



Legal Seminar 26 November 2012
Equality Law for Everyone: Challenges Ahead

SUMMARY - WORKSHOP 3

European Court of Human Rights Case Law

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Extract from the thematic report “The Prohibition of Discrimination under European Human Rights Law: Relevance for the EU non-discrimination directives – an update” written by Olivier de Schutter, published by the European Network of Legal Experts in the Non-Discrimination Field, in May 2011.

The report offers an overview of protection from discrimination under the 1950 European Convention on Human Rights and the 1961 European Social Charter as well as the 1996 Revised European Social Charter, which are the main human rights treaties of the Council of Europe. The report seeks to identify aspects of that protection which could influence the outstanding questions of interpretation of Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, as well as the proposed Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation that is currently under discussion.

The report is structured in three parts. Part I offers an overview of the anti-discrimination clauses of the European Convention on Human Rights and of the relevant case-law of the European Court of Human Rights. The European Convention on Human Rights (ECHR) contains a large range of civil and political rights, including the right to life, the prohibition of torture and of inhuman or degrading treatment or punishment, the prohibition of slavery and forced labour, the right to liberty and security, the right to a fair trial, the principle of no punishment without law (*nullum crimen, nulla poena sine lege*), the right to respect for private and family life, freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association, and the right to marry. Additional protocols to the ECHR guarantee rights such as the protection of property, the right to education, the right to free elections (Protocol No. 1), the prohibition of imprisonment for debt, freedom of movement, the prohibition of expulsion of nationals and the prohibition of collective expulsion of aliens (Protocol No. 4), the abolition of the death penalty (Protocol No. 6 and, extending the prohibition to times of war, Protocol No. 13), the procedural safeguards relating to the expulsion of aliens, the right of appeal in criminal matters, the right to compensation for wrongful conviction, the right not to be tried or punished twice, or equality between spouses (Protocol No. 7). The enjoyment of all these substantive rights must be ensured without discrimination, pursuant to Article 14

ECHR, to which the later additional protocols also refer. Part I of the report describes the method used by the European Court of Human Rights in the examination of differences in treatment which are denounced as being discriminatory. It notes in particular that the level of the scrutiny exercised by the Court will vary according to a largely implicit and evolving, but nevertheless identifiable, hierarchy of prohibited grounds of discrimination: differences in treatment on the basis of 'suspect' grounds (birth out of wedlock, sex, sexual orientation, race and ethnic origin, and more recently nationality) must be justified by 'particularly weighty reasons' and be necessary to the fulfilment of the aims pursued; differences in treatment based on 'non-suspect' grounds (these constitute a residual category which includes property, but arguably also religion as well as disability) must have an objective and reasonable justification, requiring that they pursue a legitimate aim and that there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised. However, the non-discrimination clause included in the 1950 ECHR only applies in the enjoyment of the rights and freedoms set forth in the Convention, and cannot be invoked independently of those other substantive provisions: as a result, although Article 14 ECHR may be invoked in contexts such as education, social aid or social security, the exercise of political rights or the provisions which seek to facilitate family life, as well as in situations where the impugned difference in treatment is based on the exercise of freedom of religion, on sexual orientation, or generally on the exercise by the individual of the freedoms protected under the Convention, it shall not be invocable in principle in the context of employment and occupation. Part I of the report therefore includes a study of the added value of Protocol No. 12 to the ECHR, which opened for signature in 2000 and entered into force in 2005, as this instrument provides for a general anti-discrimination clause for the States Parties with respect to which that protocol is in force. Although the scope of application of Protocol No. 12 to the ECHR is broader than that of Article 14 ECHR, the relatively low number of ratifications of this instrument, as well as the timid approach it appears to take on the scope of positive obligations which may be derived from it, will limit its effectiveness in imposing on States Parties the adoption of measures to combat discrimination in private relationships.

Part II examines protection from discrimination under the European Social Charter, according to the interpretation given to the Charter by the body of independent experts established under the Charter to monitor its implementation: the European Committee of Social Rights. Both the conclusions adopted by the Committee on the basis of the periodic state reports and the decisions it adopted in the context of collective complaints are examined in order to highlight its contribution to the shape of anti-discrimination law in Europe. Under the European Social Charter, the non-discrimination requirement is derived from Article 1, para. 2 of the 1961 European Social Charter and the 1996 Revised European Social Charter (the right to work), as well as from Article 15 (the right of persons with disabilities to independence, social integration and participation in the life of the community) and Article 23 (the right of elderly persons to social protection), whether combined or not with the non-discrimination clause included in Article E of the 1996 Revised European Social

Charter. On the basis of this latter provision, the European Committee of Social Rights requires that States Parties to the Revised European Social Charter monitor the impact of their policies and legislation on the most vulnerable segments of the population, thus imposing on them a positive duty to promote equality. This positive duty—in effect, a due diligence obligation to measure the impact on vulnerable groups of certain general measures or policies that are ostensibly ‘neutral’—goes beyond what the European Court of Human Rights has imposed on the basis of Article 14 ECHR or Protocol No. 12 to the ECHR. Part II of the report also examines the content of the practical measures (especially of a procedural nature) which promote the full effectiveness of the efforts to combat discrimination according to these provisions, and which the European Committee of Social Rights encourages the states bound by these provisions to adopt.

Part III examines the relationship of these instruments and the case-law of those bodies to the interpretation of Directives 2000/43/EC and 2000/78/EC. In this latter part, an overview is proposed, ground per ground, of the questions of interpretation which the European Court of Human Rights and the European Committee of Social Rights have addressed, to the extent that they may influence the interpretation of the directives.

The conclusions which may be derived from the study concern both the general orientation of an anti-discrimination strategy based on legal tools and specific questions of interpretation relating to each of the grounds covered by the Racial Equality and Employment Equality Directives. At the level of the general orientation of the strategy against discrimination, the report concludes that in the progressive development of anti-discrimination law in Europe, despite the important influence traditionally exercised by the European Convention on Human Rights on fundamental rights in the legal order of the European Union, the European Social Charter may become of increasing importance. Indeed, the European Committee of Social Rights is presented with state reports which make it possible to follow on a regular basis the progress made in the realisation of the rights of the 1961 European Social Charter or of the 1996 Revised European Social Charter, and since 1998, it may receive collective complaints which target general legislation and policies and the effect they produce on groups. The European Committee on Social Rights may therefore be better placed than the European Court of Human Rights to develop jurisprudence on a number of issues that are highly relevant in the implementation of anti-discrimination strategies, such as the need for an active labour policy aimed at the integration of target groups and, more generally, on the need for affirmative action—in the field of employment but also in the fields of education, housing, or social policy—directed towards the social and professional integration of the most vulnerable segments of the population, or the impact of a flexibilisation of labour legislation or of the ‘activation’ of social aid or unemployment benefits on the most vulnerable groups.

The quasi-absence of any case-law of the European Court of Human Rights deriving positive obligations from Article 14 ECHR and the timidity of the drafters of Protocol

No. 12 to the ECHR on the issue of positive action contrasts with the insistence of the European Committee of Social Rights that legislation prohibiting discrimination actually produces effective integration, as well as with the requirement—also imposed by the European Committee of Social Rights—that the States Parties monitor closely the impact their policies have on the situation of the most vulnerable groups. The report argues that combating discrimination requires more than prohibitions: as exhibited within the EU by the complementarity between the anti-discrimination directives based on Article 13 TEC (now Article 19 TFEU) and the European Employment Strategy or, more recently, the EU Framework for National Roma Integration Strategies up to 2020, it requires an active social and employment policy commensurate to the aim of realising integration. It is in this direction that recent evolution within the European Social Charter points. On the other hand, the case-law of the European Court of Human Rights under Article 14 ECHR may have an impact on certain specific issues of interpretation. It could in particular encourage an understanding of the prohibition of indirect discrimination on the grounds of race or ethnic origin which includes the requirement to take into account relevant differences between racial or ethnic groups, per analogy with the approach taken towards religion-based discrimination by the European Court of Human Rights.

From the point of view of the impact on the interpretation of the Racial Equality and Employment Equality Directives of the reference to the jurisprudence of the European Social Charter and the European Convention on Human Rights, the clearest lesson from the report is that such reference could lead to moving beyond the explicit definition of indirect discrimination under Article 2, para. 2 (b) of the both these directives. In these directives, indirect discrimination is defined only in reference to one of the three potential understandings of that concept distinguished in the report: it is seen to occur where apparently neutral regulations, criteria or practices appear to be particular disadvantageous to the members of a certain category, if the provision creating the disadvantage is not objectively and reasonably justified (a). Neither disparate impact discrimination, as demonstrated by statistics (b), nor the failure to treat differently a specific individual or category by providing for an exception to the application of the general rule (c) are explicitly included in that definition. The jurisprudence of the European Committee of Social Rights, however, strongly encourages states to combat institutional discrimination by authorising statistical proof of discrimination and by measuring the impact of the laws and policies they implement. In addition, although the Employment Equality Directive only mentions a requirement of reasonable accommodation with respect to persons with disabilities, the case-law of the European Court of Human Rights illustrates why the failure to take into account relevant differences could be seen as a form of indirect discrimination, even though it may not fall clearly within the definition of Article 2, para. 2 (b) of the Directives. With respect to religion, as shown in Section 4 of Part III of the report, this could be a consequence of the freedom of religion guaranteed under Article 9 ECHR.

The report also draws two further conclusions with regard to two specific grounds of prohibited discrimination, namely disability and sexual orientation. In the context of

the Employment Equality Directive, the requirements deriving from Article 8 ECHR may have a decisive role to play in countering the risk of discrimination against workers with disabilities resulting from the imposition of health and safety requirements which create an obstacle to their recruitment or their retention, where allegedly their employment would put themselves, their co-workers or the general public at risk. The same provision of the Convention, insofar as it protects the right to respect for private life, to which the sexual orientation of a person belongs, may contribute to the effectiveness of the prohibition of direct discrimination on the ground of sexual orientation. On the other hand, the report shows that the European Court of Human Rights has not considered that reserving advantages to married couples should be treated as discrimination based on sexual orientation in violation of Article 14 ECHR, read in combination with either Article 8 ECHR (right to respect for private life) or Article 1 of Protocol No. 1 to the ECHR (right to property, including to social benefits), even under jurisdictions where marriage is not available to same-sex couples.