing similar tasks on different types of contracts in the Irish police force (Garda), a situation which resulted from collective bargaining in connection with a major restructuring of the police force. The case was decided as a pay equality dispute under Article 157 TFEU and Directive 75/117 alone, with a major issue being whether this difference could be preserved as a measure to maintain good industrial relations. While AG Villalón made a general reference to Title III of the Charter in connection with the prohibition of discrimination on grounds of sex with regard to pay,¹⁰⁸ the Court did not mention the Charter, even in

¹⁰¹ Case C-394/11, *Belov v Elektro Bulgaria*.

¹⁰² *Belov*, AG Opinion, at para. 80.

¹⁰³ See AG Mazák in Case C-411/05, *Palacios de la Villa v Cortefiel Servicios*, AG Opinion, at para. 79 et seq., esp. para 93.

¹⁰⁴ Kilpatrick, *The Court of Justice and Labour Law in 2010*, at 291 et seq.

¹⁰⁵ *Belov*, AG Opinion at para. 81.

¹⁰⁶ Directive 2006/32/EC of the European Parliament and of the Council of 5 April 2006 on energy end-use efficiency and energy services and repealing Council Directive 93/76/EEC and Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC.

¹⁰⁷ Case C-427/11, *Kenny v Minister for Justice*.

¹⁰⁸ *Kenny*, AG Opinion at para. 64.

the part where it noted the AG's opinion with approval. Instead, the CJEU plainly confirmed that 'in line with collective agreements, the interests of good industrial relations are subject to the observance of the principle of nondiscrimination between male and female workers in terms of pay.'¹⁰⁹

In another pay equality case, *Soukupová*,¹¹⁰ questions of (age and) gender discrimination in early retirement in the agriculture sector were addressed by AG Jääskinen essentially under Article 157 EC and the general principles, but without reference to the Charter. The case is truly complex and crosscutting, as it involves an interplay of the Union's early retirement scheme in farming¹¹¹ (as transposed by national law) and domestic rules on old age pensions. An unfortunate coincidence of these rules left a female farmer in a significantly worse situation than her male counterpart of the same age. In his Opinion, AG Jääskinen emphasised that in implementing and applying EU law, Member States cannot breach the fundamental principles of EU law, among them the principle of equal treatment and the prohibition of sex discrimination.¹¹²

It was against this background that AG Sharpston suggested formulating a bright line rule about the role of the Charter in the non-discrimination field in a side note.¹¹³ The case involves a preliminary reference from the commissioner of the Greek Court of Auditors (*Elegktiko Sinedrio*) in the case of a ministry employee employed on a fixed term private-law contract, who as such was not entitled to paid leave for trade union business under Greek law, although public sector employees on permanent private-law contracts were entitled to paid trade union leave. AG Sharpston assessed the differences between fixed term and permanent employees in light of Directive 1999/70 on the framework agreement on fixed-term work,¹¹⁴ adopted on the basis of Article 139(2) EC. Clause 4(1) of the framework agreement provides that '[i]n respect of employment conditions, fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers solely because they have a fixed-term contract or relation unless different treatment is justified on objective grounds.' She argued that with regard to leave on trade union business some differences may be justified taking into account the specificities of the case. Her Opinion (similarly to what was seen from the CJEU in *Kenny*, and from AG Jääskinen in *Soukupová*) keeps to the traditional framework outlined by the directly relevant primary and secondary law on the merits, and does not go into broader fundamental rights considerations.

The reference in *Elegktiko Sinedrio* had a separate question about the permissibility of discrimination between trade union officials on fixed term contracts and on permanent contracts under the Charter. In a brief response towards the end of her opinion, AG Sharpston agreed with the Commission in finding – firstly – that 'there is no need to refer to the Charter where EU law is already explicit on the matter.'¹¹⁵ Secondly, she added that '[n]or, a fortiori, can the Charter provide grounds for justification of unequal treatment where such grounds would otherwise be absent.'¹¹⁶ Although the Court found the case inadmissible (as it did not regard the Greek Court of Auditors to be a 'court or tribunal' within the meaning of Article 267 TFEU), the opinion of AG Sharpston is significant as it signals a much more modest role for the Charter in non-discrimination cases than previously envisioned – if not frustration about the Charter.

¹⁰⁹ *Kenny* at para. 38.

¹¹⁰ Case C-401/11, *Soukupová v Ministerstvo zemědělství*.

¹¹¹ Council Regulation (EC) No 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF).

¹¹² *Soukupová*, AG Opinion at para. 51.

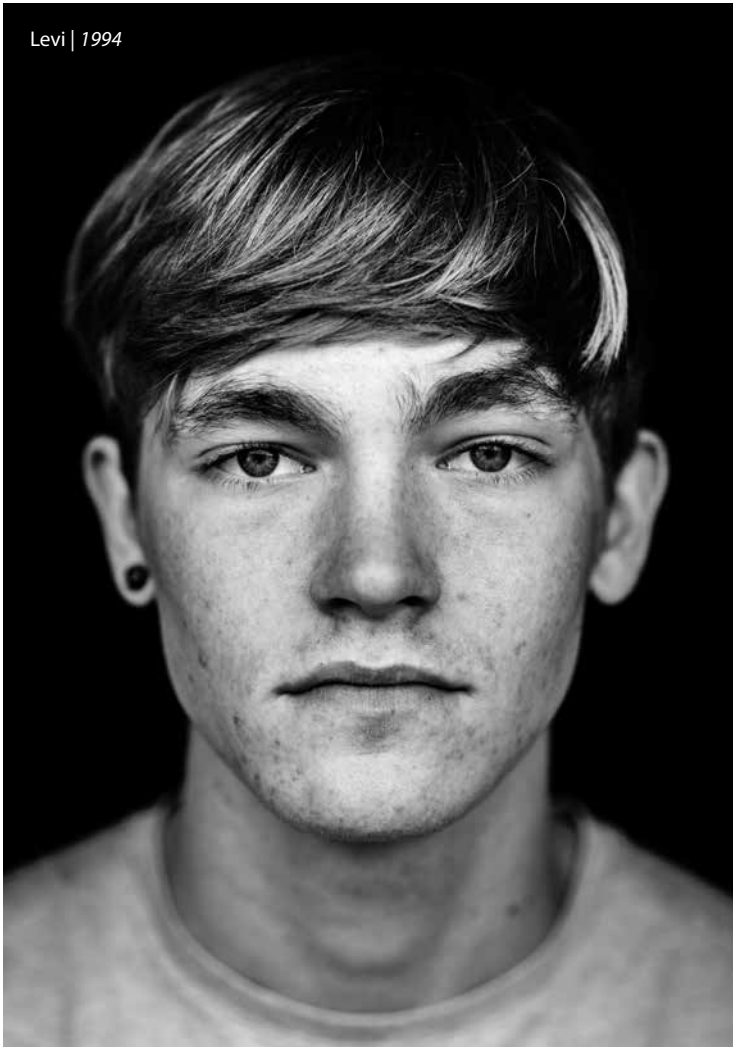
¹¹³ Case C-363/11, *Elegktiko Sinedrio v Ipourgeo Politismou kai Tourismou*.

¹¹⁴ Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.

¹¹⁵ *Elegktiko Sinedrio*, AG Opinion, at para. 80.

¹¹⁶ *Ibid.*

Levi | 1994



Paige | 1993



Jessica | 1986



This approach appears to suggest that the Charter cannot be used to depart from the ‘explicit’ terms of EU law. Note that on its face, this approach restricts the Charter’s scope more than foreseen in Articles 51(2) and 52(2). These articles intend to keep the Charter’s operation within the provisions of the Treaties, and not within ‘EU law’ as suggested by AG Sharpston. Arguably, AG Sharpston’s approach would essentially divest the Charter of any constitutional (i.e. Treaty) stature as its interpretation and application would need to conform to secondary European law, instead of requiring secondary European law to meet the Charter’s standards.

It is true that this conclusion was reached not as a result of the application of the Article 19 directives but on a more technical and specific terrain of non-discrimination, the application of a framework agreement to fixed-term work. Yet the dismissal of the Charter’s relevance appears to be symptomatic of ‘Charter fatigue’, which has gradually spread throughout the Court, the visible majority of Attorneys General and even the Commission, and is traceable in other zones of EU non-discrimination law as well.

The mood regarding the Charter is slightly less gloomy in the Court’s recent *Soukupová* judgment, a case concerning pay equality in early retirement in farming. In this case, the Court emphasised that Member States are not absolved from respecting the principle of non-discrimination and fundamental rights even in domains which have not yet been harmonised.¹¹⁷ The CJEU found that in implementing a regulation in the agricultural sector ‘the Member States are required pursuant to Article 51(1) of the Charter [...] to respect the principles of equal treatment and non-discrimination enshrined in Articles 20, 21(1) and 23 of that Charter.’¹¹⁸ In addition, the Court emphasised that treating elderly male and female farmers differently in national law ‘would be contrary to European Union law and the general principles of equal treatment and non-discrimination.’¹¹⁹ With some wishful thinking, this reference to the Charter as a set of general principles may be read as a signal that the Charter is turning into a foundation for a comprehensive equal protection framework in EU law.

Conclusion

In the already complex domain of EU non-discrimination law, the Charter of Fundamental Rights arrived on a crowded scene. Nonetheless, despite a discernable backlash, the Charter may still become a useful instrument for consolidating European non-discrimination law. From recent developments it appears that its fate depends on the interaction between the key players and stakeholders.

After the early years of initial enthusiasm both from the Court and the Attorneys General, the mood has become more reserved. This reluctance may be explained by the constitutional shock of *Test-Achats* and the uproar triggered by *Mangold* – two judgments in the non-discrimination field which have lasting legacies in EU constitutional law. In the last few months, the general principles have dominated non-discrimination case law, while the Charter seems to have silently disappeared from the scene for a while. Yet the Court’s recent reference to the Charter as a vessel for the general principles in *Soukupová* appears to go against this climate of reticence. This adds to the optimism regarding the Charter’s application voiced in reaction to the *Åkerberg Fransson* judgment of the Grand Chamber.

Nonetheless, it is not an exaggeration to say that currently curiosity about the Charter is felt more in national courts’ references for preliminary rulings, while the Court and the Attorneys General appear to prefer more conservative approaches in non-discrimination cases. This is not such a surprising development, considering that a few years ago national courts were hearing from the Court about their intensifying review obligations stemming from EU law. This period of more careful reflection in the CJEU will not

¹¹⁷ *Soukupová*, at para. 26.

¹¹⁸ *Ibid.*, at para. 28.

¹¹⁹ *Ibid.*, at para. 31.

necessarily lead to silence on the Charter in anti-discrimination issues since the transposed directives have started to come alive before national equality bodies and national courts. The supervision of these national developments under the directives, and especially their interaction with other domains of EU law, will require the CJEU's attention over the coming years. As many of these national cases are also expected to also reach the ECtHR, the CJEU may need to divide its attention if it wishes to develop EU non-discrimination law in a coherent and principled manner.

In this respect, the much feared fragmentation and lack of clarity or lack of guidance is not simply a matter of scholarly prudence. It is also a question that speaks to foundational issues of the architecture of EU anti-discrimination law as a whole. It has been said many times that in comparison with the Racial Equality Directive and the Framework Employment Equality Directive of 2000, the Commission's more recent proposals (such as the horizontal directive or the effort to protect pregnant workers) have met considerable political resistance from the Member States and are not likely to be adopted in the near future. As a consequence, stakeholders and institutions will have to survive using those instruments which are already in place if they wish to preserve the existing level of protection in the face of challenges mounted by the economic crisis across the Union.

With fragmentation, one has to take account not only of the uneven development of jurisprudence on the various protected grounds, but also of case law emerging beyond the Article 19 directives. It might be of some reassurance that in the latter cases, the Court appears to follow classic concepts of EU law. Still, it is important to recall that the distinctiveness of European non-discrimination law depends on its autonomous objective and deep intellectual connections with the protection of human rights. The Charter may be a logical instrument to use in order to re-consolidate a rich but complex jurisprudence in a framework which is sensitive to human rights considerations.

European Legal Policy Update¹²⁰

European Parliament adopts a resolution on the situation of fundamental rights in the European Union

On 12 December 2012, the European Parliament adopted a resolution on the situation of fundamental rights in the European Union by 308 votes to 229, with 48 abstentions. The text analysed the global fundamental rights situation in the EU from 2010 to 2011.

Internet source:

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0500+0+DOC+XML+V0//EN>

European Ombudsman criticises Commission's refusal to disclose documents on UK opt-out from Charter of Fundamental Rights

Following the European Commission's refusal to grant an NGO access to documents related to the UK opt-out from the Charter of Fundamental Rights, the European Ombudsman issued a critical decision where he underlined the fundamental right of public access to documents. The Ombudsman concluded that the Commission had breached the Charter of Fundamental Rights by wrongfully refusing to give public access to documents concerning the UK opt-out without putting forward any valid reasons for doing so.

Internet source:

<http://www.ombudsman.europa.eu/en/cases/decision.faces/en/12439/html.bookmark>

¹²⁰ This section provides as far as possible an overview of the main latest developments in European anti-discrimination law and policy reflecting the state of affairs from 15 June 2012 to 15 January 2013.

Court of Justice of the European Union Case Law Update¹²¹

References for preliminary rulings – Advocate General Opinions

Case C-394/11 Opinion of Advocate General Kokott in the case of Valeri Hariev Belov, delivered on 20 September 2012

A case has been referred to the Court of Justice of the European Union (CJEU) by the Bulgarian Commission for Protection against Discrimination (*Komisia za zashtita ot diskriminatsia*, ‘the equality body’). The case concerns a difference in the height at which electricity meters are attached to electricity poles in Roma-dominated districts compared to all other districts of the city. A number of questions relating to the interpretation of Directive 2000/43/EC have been referred to the Court.¹²²

The Advocate General first examined whether the equality body was entitled to refer a question for a preliminary ruling. In the light of various considerations, such as whether the body was established by law, its permanent status, its independence and its compulsory jurisdiction, the AG concluded that the Bulgarian Commission for Protection against Discrimination should be regarded in the present case as a court or tribunal which may refer questions for preliminary rulings to the CJEU.

The AG then turned to the question of whether electricity supply, as well as the provision of electricity meters, falls within the scope of access to and supply of goods and services within the meaning of Article 3 of Directive 2000/43/EC. The AG observed that the practical effectiveness of the principle of non-discrimination does not allow for a narrow interpretation of matters listed in Directive 2000/43/EC. She therefore concluded that electricity supply, including the conditions under which that electricity supply is provided and the provision of electricity meters, is covered.

On the equality body’s questions of whether for less favourable treatment to qualify as direct or indirect discrimination, it is absolutely essential for the treatment to be more unfavourable and for it to infringe, directly or indirectly, rights or interests explicitly defined in law, or whether discrimination is to be understood in the wider sense as any form of being placed in a particular unfavourable/disadvantageous situation, Ms Kokott recalled that neither form of discrimination explicitly or implicitly requires an infringement of rights or interests defined in law as this would not be ‘compatible with the high level of protection desired by the Union legislature’.¹²³ Therefore, whether or not consumers are entitled or have a right to access free electricity meters is irrelevant and national rules which provide for the infringement of rights or interests defined in law are incompatible with EU law. In order to shift the burden of proof in discrimination cases, it is sufficient for the alleged victim to establish facts which substantiate a *prima facie* case of discrimination. The AG gave further guidance to the equality body on how to assess circumstances from which a case of discrimination may be presumed. In her view, there was no direct discrimination since there was no evidence that the electricity meters were attached to poles at an inaccessible height of seven metres based on ethnic origin. However, the two districts concerned are inhabited predominantly by Roma and therefore it must be assumed that there was indirect discrimination. The AG continued with the justification test and recognised as a legitimate aim the prevention of future fraud and illegal interference so as to ensure the quality of energy supply in the interest of all consumers. However, the

¹²¹ This section provides as far as possible an overview of the main latest developments in European anti-discrimination law and policy reflecting the state of affairs from 15 June 2012 to 15 January 2013.

¹²² See *European Anti-discrimination Law Review* (EADLR), issue 14, p. 37.

¹²³ Para. 72.

measure contributes to a legitimate aim only if there are no other equally suitable measures to achieve that aim, at a financially reasonable cost, which would have a less detrimental effect on the population, and if it does not produce undue adverse effects on the inhabitants of the districts concerned.

Joined Cases C-335/11 and C-337/11 Opinion of Advocate General Kokott in the joined cases HK Danmark, acting on behalf of Jette Ring v Dansk Almennyttigt Boligselskab DAB and HK Danmark, acting on behalf of Lone Skouboe Werge v Pro Display A/S in liquidation delivered on 6 December 2012

In both cases, the questions referred to the CJEU concern the material scope of Directive 2000/78/EC with regard to the concepts of disability and reasonable accommodation.

Both Ms Ring and Ms Skouboe Werge had been on sick leave for prolonged periods due to back problems and a whiplash injury respectively. As they were absent from work for a total of 120 days during a period of 12 consecutive months, they were both dismissed with a shortened notice period pursuant to the Danish Act on Employees.

Firstly, the AG examined the concept of disability and the distinction between disability and illness. Recalling the *Chacón Navas* case, she observed that Directive 2000/78/EC does not apply to illness. However, it cannot be excluded that permanent impairment resulting from a medically diagnosed incurable illness or a medically diagnosed temporary illness is covered by the concept of disability within the meaning of Directive 2000/78/EC. In addition, a permanent reduction in functional capacity which does not entail a need for special aid or the like but necessitates part-time employment may be regarded as disability.

The AG then continued with the question of whether a reduction in working hours can be considered as reasonable accommodation for the purposes of Article 5 of Directive 2000/78/EC. 'Reasonable accommodation' covers material arrangements as well as organisational arrangements, including part time work. It is for the national court to assess whether a reduction of working hours does not create a disproportionate burden on the employer.

Finally, EU anti-discrimination law precludes national rules allowing the dismissal with a shortened notice period of employees who have been absent from work due to illness when it is linked to disability. Such a disadvantage may, however, be objectively justified, pursuant to EU law, as long as the absences were not caused by the employer's failure to provide reasonable accommodation.

References for preliminary rulings – Judgments

*Case C-141/11, Torsten Hörnfeldt v Posten Meddelande AB, Judgment of 5 July 2012*¹²⁴
OJ C 152, 21.5.2011.

Mr Hörnfeldt's employment contract was terminated on the last day of the month in which he reached the age of 67 pursuant to the Swedish Law on employment protection. He brought a legal action seeking annulment of the termination alleging discrimination based on age. In order to carry out the justification test on this difference in treatment, the referring court asked the CJEU whether this national provision was legitimate when there was no information or clear evidence to establish the purpose of the rule and whether it went beyond what is appropriate and necessary to achieve the aim pursued, the automatic termination taking no account of factors such as an individual's pension entitlement. In the absence of concrete indications of the aim pursued by the Law, the Court examined the general context of the measure in question. Preparatory documents mentioned a number of objectives, including among others,

¹²⁴ See *European Anti-discrimination Law Review (EADLR)*, issue 13, p. 35.

‘to increase the amount of the future retirement pension by allowing the worker to work after the age of 65 and to counteract the shortage of labour which would result from large numbers of forthcoming retirements.’¹²⁵ The Equality Ombudsman also mentioned that the 67-year rule aimed to ensure that younger workers could access the labour market. In the light of these observations, the Court believed the measure to be objectively and reasonably justified. With regard to the proportionality test, the Court concluded that the provision was appropriate and necessary to achieve the aims pursued. In particular, it highlighted the unconditional right to work until 67 and the fact that parties could maintain employment past that age. It also stressed that a replacement income, in the form of a retirement pension and supplementary payments in the event of an inadequate earnings-related pension, was possible.

Case C-286/12, European Commission v Hungary, Judgment of 6 November 2012
OJ C 217, 21.7.2012.

The European Commission had initiated an action for infringement against Hungary for adopting a national scheme requiring the compulsory retirement of judges, prosecutors and notaries on reaching the age of 62. The age limit was abruptly lowered from 70 to 62 with the result that those who had turned 62 before 1 January 2012 were dismissed as of 30 June 2012, and those who reached 62 in 2012 had to automatically cease their functions as of 31 December 2012. The Hungarian Government argued that this measure aimed at redressing positive discrimination and striking a balance within general labour legislation. Although the Commission acknowledged that Member States are free to set their own rules on retirement age, it alleged that the measure constituted discrimination between judges, prosecutors and notaries who have reached the age-limit and those who may continue to work. The CJEU upheld the Commission’s reasoning and found direct discrimination. As far as the justification test was concerned, the measures challenged did not meet the proportionality test with regard to the objectives pursued. Moreover, the measures abruptly and significantly reduced the age-limit for compulsory retirement, without introducing transitional measures.

Joined cases C-124/11, C-125/11 and C-143/11, Bundesrepublik Deutschland v Karen Dittrich, Bundesrepublik Deutschland v Robert Klinke and Jörg-Detlef Müller v Bundesrepublik Deutschland, Judgment of 6 December 2012

Not yet reported in the Official Journal.

A dispute arose between federal public servants and the Federal Republic of Germany (*Bundesrepublik Deutschland*) concerning the reimbursement of medical expenses of their civil partners and assistance granted in the event of illness. This assistance was refused based on the fact that civil partners are not eligible as they are not family members. The question referred to the CJEU sought to establish whether the assistance at issue constituted ‘pay’ for the purposes of Directive 2000/78/EC or a benefit paid by the general State social security or social protection schemes, which are excluded from the scope of the Directive.

The Court first recalled that the concept of pay must be read broadly as it covers ‘any consideration whether in cash or in kind, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of his or her employment from his or her employer, and irrespective of whether it is received under a contract of employment by virtue of legislative provisions or on a voluntary basis’. Consequently, a financial benefit such as the assistance granted to public servants in the event of illness, under which a large part of the eligible health care expenses incurred by the public servant or by certain members of his or her family are covered, must be considered as ‘pay’ and in the present cases was granted by reason of an employment relationship. According to the Court, the link between such

¹²⁵ Para. 25.

assistance and the employment relationship is clear from the fact that a public servant who is on unpaid leave cannot benefit from that assistance under certain circumstances, relating to the duration of unpaid leave in particular. The question referred to the Court dealt only with the concept of pay under Directive 2000/78/EC and not whether the refusal to take into account civil partners constituted discrimination.

Case C-152/11, Johann Odar v Baxter Deutschland GmbH, Judgment of 6 December 2012
OJ C 204, 9.7.2011.

The dispute arose when Dr Odar, who is severely disabled, challenged the amount of compensation for termination of employment that he received when he resigned at the age of 59. He argued that the calculation of the compensation due to him under the Contingency Social Plan concluded by his employer and his works council discriminated against him on grounds of age and disability. He invoked the fact that the amount actually paid to him differed from the amount he would have received if he had been 54 years old, with the same length of service, on the date of termination of his employment.

In the first two questions referred to the CJEU for a preliminary ruling, the referring court asked whether rules which provide that 'different treatment on the ground of age may be lawful if, in the framework of an occupational social security scheme, the management and the works council have excluded from social plan benefits workers who are financially secure because they are entitled to a pension, after drawing unemployment benefit where applicable', are contrary to the prohibitions of discrimination on the grounds of age and disability contained in Directive 2000/78/EC. The Court rapidly found that these questions related to an abstract and purely hypothetical situation considering the circumstances of the case.

The third question concerned the validity of an occupational social security scheme under which compensation for workers older than 54 is calculated on the basis of the earliest possible date on which their pensions will begin, resulting in lower compensation than the standard method of calculation based on length of service. The Court accepted that this difference in treatment constituted discrimination on grounds of age and pursued with the justification test. In the light of the German Government's observations, the Court accepted as legitimate the aim of 'granting compensation for the future, protecting younger workers and facilitating their reintegration into employment, whilst taking account of the need to achieve a fair distribution of limited financial resources in a social plan'.¹²⁶ Furthermore, this measure aims at preventing persons who are not seeking new employment from claiming compensation on termination when they will receive an occupational old-age pension. Finally, the Court concluded that the provision does not appear to be manifestly unnecessary and inappropriate for attaining the legitimate employment policy objective pursued in Germany. It must also be observed that this was the result of an agreement negotiated between employees' and employers' representatives.

The fourth and last question concerned the validity of compensation calculated on the basis of the earliest possible date on which the pension will begin and whether an early retirement pension was payable on grounds of disability, unlike the standard formula which takes into account the length of service, with the result that the compensation paid is lower. The fact that the calculation is based on pensionable age indirectly discriminates against severely disabled workers who are eligible for a pension at 60 rather than 63 and who receive less compensation on termination of employment compared to non-disabled workers. The Court did not find that the measure satisfied the necessity test as severely disabled people generally face greater difficulties in finding employment, with even greater risks as they approach retirement age.

¹²⁶ Para. 42.



European Committee of Social Rights Update¹²⁷

Decision on the merits of Complaint No 62/2010, International Federation of Human Rights (FIDH) v Belgium

In a complaint brought to the European Committee of Social Rights on 30 February 2010, the International Federation of Human Rights (FIDH) challenged the lack of stopping places for Travellers and invoked problems stemming from the non-recognition of caravans as a dwelling, in particular in the Walloon Region. It pointed to the failure to adapt the rules on health, safety and living conditions in Flemish and federal legislation on tenancy agreements. Finally, it highlighted the unreasonable use of eviction procedures against Travellers and the lack of a global and coordinated policy to combat poverty and social exclusion of Travellers, among other issues. These allegations concerned Article 16 (the right of the family to social, legal and economic protection) and Article 30 (right to protection against poverty and social exclusion) of the Revised European Social Charter as well as the non-discrimination clause (Article E).

In the Committee's view, any place in which a family resides legally or illegally, whether a building or a movable piece of property such as a caravan and the site on which the caravan is installed, must be regarded as housing. In view of the number of sites for Travellers in Belgium, the Committee held that inadequate measures had been taken to ensure their right to housing. In addition, existing measures and policies were particularly limited in scope and did not sufficiently encourage an increase in the number of sites. It also concluded that Belgium had failed to take due account of the specific circumstances of Travellers when drawing up and implementing planning legislation and held that the evictions discriminated against them. Finally, the Committee recognised that to ensure the effective exercise of the right to protection against social exclusion, states must adopt an overall and coordinated approach. Although the Committee did not ignore the existing ad hoc measures Belgium had adopted, it pointed to the scarcity of suitable means and policies and the insufficient use of binding instruments. The sum of EUR 2,000 was awarded in respect of costs and expenses.

¹²⁷ This section provides as far as possible an overview of the main latest developments in European anti-discrimination law and policy reflecting the state of affairs from 15 June 2012 to 15 January 2013.

European Court of Human Rights Case Law Update¹²⁸

Dorđević v Croatia (Application No 41526/10), First Section Judgment of 24 July 2012

The dispute arose as the first applicant, a person divested of legal capacity due to his mental and physical retardation, and his mother as the second applicant, claimed that they suffered harassment at all times of the day, in particular on the way home from school and in the late afternoon and evening when pupils gathered in front of their flat. They cited repeated demeaning acts based on the first applicant's health and both applicants' Serbian origin, such as the other children repeatedly shouting obscenities and insults or spitting at the first applicant. Several police reports showed a number of complaints from the mother and requests for assistance. Medical reports confirmed that psychological and physical harassment against the first applicant had caused stress and that he had cigarette burns on both hands. Intervention of the competent social authorities, including the Ombudsman for Children and the Ombudswoman for Persons with Disabilities, had been sought to no avail and further incidents had occurred. In the absence of an appropriate response from the competent authorities, the applicants brought the case to the European Court of Human Rights (ECtHR), pointing to the Croatian State's failure to provide an effective remedy in the legal system against violent acts by children aged under 14 by reference to Article 3 of the European Convention on Human Rights (ECHR) on torture and inhuman or degrading treatment and Article 8 ECHR on the right to a private and family life. They also alleged that the acts of abuse and the response (or the lack thereof) of the competent authorities were discriminatory based on ethnic origin and disability, in breach of Article 14 ECHR.

The ECtHR held that 'the State authorities had a positive obligation to protect the first applicant from the violent behaviour of the children involved'.¹²⁹ The harassment of the first applicant, combined with the adverse impact on his physical and mental health, was deemed sufficiently serious to reach the level of severity required by Article 3. The Court also noted that the continuing harassment impacted on the mother's daily life and routine, which was in contravention with Article 8 ECHR on the right to private and family life. The Government claimed that the applicants had not exhausted domestic remedies before bringing the claim to the Court. The Court recalled that remedies at the national level must be effective and accessible to victims so as to offer a reasonable prospect of redress. In the present case, the Court remarked on the lack of adequate response by the competent authorities despite the fact that they were aware of the situation. Although criminal proceedings could not be initiated against the children because they were below fourteen years of age, the Government had failed to demonstrate that any further steps were taken following the police and medical reports that would lead to rapid and appropriate measures. With regard to the alleged violation of Article 14 ECHR on non-discrimination, the Court rejected the claim on the grounds that an effective remedy existed in the form of an action pursuant to the national anti-discrimination legislation and that the applicants failed to exhaust domestic remedies available. The Court ordered EUR 11,500 to be paid as compensation to the applicants for non-pecuniary damages, EUR 1,206 for the costs and expenses incurred in domestic proceedings and EUR 3,500 in those before the Court, less EUR 850 already received by way of legal aid from the Council of Europe.

¹²⁸ This section provides as far as possible an overview of the main latest developments in European anti-discrimination law and policy reflecting the state of affairs from 15 June 2012 to 15 January 2013.

¹²⁹ Para. 93.

Jehovas Zeugen in Österreich v Austria (Application No 27540/05), First Section Judgment of 25 September 2012

Jehovas Zeugen (Jehovah's Witnesses) is a religious community which wished to employ a couple who were both ministers belonging to their order and were Tagalog speaking citizens of the Philippines. The religious community complained that it had been discriminated against on the ground of religion as the employment of the couple was subject to the Employment of Aliens Act, which would not have applied had it been a recognised religious society. It also argued that the employment of foreigners was intended to cater to the needs of certain groups of believers. The ECtHR held that the refusal of the authorities to grant an exemption from the Employment of Aliens Act, in particular with regard to taxation of donations, constituted discrimination on the ground of religion. A sum of EUR 12,834.45 was awarded as compensation as requested by the plaintiff.

Sampani and Others v Greece (Application No 59608/09), First Section Judgment of 11 December 2012

The complaint was initiated by the Greek Helsinki Monitor, further to Greece's failure to adequately redress the situation following a first conviction by the ECtHR for the placement of Roma children in special classes.¹³⁰ The 12th Primary School in Aspropyrgos created on 10 September 2008 was intended to indiscriminately admit Roma and non-Roma pupils alike but had continued to be attended exclusively by Roma pupils, despite the education authorities' intentions and interventions by the Ombudsman. Although the Court recognised the difficult situation of Roma children in a number of EU Member States, it found that Greece had not taken into account the particular needs of Roma children as members of a disadvantaged group. Consequently, the Court concluded that the operation of the school between 2008 and 2010 had resulted in further discrimination against the Roma complainants and awarded EUR 1,000 to each applicant family as compensation for non-material damage.

Eweida and Others v the United Kingdom (Applications Nos 48420/10, 59842/10, 51671/10 and 36516/10), Fourth Section Judgment of 15 January 2013

Four practising Christian complainants alleged that national law failed to adequately protect their right to manifest their religion. Two complainants, Ms Eweida and Ms Chaplin, challenged the ban on their wearing of a cross visibly around their necks at work, whereas the two others, Ms Ladele and Mr McFarlane, complained about sanctions taken by their employers for their refusal to provide services to homosexuals. Ms Eweida and Ms Chaplin's employers, British Airways and the Royal Devon and Exeter NHS Foundation Trust, had both introduced a new open-necked uniform for women and specified that any accessory or clothing item that was impossible to cover could be worn at work provided that prior approval was granted. Ms Eweida and Ms Chaplin both started to wear their Christian cross openly and refused to abide by their employers' uniform policy. Ms Eweida also declined an offer of administrative work without customer contact, whereas Ms Chaplin, in order to avoid the risk of injury when handling patients, was moved to a non-nursing temporary position which later ceased to exist. Ms Ladele, a Christian employed by the London Borough of Islington that has an equality and diversity policy, refused to conclude same-sex civil partnerships on the basis that they are contrary to God's law. Although initial informal arrangements had been made with colleagues so that she did not have to conduct same-sex civil partnership ceremonies, the atmosphere in the office had deteriorated with some other colleagues feeling victimised. Similarly, Mr McFarlane showed some concerns about providing confidential sex therapy and relationship counselling services to same-sex couples as he sincerely believes that homosexuality is sinful. Ms Ladele and Mr McFarlane had both faced formal disciplinary proceedings and were dismissed.

¹³⁰ See ECtHR, *Sampanis and Others*, Judgment of 5 June 2008.

In Ms Eweida's case, the ECtHR held that the aims of projecting a certain corporate image and promoting recognition of its brand and staff were legitimate but observed that a fair balance was not struck. The first applicant's Christian cross was discreet and there was no evidence that the wearing of other religious symbols, previously authorised, had any negative impact on the employer's image. Therefore, the Court concluded that the national authorities failed to protect Ms Eweida's right to manifest her religion and ordered the payment of EUR 30,000 as compensation. As regards Ms Chaplin, the protection of health and safety should be given a greater weight than her right to manifest her religion in the present case. The Court therefore concluded that interference with her right was necessary in a democratic society, and more specifically, that hospital managers were best placed to take such decisions. In the cases of Ms Ladele and Mr McFarlane, the national courts had not failed to strike a fair balance between the conflicting interests at stake when they upheld the employers' decisions to bring disciplinary proceedings as they were pursuing a policy of non-discrimination against service-users.



News from the EU Member States, Croatia, the FYR of Macedonia, Iceland, Liechtenstein, Norway and Turkey¹³¹

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

¹³¹ This section provides as far as possible a selection of the main latest developments in European anti-discrimination law and policy reflecting the state of affairs from 15 June 2012 to 15 January 2013.

*Political developments***Anti-discrimination legislation reform – no levelling up to be expected**

On 21 November 2012, the Council of Ministers decided not to further proceed with the legislative proposal brought by the Minister of Labour, Social Affairs and Consumer Protection on 30 October and aiming to enhance protection against discrimination. The bill intended to extend protection for religion and belief, age and sexual orientation to the area of access to goods and services. Criticisms against the bill arose from, among others, the Council of Austrian Bishops (Österreichische Bischofskonferenz), officially on the grounds that freedom of contract was endangered.

Internet source:

http://www.parlament.gv.at/PAKT/VHG/XXIV/ME/ME_00407/fname_267210.pdf

*Case law***Legal standing before criminal court under threat**

Criminal proceedings against the president of the umbrella organisation Litigation Association of NGOs against Discrimination (*Klagsverband zur Durchsetzung der Rechte von Diskriminierungsopfern*) were opened on 6 March 2012 for 'unauthorised professional representation of parties without being a lawyer' in court. The claim was brought by the Chamber of Lawyers and the defendant may be ordered to pay up to EUR 16,000 in penalties, an amount that corresponds to the membership fee imposed on organisations offering legal representation in court.¹³² In practice recourse to a qualified lawyer, acting on behalf of the umbrella organisation, has always been made. At the time of writing, the case was still pending and the outcome was uncertain.

Newly established public services may disregard disability access if located in ancient building

A man using an electric wheelchair wished to access the premises of a public service providing assistance to citizens which had been recently installed on a medieval site. The plaintiff had to send somebody inside to ask for assistance as neither the main front door nor the bell were accessible to wheelchair users. A staff member then accompanied him through a paved courtyard to another entrance reserved for staff only. Following an unsuccessful conciliation, the plaintiff brought a legal action seeking the payment of EUR 720 as compensation for non-pecuniary damage caused for discrimination based on disability. Both the courts of first and last instance dismissed the claim on the ground that the Federal Disability Equality Act only refers to the building of new barriers to access to goods and services. In other words, it was not necessary to adapt ancient buildings, as the law, read literally, merely prohibits the erection of new obstacles.¹³³

¹³² The Vienna Prosecutor's Office, 15th District, MBA 15- S47065/11.

¹³³ Viennese Civil Provincial Court No 36 R 96/12b; *M.L. v Austria*.

Legislative developments

Equality body becomes a centralised institution

The Belgian Centre for Equal Opportunities and Opposition to Racism (the equality body), created by the Federal Act of 15 February 1993, did not originally cover the Belgian federalised entities, which are also competent in the area of anti-discrimination. Consequently, the equality body did not have the power to implement and monitor anti-discrimination provisions adopted by the Regions and Communities. The absence of equality bodies for these entities meant that Belgium did not fully comply with Article 13 of Directive 2000/43/EC. In 2009, two protocols for collaboration were signed to allow the equality body to exercise its competences in the Walloon Region and the French-speaking Community (called the Wallonia-Brussels Federation), except for the right to bring legal action. On 20 July 2012, an agreement concluded between the Federal Council of Ministers and the governments of the three language communities (the Flemish Community, Wallonia-Brussels Federation and German-speaking Community) and the three regions (the Flemish Region, Walloon Region and Brussels-Capital Region) extended the powers of the Centre for Equal Opportunities and Opposition to Racism to cover the decentralised entities with regard to anti-discrimination legislation. The Inter-Federal Centre will assume its new functions on 30 July 2013.

Case law

Administrative penalties imposed on Muslim women wearing a *niqab* are valid

In Wallonia, several cases of women wearing a long veil totally covering their bodies and most of their faces in public spaces were reported to the local authorities, based on feelings of insecurity among the local population. This was before the entry into force of the Federal Act prohibiting the wearing of the *burqa* and the *niqab* in public areas. As the authorities could not rely on the existing local police regulations which prohibited the wearing of a mask or the use of a stratagem hiding an individual's identity in public spaces, a new provision was adopted in order to clearly prohibit the wearing of any clothing such as hoods or headgear preventing an individual's identification by the police.¹³⁴



Five Muslim women brought a claim before the Local Criminal Court of Verviers after they were ordered to pay administrative penalties, alleging that the police regulations contravened their religious freedom and right not to be discriminated against. On 10 September 2012, the Court held that sartorial freedom was not absolute.¹³⁵ Because the wearing of the veil was a personal choice not prescribed by religion, the judge considered that freedom of religion did not apply in the present case. In addition, the requirement to show the face for the purposes of identification is generally applied to all, hence is not discriminatory and meets the necessity test in a democratic society. The Court concluded that the penalties imposed were valid but reduced the fines to EUR 25 each.

¹³⁴ The Council of State (the supreme administrative court) rejected a Muslim woman's action for annulment holding that the new provision simply specifies the general prohibition without modifying the scope of the regulations. See Council of State, Decision No 213.849.

¹³⁵ Local Criminal Court (*Tribunal de Police*) of Verviers, Decision of 10 September 2012.



Political development

Bill to abolish anti-discrimination legislation and the equality body

Opposition MPs, who were formerly members of the xenophobic 'Ataka' party, introduced a bill to repeal the Protection against Discrimination Act and to abolish the Protection against Discrimination Commission. They stated that their intention was to close down the equality body, alleging that it had undermined the work of two iconic national writers.¹³⁶ Criticisms also concerned the supposedly waste of public funds, the repression of political opponents and discrimination against Bulgarian citizens in their own state. Finally they claimed that there was no need for specific anti-discrimination legislation since the Constitution and other laws sufficiently combat discrimination. The bill was unsuccessful and dismissed by Parliament.

Case law

Minister for Labour and Social Policy held liable for discrimination against biological parents of children with disabilities

The Supreme Administrative Court upheld a decision by the equality body¹³⁷ finding the Minister of Labour and Social Policy liable for failure to change a law which discriminated against the biological parents of children with permanent disabilities.¹³⁸ Under the impugned law, only foster parents could receive a salary in return for caring for children with permanent disabilities. Natural parents were not entitled to such payments and consequently time spent taking care of their children could not count towards the calculation of their pension. The equality body first ruled that natural parents, similarly to foster parents, must give up their professional activities to become care providers, but only the former remained unpaid. The Minister of Labour and Social Policy was ordered to amend the relevant law and the Council of Ministers was encouraged to table these amendments in Parliament. Before the Supreme Court, the Minister argued that the equality body had no competence to order amendments, that no discrimination had been established, and that no account had been taken of various social measures specifically targeted at children with disabilities. Because natural parents had to choose between providing care and earning a livelihood, the Court found indirect discrimination based on the breach of dignity.



¹³⁶ The works of Botev and Vazov, dating from the early 20th century and taught in schools, were found to contain anti-Turkish language.

¹³⁷ Protection against Discrimination Commission, Decision No 51 of 17 March 2011.

¹³⁸ Supreme Administrative Court, Decision No 11111 in Case No 5665/2011 of 30 August 2012.

Croatia

Legislative developments

New law on Ombudsman

The new Act on the Ombudsman entered into force on 9 July 2012 following a fast-track procedure.¹³⁹ The institution of the Ombudsman was established in 1992 and it became the specialised body for the promotion of equal treatment in 2010 pursuant to the Anti-discrimination Act.

The new law gives the Ombudsman a more pro-active role in the promotion and protection of human rights as it details proceedings which may be initiated *ex officio* or on the basis of a complaint. The Ombudsman also has now the authority to investigate at any time and place where a victim whose rights are at stake is located. An advisory board has been established with the purpose of establishing strategic plans to promote human rights and ensure continuous cooperation between the Ombudsman, civil society, academics and the media.

Internet source:

<http://www.ombudsman.hr/hr/propisi/110-zakon-o-pukom-pravobranitelju.html>

Cyprus

Case law

Equality body raises concerns regarding the administration of special units for children with disabilities



Parents of three autistic children attending a school's special unit complained to the equality body after the Ministry of Education decided to transfer a fourth child to the unit without first consulting the local Committee for Special Training and Education. The parents alleged that the Ministry failed: to provide additional equipment and staff to the unit necessitated by the transfer; to adequately investigate a complaint by parents against their children's teacher for physical and verbal abuse; to provide adequate training and information to other staff members to raise awareness and enhance their understanding of the children's special needs; and to examine the case in an objective and impartial manner. After this complaint, the transfer was cancelled. The child was supposed to return to his previous school, but his parents refused. The Ministry eventually allowed the child to remain and several measures were taken to accommodate his needs. The teacher accused of abuse was replaced and criminal proceedings were initiated by the parents against him.

Pursuant to domestic law transposing EU anti-discrimination legislation, the equality body has the right to intervene when the principle of equal treatment of persons with disabilities has been violated. The Law on Persons with Disabilities provides for the right to independent living, integration into society and equal participation in economic and social life, including access to integrated education in accordance with the individual's needs. The Law on the Training and Education of Children with Special Needs provides that children must be given equal access to education, career guidance and rehabilitation and enabled to develop their skills to the highest possible degree. The equality body noted that the system lacked effective

¹³⁹ Act on the Ombudsman of 29 June 2012, entering into force on 9 July 2012, Official Gazette 76/2012.

mechanisms in the event of abuse, in particular as children were not able to report harmful behaviour.¹⁴⁰ In addition, the equality body observed that the Ministry must ensure that the procedure for enrolling children with disabilities is followed so that the child's needs are taken into account in the final decision. In the equality body's view, the Ministry had failed to properly handle the case, revealing gaps in the monitoring, coordination and planning of action. The report recommended that the framework of special education be assessed and reviewed in order to avoid inflexible and time consuming procedures. It also encouraged continual training of teachers, including on how to identify signs of abuse.

Internet source:

<http://www.no-discrimination.ombudsman.gov.cy/ektheseis-aki>

Denial of the right to practise religion in prison is not justified

A group of Greek Pontiac detainees asked the central prison authorities if they could visit the prison church on the day of a Pontiac religious celebration. After the authorities rejected their request, they injured themselves and a complaint was filed to the Ombudsman. A few months later, another dispute arose as an Evangelical priest was denied permission to visit a group of detainees who expressed their wish to meet with a representative of the Evangelical church, on the grounds that such a visit amounted to proselytism. As a matter of fact, the detainees had not declared themselves as Evangelical when they were admitted to jail but as Catholic and Orthodox.



The prison authorities justified their refusal based on the assumption that detainees are inconsistent in their wishes as a result of their psychological condition. Consequently only visits by representatives of the religion or belief declared by detainees on admission are permitted. Furthermore, third country detainees use any means to delay their possible expulsion to their home country. They seek to meet with the Evangelical church as no one else gives them support and assistance, and they are therefore more affected by proselytism.¹⁴¹

Both complaints were addressed by the Ombudsman in one single report.¹⁴² The right to freedom of thought, religion and conscience is a fundamental right guaranteed by the European Convention on Human Rights, the Charter of Fundamental Rights, the Cypriot Constitution and the Prison Laws and Regulations, which recognise the right of prisoners to fulfil their religious, spiritual and moral needs as far as possible, including the right to practise a religion and to communicate with a representative of their church or faith. In addition, requests for visits by recognised representatives cannot be denied under UN rules.

The Ombudsman observed that the request to visit the prison's church did not need any special arrangements to be made and therefore the refusal was unjustified. With regard to the visit by a representative of the Evangelical church, the Ombudsman stressed that it was not explicitly prohibited as visits of representatives by religions or beliefs declared by detainees were possible, whereas proselytism was not clearly defined. Allegations relating to the volatility of prisoners' wishes and the greater risk of being affected by proselytism were rejected as not justified and excluding a genuine spiritual quest. The Ombudsman concluded that such views were not acceptable in a modern, democratic and tolerant society where all citizens, including detainees, are equal before the law. She therefore recommended allowing visits by any church representative and that the prison regulations should be amended accordingly.

¹⁴⁰ Equality Body Decision, File No AKI 50/2011, 27 July 2012.

¹⁴¹ Proselytism has been repeatedly interpreted and defined by the ECtHR, especially in *Kokkinakis v Greece*, in a manner that does *not* include: public expressions of faith, mere persuasion by one person of another to change his/her religion, information even by way of distributing leaflets or advertising material, missions, meetings, lectures etc. Therefore any restriction or prohibition of the said activities amounts to an unjustified restriction of religious freedom that denies individuals the right to seek information on different religions and to change or not their religious beliefs.

¹⁴² Ombudsman's Report, Ref. A/P 2430/10, 2445/10, 2446/10, 2447/10, 2467/10, 1728/11, of 9 April 2012.

Internet source:

http://www.ombudsman.gov.cy/Ombudsman/ombudsman.nsf/presentationsArchive_gr/presentation-sArchive_gr?OpenDocument

Transfer of a worker without taking into account her disability amounts to discrimination



The dispute arose as a Director for Special Education was posted to a school without her special needs being taken into account. She was diagnosed with ankylosing spondylitis, a severe back condition, by a medical panel. Suffering from a 40 per cent disability, she was advised to avoid movement and to ensure that her workplace was safe, with no risk of injury. To reach the new school, she would take between 30 and 40 minutes from her place of residence, instead of 15 minutes, with her foot on the accelerator at all times as she would be driving against oncoming traffic. In addition, pupils in the new school suffered from emotional and severe behavioural problems with outbursts of aggression which she claimed could endanger her health. The Public Education Commission claimed that the transfer was based on the needs of the service and would not affect her working conditions.

The Ombudsman noted that the needs of the service had been taken into account without considering her disability, which amounted to indirect discrimination prohibited by Article 2 of the Act on Persons with Disabilities and Article 27(1)(a), (b), (c) of the UN Convention on the Rights of Persons with Disabilities. When organising transfers, the Ministry of Education consults a list of names of teachers with disabilities, drawn up following a recommendation issued by the equality body. The Public Education Commission did not consult the list although the plaintiff's name was on it. The Ombudsman asked the Public Education Commission to reconsider its decision and invited the parties to a consultation, as provided by the law.

Internet source:

<http://www.no-discrimination.ombudsman.gov.cy/ektheseis-aki>

CZ

Czech Republic

Case law

TV channel found to having incorrectly reported on Roma, resulting in incitement to hatred



The Council for Radio and TV Broadcasting is a state agency which monitors compliance with the law on radio and TV broadcasting.¹⁴³ Following an analysis of daily news broadcast by private TV channels, the Council found that TV Nova did not ensure that programmes did not incite racial hatred. As a matter of fact, the Council observed that all news relating to Roma broadcast during the first five months of 2012 was negative. For instance, information was provided that misleadingly implied that Roma perpetrators had been involved in crimes, and the majority of people interviewed on the channel regularly stressed their fear of the Roma. The Council decided that by providing confusing and misleading information, including connecting the death of a woman with a Roma attack and calling for anti-Roma demonstrations, TV Nova had incited racial hatred and was given seven days to redress the situation and adopt corrective measures.

Internet source:

<http://www.rrtv.cz/cz/files/press/Tiskov%C3%A11%20zpr%C3%A1va.pdf>

¹⁴³ Sec. 5 a) and f), Sec. 59 paras. 1-3 and sec. 32 para 1 c) of Law No 231/2001 on the Administration of Radio and TV Broadcasting.

Case law

Automatic dismissal of an employee at the age of 67 found unlawful

The dispute arose as the complainant was dismissed based on the fact that he had turned 67. A first dismissal occurred in 2008, which was withdrawn a day later. The employer argued that at the time of the withdrawal they agreed to maintain the employment relationship for another year and a half before it would finally end. The second dismissal which occurred in 2010 was therefore a mere confirmation of the agreement. The equality body held that the employer could not prove that the parties had effectively entered into this agreement and concluded that the only reason for dismissing the complainant was his age.¹⁴⁴ The employer was ordered to pay DKK 22,000 (EUR 30,000) as compensation (equivalent to nine months' salary).

Internet source:

<http://www.ligebehandlingsnaevnet.dk/naevnsdatabase/afgoerelse.aspx?aid=947&type=Afgoerelse>



Termination of unemployment benefits at retirement age deemed lawful

The case concerned the forced termination of membership of an unemployment fund at retirement age, leading to the termination of unemployment benefits. The Court rejected DaneAge Association's claim that this constituted discrimination based on age.¹⁴⁵ The Court ruled that the unemployment benefits system is subject to detailed statutory regulation providing that the substantial costs of unemployment benefits are borne by the public. The right to unemployment benefits did therefore not pertain to the employment relationship as they were not fully or partially funded by the employer nor could they be considered as equivalent to salaries. The fact that employment influenced entitlement to unemployment benefits and that the amount was calculated on the basis of previous earnings could not lead to a different reasoning. In any event, unemployment benefits constituted social security and social protection schemes, which did not fall within the scope of Directive 2000/78/EC.

Internet source:

<http://www.domstol.dk/oestrelandsret/nyheder/domsresumeer/Pages/Tvungetoph%C3%B8rafmedlemskabafA-kassevedfolkepensionsalderenikkeulovligaldersdiskrimination.aspx>



Estonia

Case law

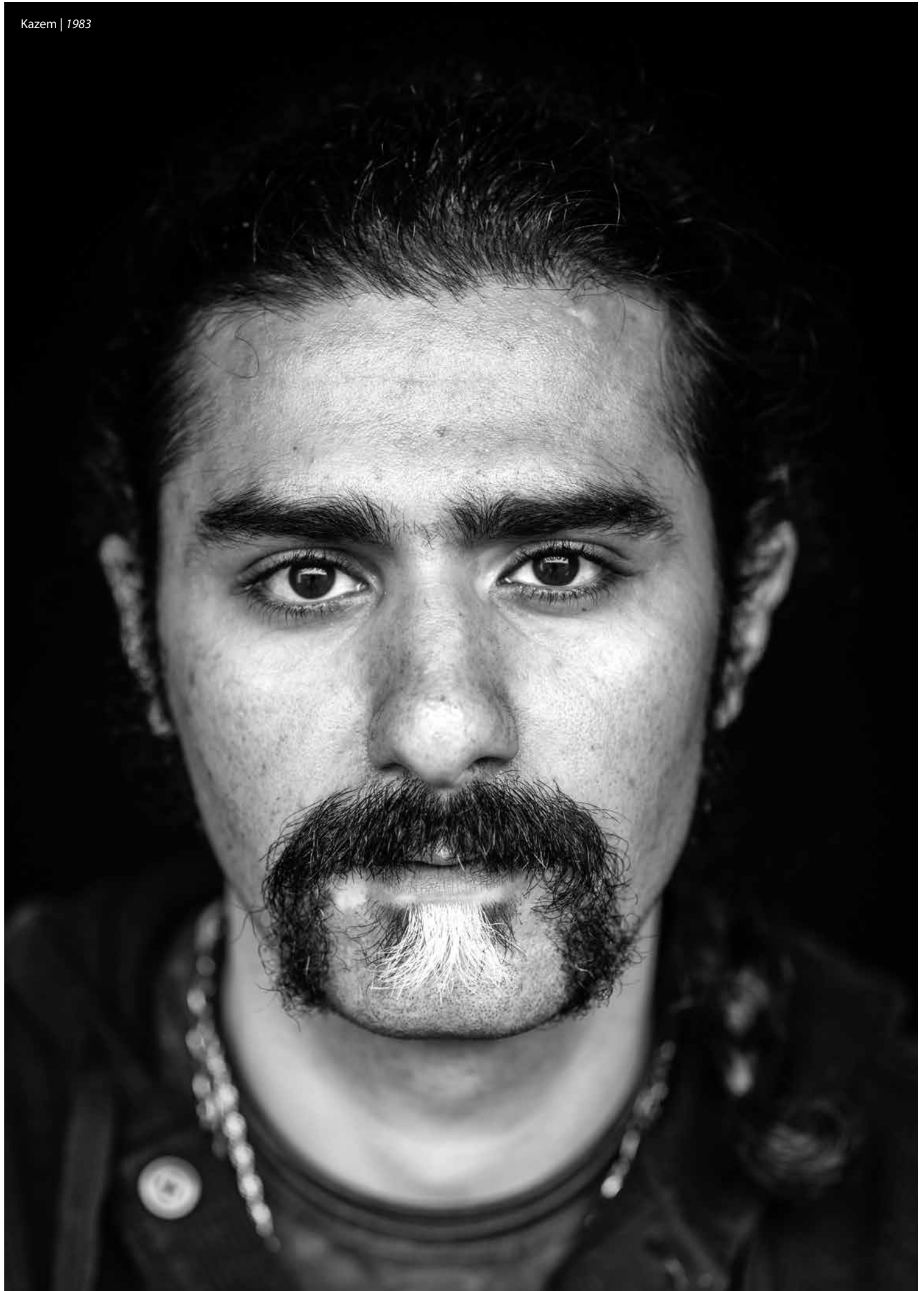
Linguistic requirements in public sector recruitment procedure found unlawful

Under the Language Act, public servants must be able to understand and use Estonian in a manner that allows performance of their duties. The mandatory levels of language proficiency are established based on the Common European Framework of Reference for Languages. Language proficiency is divided into three broad categories that can be divided into six levels: A Basic User (A1 beginner and A2 elementary), B Independent User (B1 intermediate and B2 upper intermediate) and C Proficient User (C1 advanced and C2 proficiency). The C2 level is not officially required for public servants as it is not possible to sit



¹⁴⁴ Board of Equal Treatment, Decision No 330/2012 of 5 September 2012.

¹⁴⁵ Eastern High Court, Decision No B-3292-11 of 10 October 2012.



an examination at this level. C1 is required for most public officials, including all senior public officials. Candidates who have graduated from an Estonian educational institution do not need to pass a language proficiency examination. The Public Service Act specifically refers to level of language proficiency and ethnicity as grounds protected from discrimination. Although the Equal Treatment Act imposes a general ban on ethnic discrimination in recruitment, differences in treatment on the grounds of language proficiency are permitted if provided for in the Public Service Act and the Language Act.

In 2011, the complainant applied for a position at the Ministry of Foreign Affairs which required a very good knowledge of Estonian. He has a typical non-Estonian name but had studied in Estonia. He therefore indicated Russian as his mother tongue and a level of C1 for Estonian. Following the rejection of his application by the Ministry on the ground that applicants were expected to demonstrate a level of C2, he brought a case to the Commissioner for Gender Equality and Equal Treatment, who held that there was discrimination based on ethnicity. The Commissioner observed that ethnic origin and mother tongue are closely interconnected.¹⁴⁶ The plaintiff was hence treated less favourably as compared to native speakers due to prejudices with regard to language proficiency against non-Estonians. As a matter of fact, his level of proficiency had not even been checked. Moreover a C2 level exceeded the official requirement set for public servants. Finally the Commission highlighted the fact that the Ministry is a large public institution which should be a model in terms of recruitment and compliance with the principle of equal treatment. The opinion of the Commissioner is not binding.

Internet source:

http://www.svv.ee/failid/16.08.2012_arvamus_anonymiseeritud.pdf

Finland

FI

Legislative development

Comprehensive bill amending the anti-discrimination law published

The Ministry of Justice issued the long awaited draft law amending the Anti-discrimination Act. The legislative process started in 2007 and the objective was to raise protection for other protected grounds to the same level as for ethnicity. The bill will be discussed with the representatives of social partners, NGOs and public authorities and sent out for written comments during spring 2013. The bill is scheduled to be presented to the parliament in autumn 2013.

Discrimination on the basis of age, [ethnic] origin, nationality, language, religion, belief, opinion, political activity, trade union activity, family ties, state of health, disability, sexual orientation or other reason that concerns an individual's person would be prohibited. The material scope covers all activities in both the public and private sectors, although it does not extend to matters falling within the scope of private affairs and family life or the practice of religion.

The concept of direct discrimination would differ from ground to ground and from situation to situation. In the case of direct discrimination, justification would be allowed if permitted by law or if a legitimate aim is pursued for which the means to achieve that aim are appropriate and necessary. Where the Employment Equality and Racial Equality Directives are applicable, the concepts would be similar to the ones used in the Directives. Refusal to provide reasonable accommodation would amount to discrimination.

¹⁴⁶ Opinion of the Commissioner for Gender Equality and Equal Treatment of 16 August 2012.

The new law would introduce the duty to pay due regard to equality for public authorities and employers employing more than 30 workers. Public authorities would also be required to draw up a plan to foster ethnic equality.

The mandates of the Ombudsman for Minorities and the Discrimination Tribunal would be extended to cover all the grounds listed in the Act. The Ombudsman for Equality would continue to work separately on issues relating to gender.

Internet source:

http://www.hare.vn.fi/mAsiakirjojenSelailu.asp?h_iID=12573&tVNo=4&sTyp=Selaus

FR

France

Case law

Reasonable accommodation affecting prosecutor's functions and remuneration



After a prosecutor from the public prosecution office of the Court of Besançon (eastern France) became deaf, his public hearings were assigned to colleagues and replaced with administrative tasks to accommodate his condition. In France, courts sit until hearings on the court roll finish, which often results in night sessions. The extra burden of work was compensated by higher allowances for the plaintiff's colleagues, whereas the plaintiff's remuneration was reduced to the lowest rate paid by the Court. The General Prosecutor argued that the rate was objective and reasonable as his remuneration was adjusted to reflect his effective participation in the functioning of the institution.

The Council of State (the supreme administrative court) overruled the lower courts' decisions, which held that the duty to provide reasonable accommodation did not apply to prosecutors.¹⁴⁷ The Council recalled that, in accordance with French case law, Directive 2000/78/EC was directly applicable. It then ruled that the duty to provide reasonable accommodation also implied that the measures taken did not create a disadvantage with regard to remuneration and allowed for career progression. The Council observed that the plaintiff's disability had to be taken into consideration when assessing his participation in the functioning of the public administration and calculating his remuneration. It recognised that the lower instances had committed an error in law and concluded that there was indirect discrimination.

Internet source:

<http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000026198987&fastReqId=1524882422&fastPos=1>

Refusal to post an employee abroad for fear of racial prejudice amounts to discrimination

The plaintiff was refused a five-week temporary posting as a coordinator of a new telephone service in Dubai based on her colour. Her employer feared harassment and victimisation.

The employee eventually resigned and brought the complaint to the equality body, the French Equal Opportunities and Anti-discrimination Commission (the former HALDE, now the Defender of Rights), which investigated the claim. The equality body found that the employer was unable to establish the reality or the nature of the risk alleged for the refusal in the context of her professional assignment or living conditions in Dubai. Moreover, her duties did not entail any contact with the public that would require extra

¹⁴⁷ Council of State, Decision No 347703 of 11 July 2012.

protection. The labour court upheld the equality body's observations and ruled that the employer did not establish that the decision was not discriminatory and based on objective and proportionate motives.¹⁴⁸ The employer was ordered to pay EUR 7,000 as compensation for damages and EUR 27,000 (equivalent to eight months' salary) as compensation for constructive dismissal.¹⁴⁹

A special administrative status for Travellers imposing reporting duties and withholding voting rights is discriminatory

Travellers with no permanent residence for more than six months and no regular income must obtain special travel documents (*carnet de circulation*) from the Ministry of the Interior. These documents must be presented and stamped at the Ministry of Interior's local office (*préfecture*) within 48 hours of arrival in an administrative area (*département*) and at least every three months in order to inform the local authorities of the Travellers' presence. Non-compliance with these administrative obligations may be subject to criminal sanctions ranging from a fine to prison. Travellers may therefore face identity checks by the police at any time.¹⁵⁰ Moreover, they must designate a municipality of legal residence (*commune de rattachement*) where Travellers represent less than three per cent of the population. Travellers must wait three years after their inclusion in the register of residents before they are allowed to vote, whereas all other citizens, including homeless people,¹⁵¹ acquire this right after six months.



Following a question raised by an NGO and a citizen in a motion to quash the State's administrative decision not to repeal the existing legislation, the Council of State referred the question of constitutional validity to the Constitutional Council. The Constitutional Council decided that the obligation to be registered in a given municipality and to hold specific documents was not unreasonable given the fact that it was not based on their origin but on their lack of a fixed place of residence for more than six months at a time. The State must be able to locate and contact individuals present on its territory and to regulate access to specific rights. The three per cent quota was not a limitation on Travellers' freedom of movement and establishment as they were not required to settle in the area they had designated.

However, reporting duties, police checks and penal sanctions imposed on Travellers without a regular job or income created a difference in treatment with Travellers who had a regular income. In addition, it constituted a violation of the right to freedom of movement which is contrary to the Constitution. Finally, the requirement which imposed registration for three years before being put on the electoral register was deemed contrary to the principle of equality of access to voting. The Constitutional Council declared the abrogation of these provisions, effective from the date of publication of its decision.¹⁵²

Internet source:

<http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2012/2012-279-qpc/decision-n-2012-279-qpc-du-05-octobre-2012.115699.html>

¹⁴⁸ Labour Court of Nanterre, *International SOS Assistance*, No F10/01701 of 18 July 2012.

¹⁴⁹ 'Constructive dismissal' refers to intentional actions taken by an employer to render an employee's working conditions difficult or unfair to the point that the employee feels forced to leave his or her job.

¹⁵⁰ The equality body held that such obligations were in violation of Travellers' right to free movement and right to privacy and recommended a reform of Travellers' status in order to eliminate all specific identity papers and measures that resulting in increased identity checks. See French Equal Opportunities and Anti-discrimination Commission (HALDE), Deliberation 2007-372.

¹⁵¹ Homeless people must choose their administrative residence from a list of addresses of associations and do not have to hold travel documents.

¹⁵² Constitutional Council, QPC No 2012-279 QPC of 5 October 2012.

*Political development***Survey published on Roma education**

Reacting to a recent statement made by the Minister for Labour and Social Policy at a press conference¹⁵³ that children from marginalised families (widely interpreted by media throughout the country to mean 'Roma families') faked disability in order to get into special schools motivated by the accompanying benefits, the European Roma Rights Centre (ERRC) together with a locally-based NGO National Roma Centrum (NRC) published survey results and a fact sheet on 30 August 2012 presenting a summary of statistics on education in special schools and Romani children.

The ERRC underlined that it is almost impossible to move children from a special school to a mainstream school after a child has been placed in a special school following the official categorisation process (based on official tests to assess the child's intellectual capacities). More than two thirds of parents with children in special education said that after the initial categorisation, their child was never tested again, with almost half of the parents (46.9 per cent) not being told what the testing of their child aimed to establish in the first place. Parents also reported that they were not informed enough about the best choices for their child's education. Almost half (45.3 per cent) of the parents surveyed said they did not receive full information about the difference between special education and education in a mainstream class.¹⁵⁴

The survey further shows that '[i]n 78.9 per cent of cases parents were not told that they can challenge the categorisation recommendation suggesting enrolment in special education. In 67.6 per cent of cases parents said they were not told that attending special education will severely limit the ability of their child to access higher education and employment. 58.3 per cent of survey respondents stated that they were never informed that they have the right to request re-testing and reintegration of their child into mainstream education.'¹⁵⁵ According to the survey, there seems to be a high rate of bullying of Romani children in mainstream schools, with 73.3 per cent of parents stating that their child was bullied.¹⁵⁶

No further action has been announced by either the ERRC or NRC.

Internet source:

<http://www.errc.org/cms/upload/file/macedonia-factsheet-education-en-30-august-2012.pdf>

¹⁵³ Advancing the work of the Commission for Categorisation of Children with Disabilities (Унапредувањето на работата на комисиите за категоризација на децата со пречки во развојот) <http://www.mtsp.gov.mk/default-mk.asp?ItemID=2D50BA69362CE341A19E6021D0AC9F60>.

¹⁵⁴ European Roma Rights Centre, *Macedonia: Officials, Not Parents, Take Lead on Placing Romani Children in Segregated Education* (2012), <http://www.errc.org/article/macedonia-officials-not-parents-take-lead-on-placing-romani-children-in-segregated-education/4040> accessed 31 August 2012.

¹⁵⁵ *Ibid.*

¹⁵⁶ The fact sheet does not define bullying or specify the perpetrators.

Legislative developments

Constitutional protection of Sinti and Roma adopted

The parliament of the *Bundesland* Schleswig-Holstein voted unanimously in favour of the constitutional protection of German Sinti and Roma, equivalent to the legal protection already granted to Danish and Frisian minorities in the north of Germany. Schleswig-Holstein became the first *Land* to provide such protection.

Internet source: http://www.landtag.ltsh.de/homedata/kat1/sinti-roma_sitzung_text.html

racial
or ethnic
origin

Case law

Rejection of an application based on the wearing of a headscarf is unlawful

A Muslim woman who lived in Berlin applied for vocational training at a dentist's practice. The dentist found her suitable for the position but objected to her wearing a headscarf. As the woman refused to remove it, her application was rejected.

religion
or belief

The Berlin Labour Court ruled that the wearing of a headscarf pertains to religious faith and constitutes an act of worship.¹⁵⁷ It should therefore not lead to disadvantage when applying for a job. The fact that the applicant was disqualified after she refused to remove her headscarf during working hours amounted to discrimination on grounds of religion. She was granted EUR 1,470 as compensation.

Internet source:

http://www.gerichtsentscheidungen.berlin-brandenburg.de/jportal/portal/t/22ot/bs/10/page/sammlung.psml?pid=Dokumentanzeige&showdoccase=1&js_peid=Trefferliste&documentnumber=1&numberofresults=1&fromdoc=JURE120019778%3Ajuris-r01&doc.part=L&doc.price=0.0&doc.hl=1#focuspoint

Racial profiling deemed unlawful¹⁵⁸

The dispute arose as the plaintiff was checked by the police on a train on grounds of his colour, in the context of routine checks to combat irregular migration. He brought the case to the Administrative Court, seeking a declaratory judgment on the illegality of such checks.

racial
or ethnic
origin

The Administrative Court confirmed the legality of the identity checks without addressing the issue of discrimination.¹⁵⁹ The federal police was entitled to check train passengers on routes used for irregular entry pursuant to the Residence Act. As occasional checks can be performed on passengers, the court ruled that police officers may select people to be checked on the basis of their appearance. On appeal, the Higher Administrative Court overruled the decision and held that racial profiling contravened the principle of equality enshrined in Article 3 of the German Basic Law.¹⁶⁰ After the police apologised, the proceedings were eventually declared settled.

¹⁵⁷ Berlin Labour Court, Decision Az: 55 Ca 2426/12, 28 March 2012.

¹⁵⁸ See *European Anti-discrimination Law Review* (EADLR), issue 15, p. 59.

¹⁵⁹ Administrative Court (*Verwaltungsgericht*) of Koblenz, 5 K 1026/11.K, 28 February 2012.

¹⁶⁰ Higher Administrative Court (*Oberverwaltungsgericht*) of Koblenz, Decision AZ: 7 A 10532/12.OVG of 6 November 2012.



Internet source:

<http://www.mjv.rlp.de/icc/justiz/nav/704/broker.jsp?uMen=7047a075-9880-11d4-a735-0050045687ab&uCon=0998fb32-0ba3-10dc-32ae-477fe9e30b1c&uTem=aaaaaaaa-aaaa-aaaa-aaaa-000000000042>

Greece

GR

Case law

Admission of a student with a disability refused

The National Confederation of Disabled People (NCDP) had sent a letter to the Minister of Education on 3 August 2012 regarding the exclusion of a student from a university department. Ms K informed the NCDP that she was not admitted to the Department of Foreign Languages, Translation and Interpretation as premises were not accessible to students with physical disabilities. Article 35 of Act 3794/2009 established a five per cent quota for students with specific disabilities to be admitted without sitting an entrance exam. It was also argued that the absence of adequate facilities contravened Article 21, paragraph 6 of the Greek Constitution and Article 24 of the UN Convention on the Rights of Persons with Disabilities. The Ministry has not responded so far, and no measures had been taken to solve the problem. The victim may file a complaint before the Greek Ombudsman.

Internet source:

http://www.esaea.gr/index.php?module=announce&ANN_id=4032&ANN_user_op=view&ns_news=1&MMN_position=20:20



Pupils from Muslim minorities denied access to school

At the beginning of the 2012-2013 academic year, 20 children belonging to the Turkish minority of Western Thrace in Echinós could not enrol in the minority primary school on the ground that they had not attended kindergarten. Their parents argued that they had preferred not to send their children to public kindergarten where Greek was used as the language of education. The principal of the minority school, a Turkish Muslim, consequently decided 'to guarantee the future of the children' by registering and giving them access. The vice-president of the school council, a Greek Orthodox nationalist, then alerted the school inspectorate. Following disciplinary proceedings, the principal was sanctioned with an administrative warning.



Before 2007, children did not have to demonstrate previous attendance at kindergarten. Majority kindergartens under the Ministry of Education use Greek as the language of education and there are no bilingual classes for children with ethnic and cultural differences. However, Article 40 of the 1923 Treaty of Lausanne provides that members of the Muslim minority have the right to establish, manage and control their own schools and to use their own language freely. Article 30 of the UN Convention on the Rights of the Child stipulates that in states where ethnic, religious or linguistic minorities exist, a child belonging to such a minority shall not be denied the right, in community with other members of his or her group, to use his or her own language.

Internet source

<https://www.abtftf.org/html/index.php?link=detay&id=4578&grup=4&l=en&arsiv=0>

*Legislative development***Bill on the retirement age of judges and other legal professions**

Further to the CJEU's decision on the infringement action brought by the European Commission against Hungary,¹⁶¹ on 21 December 2012 the Government submitted a bill on Legal amendments concerning the upper age limit to be applied in certain justice-related legal relationships.¹⁶² The main amendments are as follows:

- The mandatory retirement age for all legal professions, including public notaries, would gradually be reduced to 65 years by 31 December 2022.
- Judges entitled to an old age pension would have to choose between either receiving a pension or continuing to work as a judge. Any judge concerned would be granted 60 days to take a decision and if he/she failed to request the suspension of pension payments, he/she would be dismissed in a fast track disciplinary proceeding.
- Judges previously dismissed on the basis of the regulation found to be invalid by the Constitutional Court would be granted 30 days from the coming into force of the new law to decide whether or not they wished to be reinstated. If they so wished, the President of the National Judicial Office would be compelled to take all the necessary measures to reinstate them. Judges would be reinstated in their previous positions and would be fully compensated for the financial loss they had suffered. However, judges would not be reinstated in management posts ('court leadership positions'). In the event that a judge did not ask to be reinstated, he/she would be entitled to a lump-sum compensation equivalent to 12 months' salary.
- Similar provisions would be introduced with regard to prosecutors.

Internet source:

<http://www.parlament.hu/irom39/09598/09598.pdf>

*Case law***Access to bus terminal unsuccessfully challenged**

A man sued the national bus company on the ground that the bus terminal was not accessible to visually impaired passengers, alleging direct discrimination and a violation of his human dignity. He asked the Court to establish that a violation had occurred, to oblige the bus company to make the terminal accessible and to pay HUF 500,000 (EUR 1,275) as compensation for non-pecuniary damage.

The Budapest Appeal Court upheld the Metropolitan Court's first instance decision and rejected the plaintiff's claim on 6 September 2012.¹⁶³ The Court first acknowledged that the plaintiff was unable to access the bus terminal in the planning and construction of which the bus company had participated. The Court concluded that in the absence of active intention, and in spite of clear guidelines issued by the equality body on this issue, the failure to provide access could not constitute direct discrimination, but indirect discrimination. However, the Court held that the reconstruction of the terminal would severely affect bus operations and would also hinder passengers' right to movement. Moreover, the defendant's action (or inaction) could not be considered as an 'attack' targeted at one of the plaintiff's characteristics. Consequently, the differentiation should be exempted. In addition, the Court dismissed the plaintiff's

¹⁶¹ See p. 40.

¹⁶² Bill T/9598.

¹⁶³ Budapest Appeal Court Decision No 2.Pf.20.443/2012/4 of 6 September 2012.

reference to Article 31 of Act LXXVIII of 1997 on Construction Matters, which prescribes that all public buildings constructed after the entering into force of the law should be made accessible. The Court alleged that this was a requirement of a general nature from which it could not be substantiated that there was discrimination, in particular because architectural requirements regarding accessibility constantly change. Finally the Court stressed that even in the event of a decision in favour of the plaintiff, the defendant could not be forced to provide access as only specific redress targeted at the plaintiff could be ordered, to the exclusion of all other people with disabilities.

Dismissal of a visually impaired employee based on medical unsuitability is unlawful

A visually impaired employee of Baranya County Local Authority filed a complaint with the Equal Treatment Authority alleging discrimination on grounds of disability. Although Hungarian labour law allows visually impaired people to take extra days off, this right was denied to the plaintiff. Instead, his employer decided to send him twice for an extraordinary labour medical examination to check his capacity to work. The second time, an employer's representative accompanied the plaintiff and told the doctor that he would be deprived of personal assistance and the equipment made available by the employer for the purpose of performing his duties. As a result, the doctor declared the plaintiff unfit for the job that he had been carrying out for years. The employer did indeed ban the plaintiff from using the special computer and withdrew the personal assistance which had been made available. The plaintiff was eventually dismissed based on his medical incapacity.



The equality body found a clear case of discrimination, forbade any future violation by the employer and ordered the publication of its decision for a period of 90 days on the Local Authority Office's and the Equal Treatment Authority's website.¹⁶⁴

Internet source:

<http://www.egyenlobanasmod.hu/jogesetek/hu/543-2012.pdf>

Ireland

IE

Case law

Age discrimination found in redundancy package

This original case concerned an age discrimination case taken by the applicants against jam makers Chivers Ireland.¹⁶⁵ The applicants claimed they had been discriminated against contrary to Section 8 of the Employment Equality Acts 1998-2011, as they were both over 60 and the redundancy package being offered favoured those under 60 years of age. The case was taken to the Equality Tribunal where the Tribunal found that the applicants had been discriminated against. It was subsequently appealed to the Labour Court by the employer.



In the original case, finding in favour of the complainant, the Equality Officer noted that the Irish Equality Acts provide an exemption for employers to specifically and directly discriminate on the basis of age. Section 34(3)(d) of the Employment Equality Acts 1998-2011 allows employers to give a different rate of severance payment to employees to take into account differences between the age of employees on leaving the employment and their compulsory retirement ages. However, she pointed out that the Acts, *inter alia*, implement Directive 2000/78/EC, and said that domestic legislation must be interpreted in light

¹⁶⁴ Equal Treatment Authority, Decision No 543/2012 of 25 October 2012.

¹⁶⁵ Equality Tribunal, *Rose Kelly and Margaret Masterson (deceased) v Chivers Ireland Ltd.*, DEC-E2011-177.

of the wording and purpose of EU law; where there is a conflict between both, EU law takes precedence. Article 6 of the Directive allows Member States to apply differences of treatment on grounds of age but within the context of national law, these must be objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and the means of achieving that aim must be appropriate and necessary.

The question arose before the Equality Tribunal of whether the distinction between redundancy packages for those over 60 and for those under 60 was capable of being objectively and reasonably justified. The Equality Officer found that even if the company's objectives (keeping costs down and avoiding windfall payments to employees close to retirement) were legitimate aims, the means chosen to achieve these aims were not appropriate or necessary. She suggested that 'if the employer had used a tapered scheme based on income forgone that their justification would be less questionable.'

The decision was appealed by the employer to the Labour Court, but before judgment could be given it was announced that the respondents had withdrawn their appeal. The decision of the Equality Tribunal therefore stands, together with the order of the Equality Officer, which stated that there should be equal treatment with regard to pay and redundancy packages for those over the age of 60.

Internet source:

<http://www.pila.ie/bulletin/2012/may-2012/16-may-2012/equality-tribunal-says-redundancy-packages-caused-age-discrimination/>

IT

Italy

Legislative developments

Extension of competences of the equality body

The National Office against Racial Discrimination (UNAR), the national equality body, was set up in accordance with Directive 2000/43/EC to ensure the promotion of the principle of equal treatment and to combat discrimination based on racial or ethnic origin. However, UNAR interpreted its mandate to also include nationality. In addition, the Department for Equal Opportunities of the Presidency of the Council of Ministers (to which UNAR belongs) enlarged its competences to cover all types of discrimination in the course of 2010. Consequently, UNAR started on its own initiative to deal with all grounds of discrimination, including those covered by Directive 2000/78/EC. A ministerial decree which provides detailed guidance on the Department's activities eventually confirmed the extension of its powers on 31 May 2012.

However, neither the act establishing the institution or the decree of 11 December 2003 on the establishment and the organisation of UNAR have been repealed or modified. UNAR's official name has remained the same, even though racial and ethnic origin are no longer the only grounds covered.

Internet source:

www.unar.it

*Legislative developments***Prohibition on including language requirement in job advertisement**

On 21 June 2012, Parliament (*Saeima*) added a new section to the Labour Law prohibiting any mention of proficiency in a specific foreign language in job advertisements, except in cases where it is objectively necessary for the performance of the work. The amendments came into force on 25 July 2012.

In 2011, the radical national party alliance All for Latvia/Fatherland and Freedom Party/LNNK (*Visu Latvijai! Tēvzemei un Brīvībai/LNNK*) submitted several amendments to the Labour Law to prevent employers from requiring disproportionate foreign language proficiency. Although no specific language was targeted, the measure aimed at limiting the requirement for Russian to combat the alleged discrimination faced by Latvian citizens, in particular young workers, on the labour market. It was claimed that over a period of 16 years, only 35% of Latvian young people had studied Russian in schools, whereas most jobs in the private sector require two or three languages, including Russian.¹⁶⁶

Although language is not explicitly included among the list of protected discrimination grounds in the Labour Law, it may be interpreted as falling under 'other conditions'. In a dispute where an employer refused to employ a candidate of Roma origin based on her accent, the court held that there was discrimination on the grounds of national origin.¹⁶⁷ Latvia has repeatedly been criticised by various international bodies, including the OSCE High Commissioner for National Minorities, the Council of Europe Advisory Committee to the Framework Convention for the Protection of National Minorities and the ECRI for attempts to regulate the use of language in the private sector.

Internet source:

<http://titania.saeima.lv/LIVS11/saeimalivs11.nsf/0/21E616B85085E36CC2257A3100360EF4?OpenDocument>

New law prohibiting discrimination in access to self-employment adopted to replace previous law

On 29 November 2012, Parliament adopted the Law on the prohibition of discrimination against natural persons engaged in economic activity (*Likumprojekts 'Fizisko personu - saimnieciskās darbības veicēju - diskriminācijas aizlieguma likums'*) at its final reading.¹⁶⁸ This is the second law aiming to ensure the prohibition of discrimination in self-employment. The first law was adopted on 21 May 2009 in order to transpose Directives 2000/43/EC and 2004/113/EC prohibiting differential treatment on the grounds of gender, race or ethnic affiliation, providing for the shift of burden of proof and the right to compensation for loss and non-pecuniary damage. The present law implements Directive 2010/41/EC on the principle of equal treatment between men and women engaged in an activity in a self-employed capacity.

Differences in the treatment of natural persons conducting independent paid activities in the private or public sectors will be prohibited. The list of protected grounds of discrimination in relation to access to economic activity has been extended to cover age, religion, political and other belief, sexual orientation

¹⁶⁶ Russian is the second most widely spoken language in Latvia. It is the first language of the Russian minority as well as of a significant number of Ukrainians and Belarusians. A requirement for proficiency in Russian might be suspected as being a proxy for ethnic origin.

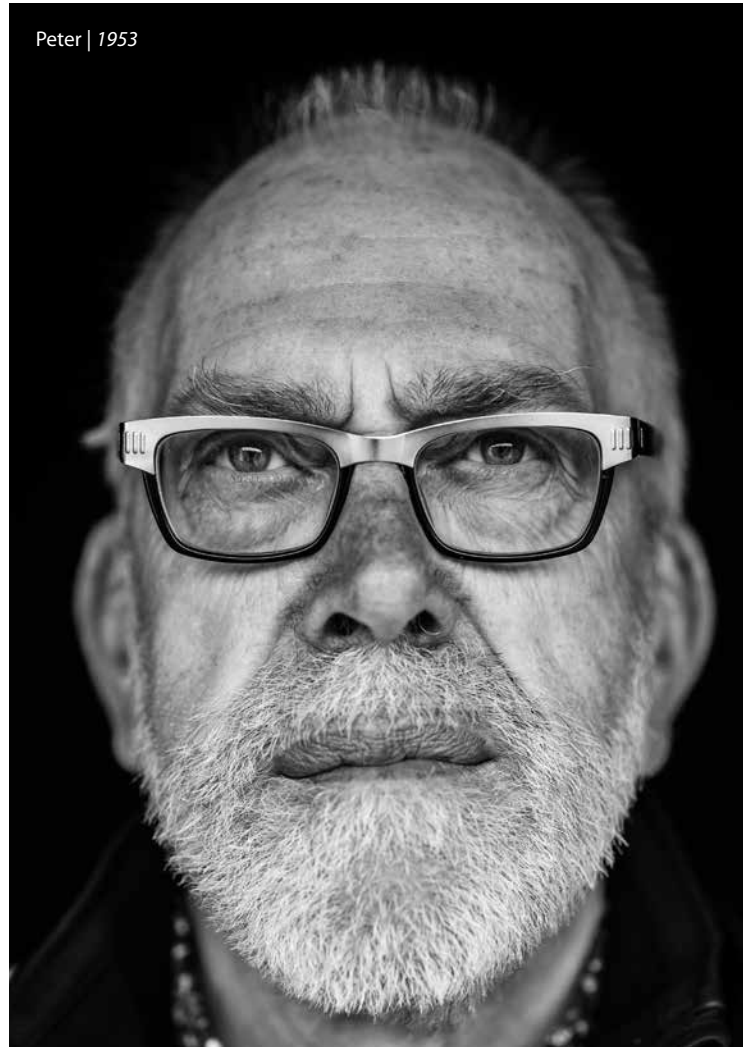
¹⁶⁷ *Sanita Kozloska v SIA Palso*.

¹⁶⁸ Law adopted on 29 November 2012, published in *Latvijas Vēstnesis* 199 (4802) of 19 December 2011.

Nikola | 1992



Peter | 1953



Menno | 2007



Agnes | 1951



and disability, in addition to gender, racial or ethnic origin, which were previously covered. Age was not included in the list of protected grounds with regard to access to goods and services. The new law will also prohibit victimisation, harassment, and instructions to discriminate, and will also provide for the shift in the burden of proof and the right to compensation for loss and non-pecuniary damage.

Internet source:

<http://www.likumi.lv/doc.php?id=253547>

Malta

MT

Legislative developments

Equality body's mandate extended

The mandate of the National Commission for the Promotion of Equality (NCPE) has been extended to cover the promotion of equality and non-discrimination on the grounds of sexual orientation, age, religion or belief, racial or ethnic origin and gender identity in employment, education and financial institutions.¹⁶⁹ Alleged victims of discrimination on these grounds may seek assistance from the NCPE and lodge a complaint for further investigation. In addition, the equality body is also responsible for safeguarding the principle of equal treatment on the grounds of gender and racial or ethnic origin in access to and supply of goods and services.

Internet source:

<http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8922&l=1>

The Netherlands

NL

Legislative developments

Public transport covered by anti-discrimination legislation

Public transport was brought under the scope of the Disability Discrimination Act in 2003, with Article 7 defining 'public transport' and Article 8 prohibiting unequal treatment in public transport. However, these two provisions would only come into force with the adoption of a specific decree. In 2009, the Government drafted a bill which was finally adopted on 31 March 2011 (Decree on the Accessibility of Public Transport – *Besluit toegankelijkheid van het openbaar vervoer*),¹⁷⁰ but the date for their entry into force remained unaddressed. This was eventually set for 9 May 2012 by the Decree of 19 April 2012.¹⁷¹

Internet source:

http://wetten.overheid.nl/BWBR0029974/geldigheidsdatum_24-05-2012



Incorporation of the equality body into the new national Human Rights Institute

The new Netherlands Institute for Human Rights (NIHR), which incorporated the Equal Treatment Commission (ETC), was inaugurated on 2 October 2012. The provisions of the General Equal Treatment Act

¹⁶⁹ Amendments to Chapter 456 of the Equality between Men and Women Act approved in Parliament on 25 June 2012 (Act No IX). The amendments came into force on 28 June 2012.

¹⁷⁰ *Staatsblad* 2011, 225.

¹⁷¹ *Staatsblad* 2012, 199.

regarding the ETC were repealed with the entry into force of the NIHR Act.¹⁷² Chapter 2 now establishes the NIHR's mandate as the equality body. A specific unit deals with individual discrimination complaints. Investigations may be carried out in the event of unequal treatment. Complaints regarding other violations of human rights are dealt with by the National Ombud, the Data Protection Authority, or courts.

The NIHR's independence is guaranteed by law as the NIHR Act determines the institution's powers and who appoints members and staff. Moreover, a government decree defines the NIHR's legal status.¹⁷³

In addition to the nine former members, three new members have been appointed. Eight more people may be appointed as staff. In order to carry out its tasks, the NIHR has been granted an additional EUR 900,000 for the first three years, which will be then reduced to EUR 600,000 annually, unless an evaluation during the third year shows that a structural adjustment is necessary.

Internet source:

<http://www.mensenrechten.nl/>

Case law

Reasonable accommodation for pupil suffering from learning disability



The case arose as a pupil suffering from the maths learning disability dyscalculia was allocated extra time by the school board to solve maths problems during written tests and examinations. She was also granted the right to use formula tables, but not during the final national exam (*Centraal Schriftelijk Eindexamen*, CSE), which is regulated by the Ministry of Education. However, the final mark for maths, which would determine whether she obtained her secondary education diploma, was highly dependent on good results in the CSE.

The pupil's parents tried to obtain permission from both the school board and the education inspectorate for her to use the tables, which was refused on the ground that this had been prohibited under the CSE regulations since 2009. No material that pupils are supposed to know by heart is allowed on their desks during examinations. According to the parents, this constituted a failure to provide reasonable accommodation amounting to discrimination on grounds of disability.

The Equal Treatment Commission (ETC) found that dyscalculia is a disability falling under the scope of the Disability Discrimination Act.¹⁷⁴ The equality body also held that, although the CSE exam was designed and regulated at national level, it was being conducted by the school. In its defence, it was argued that the school's director may modify how an exam is organised, but not its content. The equality body observed that knowledge of maths formulas was one of the conditions for obtaining the diploma. A policy forbidding use of the tables during the CSE when they could be used for all exams between first and fifth grades was therefore deemed inconsistent. In addition, a psychologist declared that pupils who have dyscalculia are not able to learn formulas by heart but are capable of understanding and applying mathematics based on formula tables. In the light of these observations, the ETC concluded that the use of tables during the CSE constituted reasonable accommodation which did not create an undue burden. The regulations in force were secondary instruments which could not justify a negation of the

¹⁷² Act of 24 November 2011 on the establishment of the Netherlands Institute for Human Rights (*Wet van 24 november 2011, houdende de oprichting van het College voor de rechten van de mens*, *Staatsblad* 2011, 573). The NIHR Act came into force by means of a decree of 6 September 2012 (*Besluit van 6 september 2012, houdende vaststelling van de datum van inwerkingtreding van de Wet College voor de rechten van de mens*, *Staatsblad* 2012, 414).

¹⁷³ Decree of 28 August 2012, *Staatsblad* 2012, 389.

¹⁷⁴ Equal Treatment Commission, Opinion 2012-85 ETC 2012-85, 7 May 2012-85.

duty to provide reasonable accommodation set out in the Disability Discrimination Act. Moreover, breach of secondary legislation is not explicitly mentioned as a possible justification for discrimination.

Internet source:

<http://www.cgb.nl/oordelen/oordeel/225281>

Compulsory retirement age for pilots is lawful

KLM pilots were obliged to retire at the age of 56 pursuant to the collective agreement in force. By contrast, pilots who had worked part time and who had not accrued a sufficient pension could maintain their employment relationship until the age of 60. When several pilots challenged the compulsory retirement age of 56, the board of KLM and the trade union (*Vereniging van Nederlandse Verkeersvliegers*, VNV) argued that the measure aimed to ensure a balanced workforce (in terms of age and experience, including a balanced distribution of job opportunities), to guarantee foreseeable and regular movement of pilots between grades and to allow personnel costs to be controlled.



Referring to CJEU case law, in particular the *Mangold* (C-144/04) and *Küçükdeveci* (C-555/07) cases, the Supreme Court observed that the principle of non-discrimination on the ground of age is a general principle of EU law.¹⁷⁵ Recalling the *Rosenbladt* ruling (C-45/09), the Court held that Member States, including social partners, have a wide margin of appreciation in formulating their policies with regard to a compulsory retirement age for certain categories of workers taking into account social policy objectives and the means to achieve these aims. The objective was not to guarantee the safety of airline traffic, as in the *Prigge* case (C-447/09). The Court therefore ruled that the justifications were covered by Article 6(1) of Directive 2000/78/EC and Article 7(1) of the Anti-discrimination Act. The means were deemed appropriate and necessary as 56-year-old pilots were not put in a difficult financial situation as they received a good pension. In addition, they were not prevented from continuing working. In the light of these observations, the Court concluded that KLM/VNV did not discriminate against pilots on the ground of age.

Internet source:

<http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BW3367>

Compensation for non-pecuniary damage refused to victim

The legality of welfare benefits granted to people of Somali origin was investigated by the local authorities of the city of Haarlem. Some members of this group were suspected of committing fraud by claiming benefits in the Netherlands while living in the UK. A dispute arose as the plaintiff refused to grant permission to investigators to visit his place of residence and later lost his right to receive benefits when they found out that he was not actually living there. The Equal Treatment Commission found that targeting beneficiaries of Somali origin, including with unannounced visits to their place of residence, was discriminatory and prohibited by Article 7a of the General Equal Treatment Act (GETA).¹⁷⁶ The Ministerial Letter of Instruction issued to instigate investigations was consequently withdrawn. After the plaintiff reapplied for social benefits, which were denied further to new checks at his residence, the District Court of Haarlem held that home investigations targeting Somalis were discriminatory.¹⁷⁷ The local authorities consequently paid the benefits claimed plus interest, but did not cover any extra expenses made by the plaintiff (such as medical costs while he was not receiving benefits as he was not insured at that time). The plaintiff then claimed compensation for these expenses, plus EUR 2,000 for non-pecuniary damages, which was refused by the local authorities, the District Court and the Court of last instance in social security matters. It was argued that he could not demonstrate that the difference in treatment had



¹⁷⁵ Supreme Court (*Hoge Raad*) Decision No LJN: BW3367 of 13 July 2012.

¹⁷⁶ Equal Treatment Commission, Opinion 2006-257 of 21 December 2006.

¹⁷⁷ District Court of Haarlem (*Rechtbank Haarlem*), No LJN BA5410 of 8 May 2007.

caused any 'mental harm' resulting in damage to his person or his well-being as required by Article 6:106 of the Civil Code. Moreover, although the Court of last instance in social security matters acknowledged that discrimination on the ground of race constituted a serious infringement of a fundamental right, it did not result in any harm to the plaintiff's honour or reputation.¹⁷⁸

Internet source:

<http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BW7531>

Discrimination on grounds of age against a 74-year-old graduate



In order to become a qualified lawyer allowed to represent clients in court proceedings, a law graduate must register as a member of the local bar association. Candidates must undertake a three-year training programme under the supervision of a tutor before being allowed to become a full member. The Bar Association of the district of 's-Hertogenbosch refused to appoint a supervisor for a 74-year-old candidate who had graduated at the age of 60. During an interview with the chair of the bar association, the candidate was asked what could possibly motivate a 74-year-old graduate to become a qualified lawyer. The reasons stated for rejection related to the fact that the tutor appointed was so much younger that it was doubtful that the graduate would accept orders from him. Moreover, the chair considered that the age of 70 was perceived in society as the maximum age for 'responsible functions' as carried out by qualified lawyers. The Lawyers Act did not set a maximum age. However, regulations prohibit lawyers over 70 from becoming members of bar associations' (local or national) boards or disciplinary committees. Reference was also made to the legislation setting a maximum age of 70 for judges and public prosecutors.

The equality body considered that the bar association took its decision based on age and subsequently examined whether there was any objective justification.¹⁷⁹ Bar associations ensure the quality of legal professional activities in a particular district, which constituted a legitimate aim. One means to fulfil this task could be to set very strict restrictions to access the profession. However, in the present case it was argued that it was not necessary to refuse the candidate purely on grounds of age, in particular because the Lawyers Act leaves some room for discretion to bar associations to individually assess candidates' quality of work and to set the conditions on which they may work with their supervisor.

Internet source:

<http://www.mensenrechten.nl/publicaties/oordelen/2012-196/detail>

NO

Norway

Case law

Employer's duty to prevent harassment



Further to a company's restructuring, six new positions were opened and advertised internally. After the complainant, who had been employed since 2000, applied to all six vacancies, he was granted his fifth choice, which involved night shifts and weekend work. He claimed that he was better qualified than other incumbents but that he was discriminated against on the ground of his Pakistani origin. Furthermore, he referred to derogatory attitudes in the workplace as several colleagues used the term 'Pakistan Ltd' ('Pakistan ASA') and he alleged that an operations director claimed to have 'chased Pakistani workers away' from his unit.

¹⁷⁸ Court of last instance in social security matters (*Centrale Raad van Beroep*), Decision, 5 June 2012.

¹⁷⁹ National Institute for Human Rights, Opinion 2012-196 of 19 December 2012.

The Equality and Anti-discrimination Ombudsman held that there was no reason to believe that the complainant's ethnicity or national origin motivated the appointment to his fifth choice as the evaluation of all candidates' qualifications seemed fair and balanced. However, the Ombudsman found harassment. The term 'Pakistan ASA' had been used in another department following suspicions among employees that working hours (distribution of overtime) had been scheduled in favour of employees of Pakistani origin. The employer acknowledged that the term may have been used in a context where favouritism was intended to be combated in the plaintiff's department. In the light of these observations, the Ombudsman held that this statement could offend employees of Pakistani origin. Moreover, he noted that the employer did not comply with the obligation to prevent harassment based on ethnicity, in accordance with the Anti-discrimination Act. The duty to prevent harassment includes 'to address current problems and to investigate what steps have been taken to identify a solution'. The Ombudsman recalled that it is sufficient to demonstrate that the employer has tried to prevent harassment, which was not the case with the present claim. Although the Ombudsman has no power to impose compensation, he urged the parties to reach a friendly settlement.

Internet source:

<http://www.ido.no/no/Klagesaker/Arkiv/2012/10816-Forskjellsbehandlet-pa-grunn-av-etnisitetnasjonal-opprinnelse/>

Collective pension scheme discriminated against part-time workers with disabilities

Storebrand Life Insurance is a major provider of pension and insurance services. The impugned collective agreement included a collective defined benefit retirement pension scheme. A member's individual pension entitlement was revised annually based on his/her salary. However, Section 7 of the agreement stipulated that the pension entitlement could be adjusted for employees with full work capacity only, to the exclusion of workers with disabilities. The Education Union challenged this practice before the Gender Equality and Anti-discrimination Ombudsman on behalf of one of its members who was partially disabled and working part-time in a private children's day-care centre. The Union alleged a violation of the Anti-discrimination and Accessibility Act and pointed out that the pension scheme, based on a collective agreement, should be regarded as deferred payment. When the employee turns 67 in 2037, her retirement pension will be calculated on the basis of her income from the date she became partly disabled in 2003, whereas other part-time workers receive a pension that takes into account their income upon retirement. The fact that two workers who both work in a half-time position are treated differently as regards the calculation of their pension because one volunteers to work part-time and the other one is partially disabled, was discriminatory according to the Union.



The Ombudsman held that the impugned agreement created indirect discrimination based on disability.¹⁸⁰ The Ombudsman is not entitled to order penalties.

Internet source:

<http://www.ido.no/no/Klagesaker/Arkiv/2012/10653-Storebrand-Livsforsikrings-forsikringsvilkar-er-i-strid-med-diskriminerings-og-tilgjengelighetsloven/>

¹⁸⁰ Gender Equality and Anti-discrimination Ombudsman, Case No 10/653.



Legislative development

President ratifies the UN Convention on the Rights of Persons with Disabilities

President Bronisław Komorowski eventually ratified the UN Convention on the Rights of Persons with Disabilities on 6 September 2012.¹⁸¹ Poland signed the Convention on 30 March 2007, but the ratification process had been postponed, in particular to carry out a review of domestic legislation to identify possible consequences.



These preparatory measures by the Ministry of Labour and Social Policy resulted, *inter alia*, in some reservations being made with regard to the Convention. The initial reservation made upon signature was reiterated: 'The Republic of Poland understands that Article 23.1 (b) and Article 25 (a) shall not be interpreted in a way conferring an individual right to abortion or mandating state party to provide access thereto, unless that right is guaranteed by the national law.'

In addition, a new reservation was made regarding the right to marry of people with disabilities: 'Article 23.1(a) of the Convention refers to the recognition of the right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses. By virtue of Article 46 of the Convention the Republic of Poland reserves the right not to apply Article 23.1(a) of the Convention until relevant domestic legislation is amended. Until the withdrawal of the reservation a disabled person whose disability results from a mental illness or mental disability and who is of marriageable age, cannot get married without the court's approval based on the statement that the health or mental condition of that person does not jeopardize the marriage, nor the health of prospective children and on condition that such a person has not been fully incapacitated. These conditions result from Article 12 § 1 of the Polish Code on Family and Guardianship (Journal of Laws of the Republic of Poland of 1964, no. 9, item 59, with subsequent amendments).'

Finally, Poland has made one interpretative declaration: 'The Republic of Poland declares that it will interpret Article 12 of the Convention in a way allowing the application of the incapacitation, in the circumstances and in the manner set forth in the domestic law, as a measure indicated in Article 12.4, when a person suffering from a mental illness, mental disability or other mental disorder is unable to control his or her conduct.'

Internet source:

http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en#EndDec

¹⁸¹ Parliament adopted the act authorising the President to ratify the Convention on 15 June 2012.

Portugal

Case law

Alleged violence against Roma by the police force



The NGO SOS Racismo alleged extreme violence by the police force (*Guarda Nacional Republicana*, GNR) during a raid on a Roma encampment. The raid was carried out as part of several investigations into thefts and robberies that had occurred in the area. It was reported that several people were soaked in water so that an electroshock weapon could be used on them, kicked, punched or verbally abused. Random checks were carried out, including on a woman who was requested to undress in front of male officers. The GNR used knives and sticks and randomly shot rubber bullets while children were forced to watch.

The GNR argued that the operation took place in compliance with three warrants issued for the investigation of thefts and robberies. The support of two special intervention units was necessary as many individuals were armed, in particular one who was known to be extremely dangerous. This required appropriate methods to control the situation in line with the risks inherent in such an operation.

Six individuals were arrested for possession of prohibited weapons and items originating from thefts and robberies or for coercion and resistance.

After the case was reported by the media, the High Commissioner for Immigration and Intercultural Dialogue, acting as President of the Commission for Equality and against Racial Discrimination (CEARD), ordered that proceedings be opened to investigate the possible existence of discriminatory acts based on racial origin. The case was also referred to the General Inspectorate of Internal Affairs.

Internet source:

<http://www.acidi.gov.pt/noticias/visualizar-noticia/5065da8122550/sobre-os-alegados-acontecimentos-de-vila-verde>

Access to a bank denied to a client of Roma origin



A customer was prevented from entering a bank branch based on his appearance: the bank manager thought he was 'scruffy' and of Roma origin. Instead, he was served in the street, outside the branch. The 36-year-old businessman immediately complained to the police and the Bank of Portugal, but was denied access to the Complaints Book on the basis that he should first take a shower and change his clothes. The bank's management board initiated internal proceedings and the NGO SOS Racismo referred the case to the Commission for Equality and against Racial Discrimination, alleging discrimination.

Internet source:

http://www.jn.pt/paginainicial/pais/concelho.aspx?Distrito=Braga&Concelho=Braga&Option=Interior&content_id=2956755&page=-1

Political developments

New equality body's steering board members appointed

As three out of the nine positions on the Steering Board of the National Council for Combating Discrimination (the NCCD, the equality body) were vacant, the president of the equality body initiated proceedings for appointing new members on 2 May 2012. The specialised committees of the Senate and the Chamber of Deputies convened a joint meeting and voted on 18 June 2012. Applicants included two nominees endorsed by the Liberal Party and the Social Democrat Party, one former member of the equality body supported by more than 30 NGOs and the Democratic Union of Hungarians (HDU) in Romania, another candidate who was also a former member, and two other candidates.

In spite of the procedural requirements, the joint parliamentary committees cast their votes without any hearing, debate or public statement. Following the vote, Mr István Haller (independent supported by HDU), Ms Teodora Berzi (member of the Liberal Party) and Ms Maria Lazar (member of the Social Democrat Party) were proposed as members, and eventually appointed by a plenary session of Parliament on 26 June 2012.

Case law

Legal claim challenging the erection of a concrete wall in Baia Mare rejected¹⁸²

Further to the erection of a concrete wall in the municipality of Baia Mare in July 2011 to separate the Roma from the wider community, the National Council on Combating Discrimination initiated an *ex officio* investigation and subsequently concluded harassment and violation of human dignity.¹⁸³ The mayor of Baia Mare was ordered to pay RON 6,000 (EUR 1,500) and to request the demolition of the wall. On appeal, the Cluj Court of Appeal quashed the equality body's decision. A final appeal filed by the NCCD is pending before the High Court of Justice.

In parallel, a Roma NGO (Romani CRISS) initiated an action to annul the mayor's authorisation to erect the wall, which was rejected by the Bucharest Tribunal.¹⁸⁴ The Court held that the building of an enclosure on a local authority's property could not be considered as discriminatory, in particular if access to houses was not made impossible. Moreover, the wall seemed appropriate for the purposes of managing the property and ensuring road traffic safety. The NGO was ordered to pay RON 1,170 (EUR 300) in legal fees to the mayor.

Relocation of Roma families deemed discriminatory

In addition to erecting a concrete wall in the municipality of Baia Mare, the local authority relocated a high number of Roma families resident in the Craica settlement to a building previously occupied by Cuprom, a copper factory which also housed chemical laboratories. Twenty-two children and two adults required urgent medical treatment when they were poisoned by chemical waste. Furthermore, the local police force requested the Roma families to collect all the chemical containers left behind so these could be decontaminated, although they did not have adequate equipment.

¹⁸² See *European Anti-discrimination Law Review* (EADLR), issue 15, p. 73.

¹⁸³ National Council on Combating Discrimination, Decision No 439 of 15 November 2011.

¹⁸⁴ Bucharest Tribunal (*Tribunalul Bucuresti*), Decision No 4506 of 13 November 2012.

racial
or ethnic
origin

racial
or ethnic
origin

The National Agency for Roma and the Human Rights, Religious Denominations and Minorities Committee of the Chamber of Deputies brought the case to the National Council on Combating Discrimination, alleging discrimination and a violation of dignity, the right to housing and the right to a clean environment. It was also argued that the relocation without any prior consultation and any strategy was abusive, endangering families' health.

The mayor of Baia Mare claimed that the families had been informed, and that some of them had voluntarily requested relocation or submitted their written consent. They had access to water, sanitary facilities and furniture. He also stressed that the children did not require hospitalisation after they had been treated. However, documents received from the local authorities showed that neither the building's owner nor the mayor had taken any measures to adapt the building and that, in any event, the relevant authorities had not issued an authorisation.

The NCCD examined the circumstances under which the relocation was carried out. Referring to the *D.H. and Others v The Czech Republic* case, the equality body recalled that the alleged agreement of the Roma community to be relocated in the industrial building could not be invoked as a justification for discriminatory treatment. It considered that the community fully relied on the local authorities and that the agreement was void. In addition, the relocation did not meet the minimum standards necessary to ensure adequate housing. The NCCD concluded discrimination based on membership of a disadvantaged ethnic group, which created an intimidating, hostile, degrading and humiliating environment. An administrative warning against the mayor of Baia Mare was issued, ordering him to see that the residential area in the building was decontaminated and refurbished in order to ensure respect of the protected fundamental rights of the relocated families.

Equality body recognises segregation of Roma pupils



A Roma NGO, Romani CRISS, filed a complaint against a school and the county school department of Olt, alleging segregation of Roma children as pupils of Roma origin were all grouped in one class. They also reported that no teacher was available on the first day of school and that the classroom was dirty and not well-maintained. The school headmaster argued that the children were enrolled in the order in which they applied to the school, regardless of their ethnic origin. He also claimed that this class gave the children the chance to be educated.

Separate investigations conducted in September and October 2011 by a school inspectorate and a prefect from Olt reached conflicting conclusions: one found that there was no segregation of Roma pupils in the school but the other concluded that there was segregation caused by inappropriate education conditions.

The NCCD referred to the UNESCO 1960 Convention against Discrimination in Education, the UN Convention for the Elimination of All Forms of Racial Discrimination as well as CERD General Recommendation XIX and concluded that the decision to group all Roma children in one class was not transparent or neutral, resulting in a differential treatment which could not be justified by a legitimate aim.¹⁸⁵ Furthermore, the equality body pointed to the school's positive duty to ensure that children from an ethnically disadvantaged group are not segregated and to divide non-Roma and Roma pupils in a proportionate manner in order to preserve their dignity. The NCCD concluded that segregation causes a negative social and educational impact, such as stereotyping, a high dropout rate, difficulties in attracting and keeping qualified teachers and a failure to provide quality teaching in order to access higher levels of education.

¹⁸⁵ National Council on Combating Discrimination, Decision No 559 in File No 52-2012 of 12 December 2012.

The NCCD ordered both the school and the school inspectorate to pay a fine of RON 2,000 (EUR 460), respectively. In addition, the school inspectorate was requested to end segregation and to monitor school activities.

Internet source:

<http://www.romanicriss.org/PDF/Prezentare%20de%20caz%20lonita%20Asan%20segregare.pdf>

Slovakia

SK

Legislative developments

Amendments limiting domestic institutional coverage of human rights and discrimination related issues

Parliament adopted amendments to the Act on the Organisation of the Activities of the Government, the Act on the Organisation of the Central State Administration and several other acts that limit domestic institutional coverage of human rights and the issues of equality and anti-discrimination. The legislative changes came into force on 1 October 2012.

The amendments abolished the position of the Deputy Prime Minister for Human Rights and National Minorities, responsible for providing guidance and ensuring the coordination and promotion of human rights, rights of national minorities, equal treatment and gender equality. This Deputy Prime Minister also contributed to areas such as education and allocation of financial resources to NGOs and public authorities carrying out activities to prevent all forms of discrimination, racism, xenophobia, anti-Semitism and other forms of intolerance. However, the Deputy Prime Minister's tasks were not fully and consistently transferred as some duties were reassigned to the Ministry of Labour, Social Affairs and Family and others (such as the power to provide grants to NGOs and public authorities) went to the Minister of Foreign and European Affairs. The 15 staff members under the supervision of the former Deputy Prime Minister for Human Rights and National Minorities were placed within the office of the Deputy Prime Minister for Investment.

Finally, the Plenipotentiary of the Government for Roma Communities established in June 2012 was moved to the Ministry of the Interior.

Internet source:

<http://www.zakonypreludi.sk/zz/2012-287>

<http://www.zakonypreludi.sk/zz/2001-575/znenie-20121001>

<http://www.minv.sk/?romske-komunita-uvod>

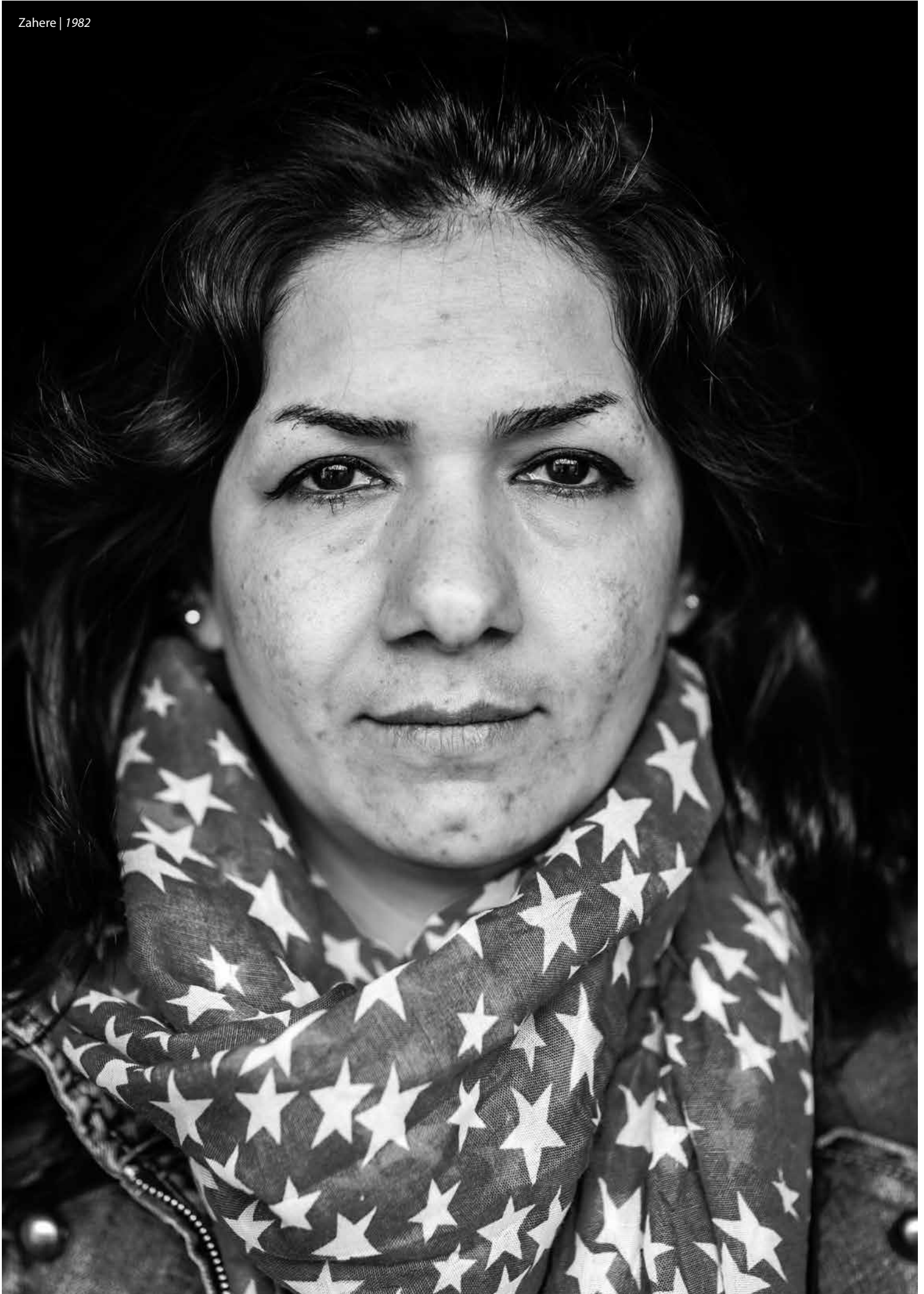
Slovenia

SI

Case law

Alleged discrimination against HIV positive job applicant

An HIV-positive job applicant for a position as a carer succeeded at interview without revealing his health condition. Although he was informed of his job title, working conditions, organisational unit and internal regulations and he received his locker keys and uniform, his employment contract was not concluded



as he had not submitted a health certificate. The plaintiff challenged the first health certificate issued by a doctor, which stipulated that he could only perform the duties of a carer if he wore double gloves and had no direct contact with blood, as he feared that this would reveal his health condition. After he succeeded with the appeal, he submitted another health certificate which did not include the impugned instructions to his employer, who ultimately announced that instructions had been received not to hire any new employees.

The Higher Labour and Social Court overruled the Labour Court decision and found that there was sufficient evidence from which discrimination could be presumed, shifting the burden of the proof onto the employer.¹⁸⁶ It was a matter of fact that the employer seriously intended to employ until the latter's health condition became clear. Furthermore, the employer did not claim that the plaintiff's condition could constitute an obstacle to performing the tasks of a carer. The case was referred back to the court of first instance for re-examination.

Internet source:

http://www.sodisce.si/znanje/sodna_praksa/visje_del_in_soc_sodisce/2012032113050038/

Sweden

SE

Legislative developments

Protection against age discrimination extended

In November 2012, Parliament adopted new legislation on age discrimination. The new law prohibits age discrimination as of 1 January 2013 in the following areas:

- access to and supply of goods and services, housing, meetings or public events (Section 12);
- social services and health and medical care (Section 13);
- social insurance, unemployment insurance and financial aid for education (Section 14);
- public employment (Section 17).

Internet source:

<http://www.regeringen.se/sb/d/15542/a/192950>

Case law

Reasonable accommodation and dismissal of an employee with a disability challenged

The plaintiff, who had worked as a bus driver since 1989, had been employed by Veolia since 2007. Further to an ischaemic stroke in March 2008, he lost some cognitive function and suffered from brain fatigue. When he recovered his driving licence in November 2010, he asked his employer to adjust his working time as he needed more sleep and suffered from headaches when he overworked.¹⁸⁷ After the employer refused and asked him to start at 4 am or 5 am instead, he was dismissed.

The plaintiff brought the case to the Equality Ombudsman, who recalled the employer's duty to provide reasonable accommodation prescribed in Chapter 2, Section 1 of the Discrimination Act. As Veolia was a big company employing 250 bus drivers, it would not have been difficult to accommodate one driver's needs.

¹⁸⁶ Higher Labour and Social Court, Decision No Pdp 475/2012 of 6 June 2012.

¹⁸⁷ He asked for part-time work to be performed during the day, from 8 am onwards, and with a day off to rest in the middle of the week. There is a disagreement between the parties with regard to the factual circumstances. The employer claimed that the worker asked to start at 10 am and to drive certain types of buses only.



The Equality Ombudsman held that there was an infringement of Section 7 of the Employment Protection Act, which requires the employer to actively support sick workers' rehabilitation before any grounds for dismissal arise. The Ombudsman has referred the case to the Labour Court to seek compensation.¹⁸⁸

Internet source:

<http://www.do.se/sv/Press/Pressmeddelanden-och-aktuellt/2012/DO-stammer-Veolia-for-diskriminering-av-busschauffor/>

Turkey

Erratum

The item included in the 15th issue of the European Anti-Discrimination Law Review, page 79, on the new education law should read as follows:

New education law

On 30 March 2012, the Justice and Development Party tabled an education bill with the support of the nationalist party, in the face of opposition from the Republican People's Party (the RPP, the main opposition party) and the pro-Kurdish party. The RPP unsuccessfully challenged the proposal before the Constitutional Court on the grounds that it violated the constitutional principles of secularism and equality.

The new law entered into force on 11 April 2012. Compulsory education was expanded from eight to 12 years and a mandatory course on human rights, citizenship and democracy for fourth grade was introduced. The law also reinstated the secondary stage of the *imam-hatip* vocational schools.

Mandatory religious courses which the European Court of Human Rights had found to violate the European Convention¹⁸⁹ were not abolished, but elective courses on Christianity, Islam, Judaism and the Alevi faith can be introduced on demand. The law also introduced optional courses on 'living languages and dialects' for two hours per week starting in the fifth grade.¹⁹⁰

Internet source:

http://www.tbmm.gov.tr/develop/owa/kanunlar_sd.durumu?kanun_no=6287

Legislative developments

Law creating the Human Rights Institute adopted

The Turkish Parliament adopted the Law on the Human Rights Institute on 21 June 2012, published in the Official Gazette on 30 June 2012.¹⁹¹ The Institute's mandate covers protecting human rights, preventing violations, combating torture and mistreatment, reviewing complaints, research and awareness-raising. Combating discrimination is not explicitly listed.

The Institute is composed of 11 members who must have complied with military service obligations and must not suffer from a mental disease which may hinder uninterrupted exercise of their duties. Pursu-

¹⁸⁸ Labour Court A 170/12.

¹⁸⁹ *Hasan and Eylem Zengin v Turkey*, Application No 1448/04, 9 October 2007
[http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-82580#{"itemid":\["001-82580"\]}](http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-82580#{).

¹⁹⁰ Namely Kurdish and other minority languages to be identified by the Government.

¹⁹¹ Law on the Human Rights Institute, No 6332, 21 June 2012, Official Gazette No 28339, 30 June 2012.

ant to Article 53 of the Law on Public Servants, the Institute must reserve 3 per cent of its employment positions for employees with disabilities. Members are appointed for four years, renewable once, either by the President, the Council of Ministers, the High Board of Education or the Union of Bar Associations. Experience or expertise in human rights is not mentioned as an eligibility criterion. However, the Law stipulates that selection must ensure that individuals, lawyers, experts, journalists, academics, and trade union and NGO representatives working on human rights are represented in a pluralist manner.

Internet source:

http://www.tbmm.gov.tr/develop/owa/kanunlar_sd.durumu?kanun_no=6287

United Kingdom

GB

Political developments

Threats to mandatory impact assessment obligations

The Prime Minister announced his intention to do away with the obligation on public authorities to consider the impact of their decision making on equality at a conference of the Confederation of British Industry. In his view, 'car[ing] about making sure that government policy never marginalises or discriminates (...) does not have to mean churning out reams of bureaucratic nonsense. We have smart people in Whitehall who consider equalities issues while they're making the policy. We don't need all this extra tick-box stuff.' The Government has lost a number of high profile judicial review claims in which it has been alleged that decision makers erred in law in inadequately assessing the impact of their decision making on equality. David Cameron also announced his intention to radically reduce the number of legal challenges to governmental decision making by making judicial review more expensive and by reducing the already short three month maximum period within which claims must be brought.

Threats to enforcement and remedies in discrimination cases

The Government has published its response to the consultation on proposals to repeal the recently implemented power for Employment Tribunals to make broad recommendations as regards future steps to be taken by employers shown to have discriminated and to also repeal the statutory provisions whereby information can be sought by potential discrimination claimants. The responses to the consultation on the proposals were overwhelmingly against; according to the document, 12% were in favour of repealing the provision allowing broad recommendations with 79% opposed, 15% in favour of repealing the statutory questionnaires and 83% opposed. Having noted that 'all business representative organisations supported repeal' the document went on to state (§6) that 'in the light of this response, the Government will seek an opportunity to repeal both the wider recommendations provisions and the obtaining information provisions'.

