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European equality law review

European network of legal experts in
gender equality and non-discrimination

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IN THIS ISSUE

- Self-employment in EU member states: the role for equality law
- Access to justice for persons with mental disabilities: with no procedural accommodation, an impossibility
- Gender identity and registration of sex by public authorities
- Combating sexual orientation discrimination in the European Union

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Introduction

The European Network of Legal Experts in Gender Equality and Non-Discrimination is pleased to present the second edition of the European Equality Law Review.

This second issue provides an overview of the latest developments in gender equality and anti-discrimination law and policy, which as far as possible reflects the state of affairs for the period January – June 2015. The various chapters detail information relating to European case law developments (European Court of Justice and European Court of Human Rights), as well as the most recent developments in legislation, policy and case law on the national level.¹ This European Equality Law Review also includes four in-depth analytical articles. The first article authored by Catherine Barnard and Alysia Blackham discusses self-employment and equality and presents some of the key findings of a recently published report of the former European Network of Legal Experts in the Field of Gender Equality.² In the second article, Margarita Ilieva explores the issue of reasonable accommodation in access to justice for persons with mental disabilities. Marjolein van den Brink and Jet Tigchelaar in the third article examine gender identity and sex registration by public authorities. Finally Christa Tobler looks at the ground of sexual orientation and presents the outcomes of a recently published report of the former European Network of Legal Experts in the Non-Discrimination Field.³

As to policy developments at the European level, important to mention here is that the Commission has formally withdrawn the stalled proposal for a Directive on maternity leave on 1 July 2015.⁴ The Commission is now exploring a fresh approach to meet the policy objectives of improving the protection of mothers, accomplishing better reconciliation of professional and family life, and facilitating female participation in the labour market. The Commission has published a Roadmap for this initiative.⁵ With this new approach the Commission seeks to make a real contribution to the improvement of the lives of working parents and other carers.

Noteworthy is also that the results of Eurobarometer 428 on gender equality were published in April 2015.⁶ This Eurobarometer measures Europeans' perceptions of gender inequalities within their own country, as well as Europeans' general attitudes towards gender equality. It focuses on four topics: attitudes towards gender equality and stereotypes; understanding gender inequality; tackling gender inequality effectively; and combating violence against women. Some of the main findings are that around three in five Europeans (62 %) think that inequalities between men and women are widespread in their country; and that three quarters of Europeans (76 %) think that tackling inequality between men and women should be an EU priority. When asked to choose, from a list of six areas of society, up to three where they believe gender stereotypes are most widespread, Europeans are most likely to mention:

- 1 On the basis of information provided by the national experts, Alice Welland from Utrecht University drafted the sections regarding gender equality and Isabelle Chopin, Catharina Germaine and Jone Elizondo from the Migration Policy Group drafted those regarding anti-discrimination. The final compilation was done by the Migration Policy Group.
- 2 Barnard, C., Blackham, A. (2015), *Self-Employed: The Implementation of Directive 2010/41 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity*, European Network of Legal Experts in the Field of Gender Equality, available at: http://www.equalitylaw.eu/index.php?option=com_edocman&task=document.viewdoc&id=2732&Itemid=295, accessed 21 October 2015.
- 3 Pudzianowska, D., Śmiszek, K. (2014), *Combating sexual orientation discrimination in the European Union* (supervised and edited by Christa Tobler), European Network of Legal Experts in the Non-Discrimination Field, available at: <http://www.equalitylaw.eu/publications>, accessed 21 October 2015.
- 4 Proposal for a directive of the European Parliament and of the Council amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding. Brussels, 3.10.2008. COM(2008) 637 final.
- 5 The Roadmap is available at: http://ec.europa.eu/smart-regulation/roadmaps/docs/2015_just_xxx_maternity_leave.en.pdf. See also the press release here: http://europa.eu/rapid/press-release_MEX-15-5464_en.htm, both accessed 21 October 2015.
- 6 The results are available at http://ec.europa.eu/justice/gender-equality/files/documents/eurobarometer_report_2015_en.pdf, accessed 21 October 2015.

work (51 %), followed by advertising (34 %), the media (33 %) and politics (28 %). They are less likely to believe that gender stereotyping is most widespread in sport (18 %); and in schools (16 %). Our Network's gender experts regularly report on many of the topics addressed in the Eurobarometer, such as these gender stereotypes in different areas of society.

During the first half of 2015 the Commission showed support to the fight against discrimination on the ground of ethnic origin, reinforcing the existing programmes in integration. The European Platform for Roma Inclusion was held in March and opened a call for proposals for projects to support activities on non-discrimination and Roma integration. Additionally, the Commission has continued the monitoring of the National Roma Integration Strategies, while offering more funds on the basis of the 4th Report on the implementation so that Member States can further implement more activities.

On 30 April 2015 a Letter of Formal Notice was sent by the Commission to the Slovak Republic concerning discrimination of Roma children in education, regarding both misdiagnosis of Roma children and their subsequent registration in special schools and discrimination in mainstream education.

The Commission launched several publications on antidiscrimination during this period. The 'Know Your Rights' discrimination booklet was published to provide easily accessible guidance for victims of discrimination. In addition, the first issue of the Diversity Newsletter was issued, as well as a 'Practical Guide to Launch and Implement Diversity Chapters'. Finally, a new 'Overview of Youth Discrimination in the European Union' was published.

The Equal Treatment Directive status remains unchanged since the meeting of the Council and its preparatory bodies on 11 December 2014. Věra Jourová, EU Commissioner for Justice, Consumers and Gender Equality took this forward by meeting with representatives of NGOs to discuss the proposal in February, following up on the commitment she showed in the Employment, Social Policy, Health and Consumer Affairs Council on 12 December 2014.

On 16 July 2015 (after the cut-off date for this issue) the Court of Justice of the European Union delivered its judgment in the *Nikolova* case (discrimination by association on the ground of ethnic origin). A summary of the conclusions of Advocate-General Kokott on the case is included in this current edition and the case will be analysed in depth in the Equality Law Review's next issue. In addition, the Court of Justice also issued a key judgment in the sphere of gender equality law on 16 July 2015, in the Greek case of *Maïstrellis* concerning parental leave. As with the *Nikolova* case, a summary of Advocate-General Kokott's Opinion is included in this edition, and the judgment will be analysed in the forthcoming edition in 2016.

As regards the European Equality Law Network itself, we look forward to the annual legal seminar, which will be held in Brussels on 24 November 2015, and will gather all members from the Network, national government officials, and representatives of national equality bodies and selected European NGOs. Professor Sandra Fredman (Oxford University) will deliver the keynote speech on intersectional discrimination, as she is currently also preparing a thematic report on this topic for the Network.

Finally, we are pleased to draw your attention to our new website which is now online: www.equalitylaw.eu. The website contains information regarding the Network's activities and reports as well as publications from the previous two networks. As always, please do not hesitate to contact one of the Network's three partners, should you need more information.

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SELF-EMPLOYMENT IN EU MEMBER STATES: THE ROLE FOR EQUALITY LAW

Catherine Barnard and Alysia Blackham*

I. Introduction

Self-employment is a growing phenomenon in the EU. In 2012, 32.8 million individuals in the EU were self-employed, accounting for 15 % of total EU employment.¹ At the same time, there is large variation between Member States, with rates of self-employment ranging from 8.1 % in Luxembourg to 32 % in Greece.² In the UK, the rise in total employment between 2008 and 2014 was predominantly among the self-employed, bringing the proportion of self-employed workers to 15 % of the labour force, the highest level in 40 years.³

In the EU, self-employment is simultaneously depicted as an opportunity, allowing workers to have independence and to create their own employment; and as a trap, consigning individuals to precarious work and insecurity.⁴ However, it is important to recognise the significant diversity in those described as 'self-employed': the self-employed have significant differences in skill and education levels, work autonomy, pay and working conditions.⁵ While recognising this diversity, it is also clear that some self-employed persons are at risk of precarious work, and have limited legal protection in their working lives (Section II). Equality law has significant potential to address this gap. Directive 2010/41 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity is the key piece of equality legislation that may assist the self-employed in the EU (Section III). However, the personal scope of the Directive is defined by reference to the law in individual Member States, requiring renewed attention on how 'self-employment' is defined and constructed in individual countries (Section IV).

Drawing on data provided by the European Network of Legal Experts in the Field of Gender Equality, obtained as part of an analysis of the implementation of Directive 2010/41,⁶ we consider the definition and construction of 'self-employment' in EU Member States, particularly in relation to issues of categorisation

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1 Kern, V., *Social Protection for Self-Employed Workers* [2013] European Parliamentary Research Service <http://epthinktank.eu/2013/07/10/social-protection-for-self-employed-workers/>, accessed 16 December 2014.

2 ONS, *Self-Employed Workers in the UK - 2014* (2014) <http://www.ons.gov.uk/ons/rel/lmac/self-employed-workers-in-the-uk/2014/rep-self-employed-workers-in-the-uk-2014.html> accessed 10 October 2015.

3 ONS, *Self-Employed Workers in the UK - 2014* (2014) <http://www.ons.gov.uk/ons/rel/lmac/self-employed-workers-in-the-uk/2014/rep-self-employed-workers-in-the-uk-2014.html> accessed 10 October 2015.

4 See, for example, European Commission, *Self-Employment in Europe (2010) and EUROPE 2020: A strategy for smart, sustainable and inclusive growth* COM(2010) 2020 final.

5 European Foundation for the Improvement of Living and Working Conditions, *The Working Conditions of the Self-Employed in the European Union* (Office for Official Publications of the European Communities 1997); European Foundation for the Improvement of Living and Working Conditions, *Self-Employment: Choice or Necessity?* (Office for Official Publications of the European Communities 2000).

6 See Barnard, C., Blackham, A., *Self-Employed: The Implementation of Directive 2010/41 on the Application of the Principle of Equal Treatment between Men and Women Engaged in an Activity in a Self-Employed Capacity* (2015).

and exclusion of particular types of work. We argue that there is limited consensus regarding the boundaries of ‘self-employment’ in Member States. We consider how these definitions and categorisations might exacerbate the precariousness of some groups of self-employed by confining the protection afforded by the Directive. In particular, we examine how the definition of self-employment may complicate the identification of the ‘duty holder’ for enforcing social rights for the self-employed (Section V). Section VI concludes.

We start by considering some of the reasons why self-employment raises particular concerns for its critics. The answer lies in precarity and the gendered nature of that precariousness.

II. Issues associated with self-employment

Precarious work

Introduction

Precarious work is a growing problem in EU countries. The crisis and growing unemployment have ‘create[d] the conditions for wider “acceptance” of work that is precarious.’⁷ However, there is limited consensus regarding what constitutes ‘precarious’ work. Fudge and Owens define ‘precarious’ work as that which ‘departs from the normative model of the standard employment relationship ... and is poorly paid and incapable of sustaining a household.’⁸ Thus, Rodgers has identified four dimensions for gauging the degree of work precarity:⁹

1. the degree of work certainty and security (including job tenure, risk of job loss and work availability). Certainty and security may be affected by the form of employment (e.g. temporary, permanent, part-time or casual employment), the nature of the work relationship (e.g. self-employment), and the presence of multiple parties, as in an agency arrangement;
2. the level of control over work and conditions (including work intensity);
3. the level of protection by law or collective agreement (including social protection); and
4. the level of income (including that derived from work, government transfers and benefits).¹⁰

Vosco defines ‘precarious employment’ as that:

characterized by uncertainty, low income, and limited social benefits and statutory entitlements. Precarious employment is shaped by the relationship between *employment status* (i.e. self- or paid employment), *form of employment* (e.g. temporary or permanent, part-time or full-time), and *dimensions of labour market insecurity*, as well as *social context* (e.g. occupation, industry and geography) and *social location* (or the interaction between social relations, such as gender, and legal and political categories, such as citizenship).¹¹

Self-employment and precarity

Self-employment is associated with a number of risk factors for precarious work. In studying the self-employed in Canada in the 1990s, Moore and Mueller found evidence that individuals were being ‘pushed’ into self-employment in response to inadequate opportunities in the paid sector. Longer spells

⁷ McKay, S. and others, *Study on Precarious Work and Social Rights* (2012), p. 14.

⁸ Fudge, J., Owens, R.J., ‘Precarious Work, Women and the New Economy: The Challenge to Legal Norms’ in: Fudge, J., Owens, R.J. (eds), *Precarious work, women and the new economy: the challenge to legal norms* (Hart Publishing 2006), p. 3.

⁹ Rodgers, G., ‘Precarious Work in Western Europe: The State of the Debate’ in: Rodgers, G., Rodgers, J. (eds), *Precarious jobs in labour market regulation: the growth of atypical employment in Western Europe* (International Institute for Labour Studies 1989), p. 3.

¹⁰ Vosko, L.F., *Managing the Margins: Gender, Citizenship, and the International Regulation of Precarious Employment* (Oxford University Press 2010), p. 2.

¹¹ Vosko, L.F., *Managing the Margins: Gender, Citizenship, and the International Regulation of Precarious Employment* (Oxford University Press 2010), p. 2 (emphasis in original).

of joblessness favoured entry into self-employment, and workers who left their previous, paid jobs involuntarily were more likely to become self-employed.¹² Thus, self-employment may be a fall-back position for those who cannot find paid employment elsewhere.

Other workers may be attracted to self-employment by 'pull' factors, such as higher expected earnings relative to paid employment and perceived freedom from managerial constraints.¹³ However, these benefits do not always result in practice. Entrepreneurship may be 'driven by unrealistic optimism' among the self-employed, particularly in relation to the level of earnings they will achieve.¹⁴ In recent surveys, 18 % of the self-employed have been classified as poor, compared with only 6 % of employees,¹⁵ indicating that self-employed workers are more at risk of poverty than employees. Indeed, average income from self-employment has fallen by 22 % since 2008–09.¹⁶ Previous studies have also found that low-skilled workers generally have higher income in waged employment than when self-employed.¹⁷ Thus, the idealised 'pull' factors of self-employment may actually exacerbate individual precarity.

However, the self-employed may have greater job satisfaction,¹⁸ particularly for those in non-professional and non-managerial roles.¹⁹ Thus, for some, self-employment may provide greater autonomy, flexibility, skill utilisation and job security.²⁰ For older workers, self-employment may also provide opportunities for gradual retirement,²¹ granting them their independence and autonomy which may be lacking as a 'payroll' employee.²² Thus, the self-employed often see self-employment as liberating, freeing them from the strictures of employment and allowing better balance of work and caring obligations. Again, this is often not achieved in practice.²³ Indeed, the self-employed (particularly homeworkers) may experience the same exploitative conditions they had tried to escape in employment.²⁴ Self-employment increasingly makes no distinction between work and home life,²⁵ making a mockery of any notion of 'work-life balance' and potentially leading to excessive working hours.²⁶ Median working hours for the self-employed are approximately 5 to 13 hours more per week than for employees,²⁷ and self-employed workers are more

- 12 Moore, C.S., Mueller, R.E., 'The Transition from Paid to Self-Employment in Canada: The Importance of Push Factors' (2002) 34 *Applied Economics*, p. 791.
- 13 See Taylor, M.P., 'Earnings, Independence or Unemployment: Why Become Self-Employed?' (1996) 58 *Oxford Bulletin of Economics and Statistics*, p. 253.
- 14 Arabsheibani, G. and others, 'And a Vision Appeared unto Them of a Great Profit: Evidence of Self-Deception among the Self-Employed' (2000) 67 *Economics Letters*, p. 35.
- 15 European Commission, *Self-Employment in Europe (2010) and EUROPE 2020: A strategy for smart, sustainable and inclusive growth* COM(2010) 2020 final, p. 26.
- 16 ONS, *Self-Employed Workers in the UK - 2014* (2014) <http://www.ons.gov.uk/ons/rel/lmac/self-employed-workers-in-the-uk/2014/rep-self-employed-workers-in-the-uk-2014.html> accessed 10 October 2015. See also Parker, S.C., 'The Inequality of Employment and Self-Employment Incomes: A Decomposition Analysis for the UK' (1999) 45 *Review of Income & Wealth*, p. 263.
- 17 Lofstrom, M., 'Does Self-Employment Increase the Economic Well-Being of Low-Skilled Workers?' (2011) 40 *Small Business Economics*, pp. 933 and 948.
- 18 Benz, M., Frey, B.S., 'The Value of Doing What You like: Evidence from the Self-Employed in 23 Countries' (2008) 68 *Journal of Economic Behavior & Organization*, p. 445; Andersson, P., 'Happiness and Health: Well-Being among the Self-Employed' (2008) 37 *The Journal of Socio-Economics* p. 213.
- 19 Hundley, G., 'Why and When Are the Self-Employed More Satisfied with Their Work?' (2001) 40 *Industrial Relations: A Journal of Economy and Society*, p. 293. See also Smeaton, D., 'Self-Employed Workers: Calling the Shots or Hesitant Independents?: A Consideration of the Trends' (2003) 17 *Work, Employment and Society*, p. 379.
- 20 Hundley, G., 'Why and When Are the Self-Employed More Satisfied with Their Work?' (2001) 40 *Industrial Relations: A Journal of Economy and Society*, p. 293.
- 21 Quinn, J.F., 'Labor-Force Participation Patterns of Older Self-Employed Workers' (1980) 43 *Social Security Bulletin*, p. 17.
- 22 See Parry, J., Taylor, R.F., 'Orientation, Opportunity and Autonomy: Why People Work after State Pension Age in Three Areas of England' (2007) 27 *Ageing and Society*, p. 579.
- 23 See Jurik, N.C., 'Getting Away and Getting By The Experiences of Self-Employed Homeworkers' (1998) 25 *Work and Occupations* p. 7; Duberley, J., Carrigan, M., 'The Career Identities of "mumpreneurs": Women's Experiences of Combining Enterprise and Motherhood' (2013) 31 *International Small Business Journal*, p. 629.
- 24 See Jurik, N.C., 'Getting Away and Getting By The Experiences of Self-Employed Homeworkers' (1998) 25 *Work and Occupations* p. 7.
- 25 See Baines, S., Gelder, U. 'What Is Family Friendly about the Workplace in the Home? The Case of Self-Employed Parents and Their Children' (2003) 18 *New Technology, Work and Employment*, p. 223.
- 26 See Duberley, J., Carrigan, M., 'The Career Identities of "mumpreneurs": Women's Experiences of Combining Enterprise and Motherhood' (2013) 31 *International Small Business Journal*, p. 629.
- 27 European Commission, *Self-Employment in Europe* (2010), p. 26.

likely to work higher (over 45) or lower (8 or less) hours than employees,²⁸ perhaps demonstrating that individuals have limited control over work hours and work intensity.²⁹

It is clear that some self-employed persons will have significantly better work outcomes than others. In studying US data, Robinson and Sexton found that the number of years of formal education increased the probability of becoming self-employed; and that self-employment earnings increased significantly for each year of education.³⁰ Similarly, studies of EU data have found that formal education and previous labour market experience have a positive impact on self-employment survival.³¹ Thus, better-educated individuals are more likely to be self-employed for a longer period, and are more likely to achieve higher earnings from their activities.³²

In this context, Beugelsdijk and Noorderhaven argue that there is at least one unifying personality trait for the self-employed: according to their study, entrepreneurs are more individually oriented than the rest of the population.³³ Beyond this one characteristic, there is likely to be significant diversity among the self-employed. That said, even highly skilled technical contractors, who may be paid more in a self-employed capacity, report feeling anxiety and estrangement in their working arrangements.³⁴ Thus, self-employment may both reduce and exacerbate work precarity for different individuals in different ways. Any analysis of self-employment should have regard to this diversity, and must consider the different aspects of precarity, which may overlap and interact in unexpected ways.

In summary, self-employment cannot be seen as a purely positive or purely negative phenomenon. Indeed, self-employment is not self-evidently an indicator of precarity.³⁵ The 'self-employed' covers a wide range of individuals. Thus, Eardley and Cordon have criticised the 'widespread and persistent idea of self-employed people as an affluent and self-sufficient *petite bourgeoisie*', drawing attention instead to the low-income self-employed.³⁶ There has been recognition for many years that those classified as 'self-employed' do not always have autonomy or control of their own means of production.³⁷ This has led to a growing emphasis on the 'dependent self-employed', or those who work for mainly one customer in a position of 'hierarchical subordination'.³⁸ In other words, in some systems that customer may be viewed as an employer.

Self-employment and gender

In considering the diversity of the self-employed in the EU, it is essential to take into account equality issues. Eurofound estimates that 34.4 % of the self-employed in the EU are women. On average, from 2008-2012 across the EU 28 Member States, the share of self-employed women compared to the total number in employment was much smaller than the corresponding share for men: 10 % compared with

28 ONS, *Self-Employed Workers in the UK - 2014* (2014) <http://www.ons.gov.uk/ons/rel/lmac/self-employed-workers-in-the-uk/2014/rep-self-employed-workers-in-the-uk-2014.html> accessed 10 October 2015.

29 European Foundation for the Improvement of Living and Working Conditions, *The Working Conditions of the Self-Employed in the European Union* (Office for Official Publications of the European Communities 1997), p. 1.

30 Robinson, P.B., Sexton, E.A., 'The Effect of Education and Experience on Self-Employment Success' (1994) 9 *Journal of Business Venturing*, p. 141.

31 Millán, J.M., Congregado, E., Román, C., 'Determinants of Self-Employment Survival in Europe' (2010) 38 *Small Business Economics*, p. 231.

32 Robinson, P.B., Sexton, E.A., 'The Effect of Education and Experience on Self-Employment Success' (1994) 9 *Journal of Business Venturing*, p. 141.

33 Beugelsdijk, S., Noorderhaven, N., 'Personality Characteristics of Self-Employed; An Empirical Study' (2005) 24 *Small Business Economics*, p. 159. On personality traits of the self-employed, see Caliendo, M., Fossen, F., Kritikos, A.S., 'Personality Characteristics and the Decisions to Become and Stay Self-Employed' (2013) 42 *Small Business Economics*, p. 787.

34 Kunda, G., Barley, S.R., Evans, J., 'Why Do Contractors Contract? The Experience of Highly Skilled Technical Professionals in a Contingent Labor Market' (2002) 55 *Industrial & Labor Relations Review*, p. 234.

35 See further Dello, B., *Salvation in a Start-up? The Origins and Nature of the Self-Employment Boom* (2014).

36 Eardley, T., Corden, A., (1944), *Low Income Self-Employment: Work, Benefits and Living Standards* (Avebury, 1996) p. 1.

37 See Dale, A., 'Social Class and the Self-Employed' (1986) 20 *Sociology*, p. 430.

38 See, for example, Ulrike, 1972-Muehlberger, *Dependent Self-Employment: Workers on the Border between Employment and Self Employment* (Palgrave Macmillan, 2007).

18 %.³⁹ While the number of self-employed women is increasing in the UK, men still constitute 68 % of self-employed workers.⁴⁰

Marlow argues that gender impacts upon women's experiences of self-employment, and affects the initiation, development and daily management of small firm ownership.⁴¹ Thus, gendered structural constraints continue to limit women's success as entrepreneurs.⁴² This is reflected in the number of self-employed women with employees (and, therefore, larger scale businesses): in 2013, the number of self-employed women with employees was 2 299 400 (compared with 6 514 900 for men). Thus, self-employed women are more likely to have smaller businesses (or to be operating alone) than their male counterparts, and may be more exposed to issues of precarity. Similarly, previous studies of US small businesses have found that female-owned businesses have lower survival rates, profits, employment, and sales than male-owned businesses.⁴³ Fairlie and Robb explain the lower success rates for female-owned businesses due to women having less start-up capital, less human capital, and less prior work experience in a family business.⁴⁴

The nature of self-employed work also varies by gender. In the UK, the most common roles for the self-employed in 2014 were in construction, taxi driving and carpentry,⁴⁵ traditionally male-dominated industries. While male self-employed workers are largely employed in skilled trades, many female self-employed are working in unskilled, low-paid areas. For self-employed women in the UK, the top three occupations in 2014 were cleaners and domestics, child minders and hairdressers and barbers.⁴⁶ These roles are generally associated with low levels of pay and benefits, poor conditions and limited skill and education. Indeed, Burke, FitzRoy and Nolan report a 'somewhat puzzling' finding that education and training have no significant association with the value of the business for female self-employed workers, though it does for men (see above).⁴⁷ However, if self-employed women are operating in sectors that require low levels of skill and experience, this finding is entirely unsurprising and risks becoming a self-fulfilling prophesy.

This may also reflect a broader argument that men and women approach self-employment differently. Biehl, Gurley-Calvez and Hill argue that male self-employment is often driven by labour-market opportunities, including the prospect of increased income compared with wage-based employment. In contrast, female self-employed workers are often driven by lifestyle factors, and are strongly influenced by other household earnings in their decision-making.⁴⁸ Allen and Curington found similar results in their examination of US data.⁴⁹

39 European Institute for Gender Equality, Gender Equality and Economic Independence: *Part-Time Work and Self-Employment – Review of the Implementation of the Beijing Platform for Action in the EU Member States* (2014) pp. 33–34.

40 ONS, *Self-Employed Workers in the UK - 2014* (2014) <http://www.ons.gov.uk/ons/rel/lmac/self-employed-workers-in-the-uk/2014/rep-self-employed-workers-in-the-uk-2014.html> accessed 10 October 2015.

41 Marlow, S., 'Self-employed Women – New Opportunities, Old Challenges?' (1997) 9 *Entrepreneurship & Regional Development*, p. 199.

42 Loscocco, K., Bird, S.R., 'Gendered Paths: Why Women Lag Behind Men in Small Business Success' (2012) 39 *Work and Occupations*, p. 183.

43 Fairlie, R.W., Robb, A.M., 'Gender Differences in Business Performance: Evidence from the Characteristics of Business Owners Survey' (2009) 33 *Small Business Economics*, p. 375.

44 Fairlie, R.W., Robb, A.M., 'Gender Differences in Business Performance: Evidence from the Characteristics of Business Owners Survey' (2009) 33 *Small Business Economics*, p. 375. Fairlie, R.W., Robb, A.M., 'Gender Differences in Business Performance: Evidence from the Characteristics of Business Owners Survey' (2009) 33 *Small Business Economics*, p. 375. In the UK, see Burke, A.E., FitzRoy, F.R., Nolan, M.A., 'Self-Employment Wealth and Job Creation: The Roles of Gender, Non-Pecuniary Motivation and Entrepreneurial Ability' (2002) 19 *Small Business Economics*, p. 255.

45 ONS, *Self-Employed Workers in the UK - 2014* (2014) <http://www.ons.gov.uk/ons/rel/lmac/self-employed-workers-in-the-uk/2014/rep-self-employed-workers-in-the-uk-2014.html> accessed 10 October 2015.

46 ONS, *Self-Employed Workers in the UK - 2014* (2014) <http://www.ons.gov.uk/ons/rel/lmac/self-employed-workers-in-the-uk/2014/rep-self-employed-workers-in-the-uk-2014.html> accessed 10 October 2015.

47 Burke, A.E., FitzRoy, F.R., Nolan, M.A., 'Self-Employment Wealth and Job Creation: The Roles of Gender, Non-Pecuniary Motivation and Entrepreneurial Ability' (2002) 19 *Small Business Economics*, p. 268.

48 Biehl, A.M., Gurley-Calvez, T., Hill, B. 'Self-Employment of Older Americans: Do Recessions Matter?' (2013) 42 *Small Business Economics*, p. 297, p. 308; see also Fairlie, R.W., Robb, A.M., 'Gender Differences in Business Performance: Evidence from the Characteristics of Business Owners Survey' (2009) 33 *Small Business Economics*, p. 375.

49 Allen, W.D., Curington, W.P., 'The Self-Employment of Men and Women: What Are Their Motivations?' (2014) 35 *Journal of Labor Research*, p. 143.

Women in self-employment may also be affected by broader social trends and gendered notions of ‘work’ (and what is regarded as ‘acceptable’ work). For example, the German expert from the European Network of Legal Experts in the Field of Gender Equality noted the decline in the ‘female job’: self-employed midwives are increasingly giving up work due to the low level of remuneration paid by health insurance schemes for their services, coupled with significant increases in professional liability insurance premiums.⁵⁰ Thus, gendered notions of ‘work’ and broader social concerns may particularly affect certain forms of ‘female’ self-employed jobs.

III. Legal protection for the self-employed: the role of equality law

The absence of legal protection

The analysis in Section 2 has demonstrated that some self-employed persons are at risk of precariousness, and that given the significantly lower number of women than men working as self-employed, equality issues pervade self-employed work at least as much as they do ‘standard’ employment. Further, some self-employed persons (particularly those with low levels of skills and education, or who are at risk of poverty) may have limited bargaining power in negotiating the arrangements under which they provide their services. Despite this, there is limited legal protection provided for the self-employed: *employment* protection, by its very nature, does not apply to those working in a self-employed capacity. Thus, the self-employed cannot claim unfair dismissal or redundancy payments nor can they complain that their terms and conditions are lower than statutory employment minima.

The self-employed are often responsible for their own working conditions, and have limited scope to bring a claim under health and safety legislation⁵¹ or working time regulations.⁵² Thus, legal protection for the self-employed is largely confined to contract law, via the negotiation of terms of engagement. However, this is likely to be of limited use to those with minimal bargaining power.

The role of equality law

In this context, equality law has significant scope to assist the self-employed. It has the potential to regulate the entire life cycle of self-employed work, ranging from engagement (that is, by ensuring equality in the selection of the self-employed to perform the work), to terms and conditions of work (by ensuring equality in the terms and conditions under which the self-employed are engaged), to termination (in preventing the use of discriminatory considerations in the termination of services provided by the self-employed). Putting it another way, if women are denied access to the opportunities available to the self-employed, purely on the grounds of sex, they will not even be able to aspire to the potential economic, social and professional opportunities offered by self-employment.

There is, therefore, a strong case to consider the application of equality law to the self-employed. The question, then, is whether the self-employed fall in the personal scope of EU equality law. The answer is: it depends on the specific provisions in the specific directive.

So, for example, as consumers of goods and services, the self-employed are protected by 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.⁵³ However, this will not provide protection for the self-employed in relation to those they are contracting with to provide their services (though it

50 See Barnard, C., Blackham, A., *Self-Employed: The Implementation of Directive 2010/41 on the Application of the Principle of Equal Treatment between Men and Women Engaged in an Activity in a Self-Employed Capacity* (2015).

51 See *Health and Safety at Work etc. Act 1974* (UK); *Management of Health and Safety at Work Regulations 1999* (UK) SI 1999/3242.

52 See Directive 93/104/EC concerning certain aspects of the organisation of working time, as amended by Directive 2000/34/EC and implemented in the UK by the *Working Time Regulations 1998* (UK) SI 1998/1833.

53 This will also regulate how the self-employed provide goods and services in the course of their work.

may protect those receiving services from the self-employed). The self-employed are also covered by Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security and Article 6 of Directive 2006/54 for the purposes of equal treatment in occupational social security.

Thus, the self-employed have some (limited) equality protection as consumers and in relation to social security provision. However, this is unlikely to be of significant assistance in the day-to-day undertaking of work in a self-employed capacity. This brings us to Chapter 3 of the Recast Directive 2006/54, relating to equal treatment in access to self-employment, vocational training and promotion and working conditions. Article 14(1) of the Recast Directive prohibits direct and indirect discrimination on the grounds of sex in relation to: conditions for access to self-employment; access to vocational guidance and training; employment and working conditions, including dismissals; and membership of, and involvement in, organisations of workers or employers, including those related to workers in particular professions. Article 14(1)(a) seems the most relevant and its focus is on (initial) access to self-employment.

The self-employed may also be covered by the Race Directive 2000/43⁵⁴ and Framework Directive 2000/78⁵⁵ in so far as they cover access to self-employment. However, the potential scope of the relevant provisions remains unclear. The issue did arise in *Allonby*,⁵⁶ where the Court of Justice held that the equal pay provisions in Article 157 TFEU did not apply to entrepreneurs, though the provisions cover the self-employed where they are largely dependent on one particular ‘employer’.

The protections provided by the equality directives and Article 157 TFEU were arguably extended by Directive 2010/41. It defines the principle of equal treatment in relation to the self-employed as meaning ‘there must be no discrimination on grounds of sex, for instance in relation to the establishment, equipment or extension of a business or the launching or extension of any other form of self-employed activity.’⁵⁷ However, despite the title of the Directive, there is good evidence, based on the *travaux préparatoires*, that the key aims of the Directive are actually:

- to encourage female entrepreneurship;
- to protect assisting spouses and life partners; and
- to provide maternity rights to female self-employed workers and spouses and life partners of self-employed workers.

Thus, the Directive is arguably not aimed to facilitate equality generally in relation to the self-employed: equal treatment is not the core of the Directive, which is instead focused on social security provision and spouses and life partners of the self-employed.⁵⁸ Indeed, the right to equal treatment may be limited to the self-employed seeking initial access to self-employed activity, not the actual pursuit of (exercising) that activity.⁵⁹

Who is a ‘self-employed’ worker?

While the protection provided by Directive 2010/41 may be limited in material scope, it is also necessary to consider the personal scope of the Directive: or, more particularly, who is a self-employed worker? The scope of the Directive, laid out in Article 2(a), covers: ‘self-employed workers, namely all persons

54 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180 of 19 July 2000, pp. 22-26. See Article 14.

55 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303 of 2 December 2000, pp. 16-22. See Article 3.

56 Case C-256/01 *Allonby v. Accrington & Rosendale College* [2004] ECR I-873, paragraph 71.

57 See Preamble to the Directive, [14].

58 See Barnard, C., Blackham, A., *Self-Employed: The Implementation of Directive 2010/41 on the Application of the Principle of Equal Treatment between Men and Women Engaged in an Activity in a Self-Employed Capacity* (2015).

59 See Barnard, C., Blackham, A., *Self-Employed: The Implementation of Directive 2010/41 on the Application of the Principle of Equal Treatment between Men and Women Engaged in an Activity in a Self-Employed Capacity* (2015). This issue will be explored further in a subsequent paper.

pursuing a gainful activity for their own account, under the conditions laid down by national law'. The approach in Article 2(a) makes reference to three EU conditions: (1) those persons (2) who are pursuing a gainful activity (3) for their own account; and then includes (4) a reference to national law. Thus, there is significant scope for national law to define and construct who might be 'self-employed'. As part of an analysis of the implementation of Directive 2010/41,⁶⁰ members of the European Network of Legal Experts in the Field of Gender Equality were asked to provide information regarding how the 'self-employed' were defined in national law. The question of who is 'self-employed' and indeed 'self-employed worker' is a vexed one and goes to the heart of most labour-law systems. However, one of the challenges in defining 'the self-employed' relates to where this definition might be located. In some Member States, the definition was most prominent in tax and social security legislation. In others, like the UK, it was defined in a complex line of case law. In other Member States, the definition was laid out in labour legislation, or in company law. Thus, it may be difficult to identify how 'the self-employed' are defined and constructed in any Member State, and different definitions may be used for different purposes. This obviously makes effective analysis more difficult.

With this broad caveat, the different approaches of the Member States to the definition of 'self-employment' may be summarised as follows. *First*, some countries have simply copied out the provisions of the Directive. Malta is a good example: 'self-employed workers... means all persons pursuing a gainful activity for their own account'.⁶¹

Second, other Member States provide an explicit definition of the 'self-employed'. However, this definition can be found in a variety of locations. In some countries the definition of self-employment can be found in labour legislation. For example, in Cyprus Law No. 59(I)/2010 says that the term 'self-employed' covers any employment in Cyprus of a person who is pursuing a gainful activity, provided such activity is not insurable under the First Schedule, Part I under the title 'Employees, Insurable and Non-Insurable Employments'. The First Schedule refers to employment in Cyprus of a person on the basis of a contract of work or training or under such circumstances from which an employer-employee relationship can be derived.

In other countries a definition can be found in social security legislation. For example, in Iceland the Unemployment Insurance Act No. 54/2006 defines a self-employed individual as 'Any person who works at his/her own business or independent activity to the extent that he himself/she herself is obliged to pay tax deductions at source in respect of calculated wages and social insurance tax in respect in respect of his/her work, either every month or in another regular manner according to rules set by the Director of Internal Revenue on calculated remuneration'.⁶²

In another group of countries, the tax legislation contains the only or the most comprehensive definition of self-employment. For example, in Croatia the labour-law rules do not define the self-employed but the Law on Income Tax specifies that self-employed income tax duty holders are: artisans together with four categories of freelancers (or independent contractors): (1) health workers, veterinarians, lawyers, notaries, auditors, architects, insolvency managers, court interpreters, translators, tourist guides, and similar; (2) scientists, writers, innovators, and similar; (3) teachers, pedagogues, and similar; (4) journalists, artists and sportsmen and women; and persons employed in agriculture and forestry.

In the final group of countries, entrepreneurship is seen as a matter for the civil code and it is here that a definition can be found. So for example, the Czech Civil Code defines entrepreneur as: 'Whoever performs independently on their own account and responsibility of trade or employment in a similar manner with

60 See Barnard, C., Blackham, A., *Self-Employed: The Implementation of Directive 2010/41 on the Application of the Principle of Equal Treatment between Men and Women Engaged in an Activity in a Self-Employed Capacity* (2015).

61 See Barnard, C., Blackham, A., *Self-Employed: The Implementation of Directive 2010/41 on the Application of the Principle of Equal Treatment between Men and Women Engaged in an Activity in a Self-Employed Capacity* (2015), p. 193.

62 See Barnard, C., Blackham, A., *Self-Employed: The Implementation of Directive 2010/41 on the Application of the Principle of Equal Treatment between Men and Women Engaged in an Activity in a Self-Employed Capacity* (2015), p. 135.

the intent to do so consistently for profit, is considered with regard to this business for entrepreneurs [sic].⁶³ The Liechtenstein Commercial Code uses similar terminology. In Italy, the Civil Code defines the self-employed as ‘persons who commit themselves to make a service or a work totally or mainly by means of their labour and without any subordination towards the customer’ and small entrepreneurs as ‘small independent farmers, craftsmen, traders and those who professionally perform an activity which is organised mainly with their work and with the work of their family’.⁶⁴

Third, in some countries, such as Denmark, there is no definition of the term ‘self-employed’. *Fourth*, some countries do not have a definition of the self-employed, but define the term negatively by reference to employees: the self-employed are essentially those who are not employees. For example, in Norway, a self-employed person is defined as a person not employed by an employer. The definition is not spelled in the text of the law but is evident in practice. Likewise, in Portugal self-employment is a wide concept that includes all forms of employment that do not fall under the definition of an employment contract either in the private sector or in the public sector. The main criterion to identify an employment relationship is the subordinated position of the employee, in the sense that s/he is bound to perform the work according to the instructions of the employer and is also subjected to disciplinary rules and sanctions applied by the employer. If there is no subordination of the worker, he/she is qualified as self-employed, and the professional relationships that he/she establishes as independent contractor are governed by the adequate civil or commercial provisions. Latvia also follows this pattern and recognises only two categories of persons: either ‘employees’ or ‘self-employed’. Sweden, too, operates a binary system: the concept of employee is broad in range and covers all dependent work/workers. Swedish law does not provide a specific definition of self-employed people: they may be individual entrepreneurs or partners in a trading partnership or even the owner of a small joint-stock company. The character of the self-employed is important mainly for tax and social security purposes. For tax purposes there is a definition of individual entrepreneur (*enskild näringsidkare*) involving ‘economic activities carried out in a professional and independent way’ (*Förvärvsverksamhet som bedrivs yrkesmässigt och självständigt*).⁶⁵ This is interpreted as requiring activities of some importance carried out on a continuous basis and in relation to several customers/clients.

Fifth, some countries do not use the term ‘self-employed’ but use alternative forms. For example, in Hungary the terms ‘sole proprietor’ or ‘sole trader’ are used, and likewise in Estonia, where the acronym ‘FIE’ (*füüsilisest isikust ettevõtja*; which directly translates to ‘natural person entrepreneur’) is also used. Likewise, in Poland ‘entrepreneur’ is used. An entrepreneur is a natural person, legal person and/or organisational entity without legal personality, on which the separate law confers legal capacity: pursuing economic activity on its own behalf. Partners in a civil-law partnership (companies) are also considered as entrepreneurs, as far as their economic activity is concerned. This definition encompasses ‘small entrepreneurs’ or ‘business persons’. Likewise, in Finland the term entrepreneur is used and this is part of a three-limb approach (see below) which distinguishes between ‘employees, comparable to employees, or entrepreneurs’. In the Netherlands the Dutch equal treatment legislation uses the term ‘liberal professions’, which may be narrower in scope than ‘self-employment’. In the Dutch interpretation of this concept, however, not only are doctors and architects covered, but so are freelancers, sole traders, and entrepreneurs.

Sixth, in some countries, such as Bulgaria, there is no general definition of self-employment but there is a definition of the self-employed in particular sectors. In the Czech Republic the law generally adopts a sectoral approach, with a general approach as a catchall. For example, Section 9 of the Pensions Act defines self-employment as independent activity in agriculture, trade based on a trade licencing act,

63 See Barnard, C., Blackham, A., *Self-Employed: The Implementation of Directive 2010/41 on the Application of the Principle of Equal Treatment between Men and Women Engaged in an Activity in a Self-Employed Capacity* (2015), p. 71.

64 See Barnard, C., Blackham, A., *Self-Employed: The Implementation of Directive 2010/41 on the Application of the Principle of Equal Treatment between Men and Women Engaged in an Activity in a Self-Employed Capacity* (2015), p. 151.

65 See Barnard, C., Blackham, A., *Self-Employed: The Implementation of Directive 2010/41 on the Application of the Principle of Equal Treatment between Men and Women Engaged in an Activity in a Self-Employed Capacity* (2015), p. 256.

activity of an associate in a public trade company or in a ‘comandite’ (a type of company) activity as a free artist, some special activities provided with special authorisation and all other activities performed in the individual’s own name and under his or her own responsibility for the purpose of making a profit.

Seventh, a number of countries have recognised that some individuals who may be described as self-employed actually have employee-like qualities. These individuals may receive some recognition in the national systems as, in the case of Germany, ‘quasi-subordinate’ employees, ‘workers’ in the United Kingdom,⁶⁶ and *para subordinati* in Italy. However, it is often difficult to identify this group in practice. This is certainly the case in Germany where the question has been the subject of rather heterogeneous case law. The main criteria are: decisive influence on working conditions, authority to give instructions, competence to delegate the performance of duties, contractual obligations to one or more employers or clients and the comparable need for social protection.

In summary, then, it is clear that the question of who is ‘self-employed’ and, indeed, a ‘self-employed worker’ is highly contentious. The definition, and location of the definition, of self-employment varies widely between the Member States. Thus, the protection afforded by Directive 2010/41 may be experienced by a disparate group of ‘self-employed’ in different Member States.

Despite the complexity of defining who is ‘self-employed’, the majority of country experts reported no case law on the interpretation of the Directive. Where there is case law, it often concerns the personal scope of the national implementing measure of the Directive: is the national rule sufficiently broad to cover the self-employed person bringing the claim? A handful of countries have had a range of cases covering, for example, the differential treatment between workers and the self-employed (Italy, Poland) or between male and female self-employed workers (Spain). Otherwise the reports mentioned the cases before the Court of Justice: *Joergensen*,⁶⁷ *Danosa*,⁶⁸ and *Soukoupová*.⁶⁹ Thus, while the personal scope of the Directive is often very unclear, this has not been an issue with which Member States or their courts have engaged.

IV. Implications of definitional ambiguity

Four main issues arise directly from the definitional ambiguity outlined in the previous sections:

- issues of coverage;
- identifying the duty holder;
- enforcement of protection, and
- statistics.

We shall consider these issues in turn.

Issues of coverage

Within this complex definitional framework, there is an obvious risk that some individuals may be excluded from the definition of the ‘self-employed’, and deprived of equality protection as a result. Yet, when asked whether any individuals were excluded from these definitions, most experts did not identify any excluded categories of workers. This was not the case for all Member States: in the United Kingdom the expert noted the risk that ‘small entrepreneurs’ or ‘business persons’ will not be covered. So, if a contractor finds that her services are dispensed with when she becomes pregnant, she will be unable to bring her claim within any provision of the Equality Act 2010 (UK) if her contractual engagement does not impose on her a duty to provide her services personally (as distinct from a duty to ensure that the relevant

66 See, for example, *Pimlico Plumbers Ltd v. Smith* [2014] UKEAT 0495_12_2111 (21 November 2014).

67 Case C-226/98 *Birgitte Jørgensen v. Foreningen af Speciallæger and Sygesikringens Forhandlingsudvalg* [2000] ECR I-02447.

68 Case C-232/09 *Dita Danosa v. LKB Lizings SIA* [2010] ECR I-11405.

69 Case C-401/11 *Blanka Soukupová v. Ministerstvo zemědělství* [2013] ECR n.y.r.

service is provided).⁷⁰ A similar issue arises in Ireland: the definition of the contract of employment in the Employment Equality Acts provides that a person who personally executes a service falls within the scope of the Act. However, individuals who provide services through a limited liability company are not working ‘on their own account’ and therefore may not fall within the scope of the Directive.

Identifying the ‘duty holder’

Countouris and Freedland have noted that in relation to ‘the question of who ought to be seen as the duty holder vis-à-vis self-employed professionals in respect of the various distinct “equality duties”, national approaches appear to vary considerably and are often characterised by a high degree of uncertainty.’⁷¹ Unlike in the case of employees, there is no employer to enforce the various obligations against.⁷² Thus, it is difficult to identify who might be the ‘duty holder’ in relation to the self-employed. This is made more complex by the diversity of individuals who may fall within the definition of ‘self-employed’.

Despite these concerns, few experts again noted that issues regarding the ‘duty holder’ had made implementation or application of the Directive difficult. Many reports merely noted that they had not experienced problems in this area (e.g. Czech Republic, Denmark, France, Greece, Liechtenstein, Luxembourg, Sweden, and Turkey). Other reports said that issues over who the duty holder should be *could* raise issues in the future (e.g. Bulgaria, Italy, Lithuania, and Slovenia) or was a live issue at present (e.g. Germany), though few complaints had been received to date (e.g. Cyprus).

The only countries that had explicitly determined who the duty holder should be were Hungary and Portugal: Hungary, where Article 5(d) of the Equality Act stipulated that the person who has the right to give orders to the self-employed person was supposed to follow the rules of equal treatment. This rule applied to all aspects of equal treatment with respect to the self-employed. In Portugal Law No. 3/2011 said that the duty holder was the counterpart in the service contract that involves self-employment or the beneficiary of such a service. This did not apply to the creation of business or maternity rights, where the definition of the duty holder was more complex.⁷³

In other countries, the ‘duty holder’ could variously be the Government (via the implementation of social protection programmes: e.g. Croatia, Estonia, Greece, Latvia; or due to a failure to implement the Directive: Czech Republic, and Norway), professional and sectoral associations/statutory professional corporations (Austria, Cyprus, Greece, Italy, Poland, and Slovenia), local public authorities (Estonia, Poland, Spain, and Sweden), statutory and private insurance funds and professional pension funds (Germany), those receiving services from the self-employed and/or contracting with them (Austria, Estonia, Germany, Greece, Ireland, Italy, the Netherlands, Portugal, Spain; contrast with Sweden), those offering training (Estonia) or suppliers of goods and services (Estonia, Sweden). In the United Kingdom, the expert felt the issue was not uncertainty regarding who the duty holder was, but rather an absence of *any* duty holder, at least in relation to treatment which was unrelated to the payment of social security benefits. That said, few (if any) cases or claims had tested who the duty holder was in this context (e.g. Italy and Malta). Concerns were also raised in the reports that it was difficult to monitor and police the circumstances of the self-employed, as their working conditions and protections are often self-determined (e.g. Belgium) and/or social protection is dependent on self-declared income (e.g. Finland and Iceland).

70 See, for example, *Halawi v. WDFG UK Ltd (t/a World Duty Free)* [2014] EWCA Civ 1387 (28 October 2014).

71 Countouris, N., Freedland, M., ‘Work, self-employment, and other personal work relations: who should be protected against sex discrimination in Europe’, *European Gender Equality Law Review* No. 2/2013, pp. 15-20 – see in particular p. 18.

72 Masselot, A., Caracciolo Di Torella, E., Burri, S., *Fighting discrimination on grounds of pregnancy, maternity and parenthood*, p. 21.

73 Compare Denmark, where Section 5 of the Equal Treatment in Employment and Occupation Act specifies that the duty holder can be any person, including employers, organisations, or the Government.

Enforcement of protection for the self-employed

The previous two sections highlight broader issues regarding the enforcement of protections for the self-employed, and whether the self-employed are likely to bring individual proceedings where their rights are infringed. If the self-employed are unlikely to litigate, this may place greater demand on national equality bodies to protect the self-employed and enforce statutory protections. Article 11 of Directive 2010/41 says:

‘The Member States shall take the necessary measures to ensure that the body or bodies designated in accordance with Article 20 of Directive 2006/54/EC are also competent for the promotion, analysis, monitoring and support of equal treatment of all persons covered by this Directive without discrimination on grounds of sex. [...]’

However, the experts noted that few national equality bodies are effectively responding to the needs of the self-employed. While three national reports indicated satisfaction with the implementation and realisation of Article 11 (the Czech Republic, Norway, and Portugal), the remaining reports indicate considerable dissatisfaction. Three themes emerge: (1) the invisibility of the self-employed in the eyes of the agencies; (2) lack of resources of the equality bodies; and (3) lack of independence of the equality body. We shall examine these themes in turn.

First, where equality bodies do exist and have a broad remit, they do not extend this in practice or in law to the situation of the self-employed. This was raised as an issue in more than half the countries. A corollary of this may be that, as in Croatia, Greece, Ireland, the self-employed are not bringing claims to the equality body itself. *Second*, there is a common theme about a lack of resources to support the equality bodies. This often means that they have to prioritise their activities by, for example, focusing on the position of employees and not the self-employed. This is particularly the case in Belgium, Luxembourg, and the United Kingdom. *Third*, there is a concern that the equality bodies are not independent in practice. This is the case in Finland, Italy, Slovenia, and Spain. In Romania the National Council for Combating Discrimination is an independent body according to the law, but the process of naming the members of the Steering Committee of NCCD is heavily politicised and not all members have the required expertise required by law. The Department for Equal Opportunities between Women and Men is not independent—it is a department within the Ministry of Labour, Family, Social Protection and the Elderly. *Finally*, in Liechtenstein Article 11 has not been implemented at all.

Statistics regarding the ‘self-employed’

The accuracy of national and European statistics on self-employment depend on how ‘self-employment’ is defined. The definition adopted for the purpose of gathering data was different to the legal definition of self-employment in Hungary, the Former Yugoslav Republic of Macedonia and Romania. Other reports noted that the definition was consistent with that at law (e.g. Germany, France, and Spain) or in social security provisions (e.g. Austria, Belgium, Cyprus, and Lithuania). In other countries, there was no explicit legal definition of the ‘self-employed’ (see the discussion of Article 2 above), making any useful comparison of the definitions difficult. In some countries, an explicit definition was adopted for determining statistics, though the Member State lacked a legal definition (e.g. Bulgaria); some statistics adopted the Eurostat definition (e.g. Greece); and others relied on self-classification (e.g. the United Kingdom). Some reports explicitly noted definitional issues in compiling statistics (e.g. Estonia, the Former Yugoslav Republic of Macedonia, Poland, and Portugal).

Thus, given these definitional issues, national statistics regarding self-employment cannot be directly compared, and while self-employment was noted to be increasing in some countries (e.g. Austria, Belgium, Cyprus, Denmark, Germany, Greece, Iceland, the Netherlands, Slovakia, and the United Kingdom), decreasing in others (e.g. Italy, Lithuania, the former Yugoslav Republic of Macedonia, and Poland) and,

in some contexts, remaining fairly stable (e.g. Denmark, Estonia, Latvia, Romania, and Slovenia), it is unclear exactly what is being measured in these contexts. Further, it is important to distinguish a decline in the *proportion* of the self-employed from a decline in the *number* of self-employed (e.g. Greece, where overall numbers are decreasing, but the proportion of self-employed is increasing).

V. Conclusions

This article has demonstrated the inherent ambiguity relating to the definition of the ‘self-employed’ in EU Member States. This may have serious consequences for the personal scope of Directive 2010/41, which is largely determined by reference to national law. While equality law has significant potential to assist the self-employed, current legislative provisions do not deliver on this promise. This definitional ambiguity has serious consequences for those who might be excluded from legislative protection, identification of the duty holder and the collection of statistics relating to the self-employed. However, these definitional issues have not been addressed by governments or courts in most Member States, perhaps reflecting the reluctance or inability of the self-employed to enforce their equality rights.

Future discussions of this topic should focus on the enduring differences between and within ‘the self-employed’, to accommodate the significant diversity and variation within this group. This may have significant implications for equality issues among the self-employed, which have been the subject of limited academic discussion to date. Since the category of self-employment is likely to expand rather than disappear, we must be more precise about what we are defining, constructing and measuring as self-employed work, and about the consequences of this definition for legal protection.

ACCESS TO JUSTICE FOR PERSONS WITH MENTAL DISABILITIES: WITHOUT PROCEDURAL ACCOMMODATION, AN IMPOSSIBILITY

Margarita Ilieva*

Introduction

In large parts of Central and Eastern Europe, persons with mental disabilities, especially those who are institutionalised, are generally barred from access to the law. Procedural rules regarding legal standing at both the national and supranational level, as well as institutional attitudes of denial operate in concert to keep (institutionalised) persons with mental disabilities caught in a non-place where the law is beyond invoking. These people, held in the exclusive control of the State, are effectively banned from the space the rest of us share where the law has jurisdiction. In that sense, mental health institutions are in reality extraterritorial, not belonging to legal order. In many countries of the region, large numbers of people with mental disabilities are institutionalised. Their abuse and dispossession of access to justice is a 'hidden human rights crisis' in the words of the Council of Europe's Commissioner of Human Rights.¹

In large parts of Central and Eastern Europe, the majority of persons with mental disabilities are institutionalised soon after they are born. Their abandonment means that they have no relatives or friends to function as guardians independently from the State. Their guardians are appointed by the State and are usually employees of the institution that they need protection against. Guardianship systems are crude, effectively placing incapacitated persons in a 'civil death' situation: they cannot exercise any rights on their own (including authorise an attorney). Moreover, incapacitation proceedings are separate from guardian appointment proceedings. Accordingly, there are people who were deprived of capacity but have no guardian (yet): a complete blockage.

This article will review case law and pending cases at the European level indicative of prevailing patterns of procedural disenfranchisement of persons with mental disabilities in institutions. It will argue that procedural justice for persons with mental disabilities in terms of admittance to remedies is only possible through reasonable accommodation of proceedings allowing NGOs, as a matter of right, to represent victims who died before having a chance to authorize representation, or after a case was brought, where there are no concerned relatives, as well as to represent victims who are unable to give consent and have no other representation.

Procedural accessibility for institutionalised persons with mental disabilities depends on standardizing recognition of NGOs' legal standing to act on their behalf, whether living or deceased, without specific authorization. If such procedural recognition is withheld, persons with mental disabilities will continue

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1 Amicus curiae submission by the Commissioner before the Court, available at: <https://wcd.coe.int/ViewDoc.jsp?id=1851457>, accessed 28 October 2015.

to exist outside of the perimeter of remedies, and impunity will be continuously reproduced, their basic rights indefinitely remaining a purely nominal value. The existing lack of remedy reachability results in a virtual impossibility of redress. An adjustment to standing rules is indispensable.

Criminal (in)justice

In Central and Eastern Europe, institutionalised people with mental (and physical) disabilities' neglect by criminal justice systems is as prevalent as their criminal neglect and abuse by the institutions that hold them. In terms of basic access to criminal justice, they are denied by the authorities, as are their needs of humane treatment, therapy, psychosocial care, and human integration in the institutions. They are deprived of the protection of criminal law to a point where their right to recognition as persons before the law is denied. The criminal justice authorities who owe them *ex officio* protection against abuse remain blind to them as holders of rights, allowing their abusers to go unpunished. Institutions being purposefully built away from society, in remote and isolated locations, with no public access, police and prosecutors are largely unaware or indifferent to the ill-treatment of people detained there. The lack of (effective) investigations is of epidemic proportions. Criminal justice denial is institutionalised.

The authorities' disregard for people in mental care facilities as subjects of criminal law protection amounts to refusing them recognition as humans.

How is this possible?

The cause is lack of representation: institutionalised persons with mental (and physical) disabilities cannot represent themselves, and no adequate representatives are available. Their vulnerability entails a near-absolute inability to complain: their disabilities and their social isolation mean they have no access to information about remedies. Their abandonment (the majority have no (concerned) relatives) means they have no family/ community or other social support. Their deprivation of liberty means they have no access to alternative representation. Their not having legal capacity or not being recognized as having competence to exercise rights makes it practically impossible for them to bring a complaint independently of a guardian. Their actual or perceived limited competence causes their interpretation of facts to be disbelieved, or disrespected. For legal redress, credibility is vital. Persons with disabilities are ignored or questioned because of their disability: they are assumed not to be credible.

Their not having effective guardianship means they are left without resource. Guardians in fact serve to block their access to the courts where domestic law requires a guardian's consent to bring legal action. Guardians generally lack good faith, being part, as a rule, of a conflict of interests – an institution's director (or other employee) would be a victim's guardian, as well as (an employee of) the one person with overall responsibility for any victimization occurring within the institution. A guardian may also be altogether absent because of a time lapse between proceedings to deprive a person of capacity and proceedings to appoint a guardian. In a third scenario, a relative who is interested in a person's removal by means of institutionalisation will be their guardian. Incapacitated persons cannot validly sign a power-of-attorney on their own.

Institutionalised persons with mental disabilities' exclusion from society means they are dependent on staff, which makes them extremely vulnerable. Abuses occurring inside institutions being hidden from society, public opinion is not available to mobilise on behalf of victims. Not having representation, institutionalised crime victims are dependent on *ex officio* action by police and prosecutors. Law enforcement and the justice system, however, suffer from institutionalised prejudice against mental disability and normalize victims' neglect and injury. As a result, crime against institutionalised persons with mental disabilities goes unprevented, unpunished, and unredressed. Cases almost never reach the courts.

The only proxy: an NGO

The Bulgarian Helsinki Committee (BHC)² is experienced in representing institutionalised victims with mental disabilities, striving to compel domestic authorities to grant the criminal justice access first denied. The BHC's litigation on behalf of children and adults with mental and physical disabilities swallowed up by the institutions tells paradigmatic stories.

Aneta and Nikolina

In July 2015, the European Court of Human Rights (the Court) communicated to the Bulgarian Government two applications against Bulgaria filed by BHC on its own behalf in the name of two deceased girls with mental disabilities who had lived in institutions and whose rights under the European Convention on Human Rights (the Convention) had been violated.³ Aneta (age 15) died in 2006 of stomach puncture. Her stomach was found to contain 4 kilograms of trash: 25 shoe insoles, 8 rags, 3 sponges, 6 socks, 3 pieces of paper and 3 stones. The investigation that followed uncovered nothing about how the child swallowed those objects, and found no one responsible; it was terminated two years later. Aneta had been abandoned at birth, and had no close relatives. At age 3, she was diagnosed with developmental disabilities. All her life, she lived in social care institutions.

Nikolina (age 19) died in 2007 of, *inter alia*, marasmus (a severe form of malnourishment). She was hospitalized with sepsis (a whole-body infection), multiple organ dysfunction, coagulopathy (a clotting disorder) and anaemia, after having been unable to feed for two months and having suffered haemorrhages all over her body. No investigation followed until BHC intervened, three years later. In that delayed investigation, the prosecutor's office attributed Nikolina's death to her intellectual disability, found no one responsible and closed the case. Nikolina had been abandoned and placed in an institution when she was one month old. Her father died, and her mother never showed an interest in her; neither did her older siblings. At 6 months old, she was diagnosed with developmental disabilities. At 14 years old, she was placed under guardianship by a court. There is no information in the case file whether a guardian was appointed, or who that person was. Her life was spent in institutions.

Boris

In a third BHC case on behalf of a dead institutionalised child brought before the Court,⁴ Boris' deprived life and unaccounted-for death are detailed. He died (age 14) of dysentery in a social care home where several epidemics of dysentery had already taken place, killing other children. Boris was held in the home for more than a week without diagnosis and treatment, before being hospitalized. He had been abandoned, and institutionalised, when he was 18 days old. From age 3, he had suffered from malnutrition. His malnourishment progressed over the years, with nothing being done to counter it. At the time of his death, he weighed 8 kilograms. Boris had no access to rehabilitation before he was 12. Until then, he 'only lay in a basket', as a staff member put it. With rehabilitation, in less than a year he was able to walk assisted. Boris' death was not investigated before BHC intervened, several years later. The Prosecutor's Office then found that his death was natural due to his Down's syndrome, said to have decreased his immunity. The prosecutors did not discuss his 11 years of malnourishment as a factor in this decreased immunity. They ignored the dysentery epidemics; dysentery, they stated, was 'normal' for large groups of children. Neither did the prosecutors discuss Boris' deprivation of access to rehabilitation, or his delayed hospitalization. They took into account, however, his 'oligophrenia' as a cause of his death.

2 BHC is the largest Bulgarian human rights organization, active in strategic litigation at the national and European level (www.bghelsinki.org).

3 Applications Nos 35653/12 and 66172/12, *Bulgarian Helsinki Committee v. Bulgaria*: [http://hudoc.echr.coe.int/eng#{"fulltext":\["35653/12"\],"documentcollectionid2":\["GRANDCHAMBER","CHAMBER","COMMUNICATEDCASES"\],"itemid":\["001-156281"\]}](http://hudoc.echr.coe.int/eng#{), accessed 28 October 2015.

4 While this article was being written, a letter arrived from the Court giving notice that this application was declared 'manifestly ill-founded' without any reasons given in the regrettable practice of the Court.

Unlikely allies

The cases of Aneta, Nikolina and Boris were brought to court by BHC after BHC mounted and exhausted a litigation campaign to bring the Prosecutor's Office to properly investigate their deaths, along with 235 other deaths of institutionalised children and young people with mental disabilities between 2000 and 2010.

In 2007, BHC asked the Prosecutor's Office to inspect all mental health institutions for children and young people to uncover criminal neglect, bodily harm and death caused there. In 2008, the prosecutors inspected all institutions and found, by official decrees, a large number of disturbing facts concerning structural deficits of care, and a great many deaths and bodily harm incidents. However, they refused to open criminal proceedings to investigate these facts. BHC then brought an *actio popularis* civil court action against the Prosecutor's Office, claiming that it was liable for institutional discrimination against children and young people in mental care homes. If these children had not been disabled and institutionalised, i.e. stigmatized and powerless, under state control, deprived of any social representation – no family/public to stand up on their behalf, and no real guardians (institution directors) – BHC argued, the Prosecutor's Office would not have neglected their deaths and bodily harm but would have investigated them. Boris Velchev, Prosecutor General at the time, requested a partnership with the BHC.

As a result, in 2010, prosecutors and BHC monitors, accompanied by health and social workers, did a fresh round of inspections in all institutions. BHC lawyers produced comprehensive reports with findings, detailing hundreds of instances of neglect and death. The body count was 238 children in ten years. BHC found severe malnutrition, delayed hospitalisation, no in-house doctors and grave ill-treatment.⁵

With very few exceptions, none of the deaths were investigated, resulting in utter impunity for those responsible and lack of protection for the victims. The Prosecutor General publicly stated that each death and instance of bodily harm would be investigated, and BHC lawyers would have access to the cases in order to monitor the results and to appeal against ineffective prosecutorial decrees. Between 2010 and 2015, out of hundreds of investigations, not a single case was brought to court. Prosecutors have been closing the cases one by one, finding the deaths due to the disabilities of the deceased or it being impossible to prove anyone's guilt. The BHC has been appealing against hundreds of ill-founded decrees. Aneta's case was reopened, obtaining no results. Criminal proceedings were initiated in the deaths of Nikolina and Boris and were similarly closed without result, despite the BHC's appeals.

A public interest action

In this case study, an NGO has acted on behalf of hundreds of dead individuals separately, without any authorization and without any connection between the victims and the NGO. The NGO has been recognised as having such standing by the domestic criminal justice authorities, and has been exhausting remedies for the victims' sake in its own right. It has been acting as a special representative on behalf of the public in the name of the victims.

Supranational standing

Before the Court, the BHC claimed that it should be allowed, as a matter of principle, to act as a special representative of the deceased because, if not, their rights would be immaterial, and the State would enjoy a license to continue with impunity. If the BHC's standing to litigate in the children's name is not recognized, they will be victimized at Convention level by the same denial of access to justice they suffered at national level. The remedy to the pervasive dispossession of institutionalised persons with mental disabilities of avenues of redress in the region is to allow NGOs to pursue justice for victims in the NGOs' own right.

5 See at: <http://www.bghelsinki.org/en/rights/children-rights/>, accessed 28 October 2015.

On the merits, BHC claims that the victims suffered violations to their right to life, their right to be free from inhuman/degrading treatment, their right to an effective remedy, and their right to equality before the law. None of the deprivation they suffered would have occurred but for their disabilities and their social segregation, permitting the State's institutions to ill-treat them in the dark, away from public scrutiny, with the (un)concerned Prosecutor's Office turning a blind eye when the time came for accountability. Had they not been stigmatized by ableist prejudice and banished from society, their deaths would not have been normalized by inaction and explained away by disability.

Representative action, representative cases

BHC represents Aneta, Nikolina and Boris, and Aneta, Nikolina and Boris represent a host of people lost to the institutions. Their cases are not exceptional. They are emblematic of the 'hidden human rights crisis'⁶ in Europe, as the Council of Europe's Commissioner of Human Rights has termed the plague suffered by persons with mental disabilities.

'In Europe today, thousands of people with disabilities are still kept in large, segregated and often remote institutions. In a number of cases they live in substandard conditions, suffering neglect and human rights abuses. In too many cases, premature deaths are not investigated or even reported. [...] The Commissioner is concerned that human rights violations experienced by people with disabilities are often not brought to courts. In practice, there are a number of barriers to accessing justice for people with disabilities, including physical access difficulties. [...] [P]ersons with disabilities often experience isolation. This is especially true for people living in institutions: many of the residents have lost all contact with their families, or are orphans.'⁷

The Commissioner acknowledges institutionalised persons' lack of information on their rights, their deprivation of legal capacity, the inaccessibility of legal aid and the inadequacies of legal representation, with no guardian being appointed or with conflicts of interests. He documents these as reasons why legal proceedings are not accessible and there is 'a significant discrepancy between the scale of human rights violations perpetrated against persons with disabilities and the relatively low number of court cases tackling these violations.'⁸ The Commissioner confirms that access to justice for persons with intellectual disabilities is highly problematic due to restrictive rules on legal standing, with frequent abuses against such people being ignored, an atmosphere of impunity surrounding them.

Other international authorities reflect this reality too. The Special Rapporteur on Disability has stated that '[p]eople with developmental disabilities [...] encounter significant problems in accessing the judicial system to protect their rights [...].'⁹ A 2007 study in Europe found that legal proceedings were generally not accessible for people with intellectual disabilities, the legal frameworks disregarding their specific physical, intellectual and other needs; institutionalised people had very limited possibilities to claim their rights.¹⁰

Fifteen dead children and no NGO

In the case of *Nencheva and Others v. Bulgaria*,¹¹ the Court found that fifteen children and young people with physical and mental disabilities died in the winter of 1996-1997 from undernourishment, lack of medicine, and cold (lack of heating, clothes, bed covers) in a social care home. These fifteen children

6 Amicus curiae submission by the Commissioner before the Court, available at: <https://wcd.coe.int/ViewDoc.jsp?id=1851457>, accessed 28 October 2015.

7 Amicus curiae submission by the Commissioner before the Court, available at: <https://wcd.coe.int/ViewDoc.jsp?id=1851457>.

8 Amicus curiae submission by the Commissioner before the Court, available at: <https://wcd.coe.int/ViewDoc.jsp?id=1851457>.

9 Special Rapporteur on Disability, *Report by the Special Rapporteur on Disability on the Question of Monitoring*, paragraph 2, <http://www.un.org/esa/socdev/enable/rapporteur.htm>, accessed 28 October 2015.

10 Inclusion Europe, *Justice, Rights and Inclusion for People with Intellectual Disability*, at 31, <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1279&context=gladnetcollect>.

11 Judgment of 18 September 2013, application number: 48609/06.

died, one by one, in a period of three months during which the authorities remained inactive while the director of the home continually asked for help. The Court characterized this as a 'national level drama'.¹² It qualified the case as an exceptional one affecting the public interest, and noted with concern that the Government gave no explanation why the investigation took two years to even start. The proceedings lasted eight years, and resulted in no conviction. The investigation took six of these years, stalling for four; it was ineffective, and did not establish the concrete reasons behind each death. Only 13 of the 15 deaths were investigated, with no explanation given to the Court. The wrong persons were brought to court, and they were acquitted. The Bulgarian court reasoned who might be the right persons to be brought to court, but the Prosecutor's Office did not act on that. The Court found a violation of the State's duty to protect the children's right to life because of its failure to investigate their deaths (Article 2 – procedural aspect, of the Convention).

Eight of the dead children, who did not have parents, were represented before the Court by an NGO, the others being represented by their parents. The Court did not recognize the NGO's standing because it had not attempted to act on behalf of the dead children at the domestic level.¹³

Therefore, in similar circumstances, an NGO which did act as a special representative of the victims before the national authorities would have standing before the Court on behalf of the deceased.

Valentin: one (of many)

After *Nencheva* came *Câmpeanu* – and the Court lived up to that promise. On 17 July 2014, the Grand Chamber ruled in the ground-breaking case of *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*,¹⁴ and changed the legal standing scene under the Convention. Valentin who died at the age of 18 had no next of kin. He was considered highly vulnerable by the Court: a Roma youth with severe mental disabilities, infected with HIV, who lived his whole life in the hands of the State and who perished in a hospital as a result of neglect. Following his death, without having had any significant contact with him while he was alive or having received any authority from him or any other competent person, the applicant NGO (the CLR) brought before the Court a complaint concerning, amongst other things, the circumstances of his death. While alive, Valentin did not initiate any proceedings before the domestic authorities to complain about his medical or legal situation. Although formally he had legal capacity, in practice he was treated as an incapacitated person. In view of his state of extreme vulnerability, the Court considered that he was not capable of initiating any proceedings by himself, being without legal support and advice. He was thus in a wholly different and less favourable position than other persons on whose behalf applications had been lodged after their death: those persons were not prevented from bringing proceedings during their lifetime.

The Court attached considerable significance to the fact that neither the CLR's capacity to act for Valentin nor their representations on his behalf before the domestic medical and judicial authorities were questioned by the latter; such initiatives, which would normally be the responsibility of a guardian or representative, were thus taken by the CLR without objections from the authorities, who acquiesced in the procedures and dealt with the applications submitted to them. The Court also noted that no competent person or guardian had been appointed by the State to take care of Valentin's interests. Owing to the failure of the authorities to appoint a legal guardian or other representative, no form of representation was available for his protection before the national authorities. The Court also considered significant that the main complaint concerned Valentin's right to life, which could not be pursued by him by reason of his death.

12 Paragraph 123 of the judgment.

13 Paragraph 93 of the judgment.

14 Application number: 47848/08.

Qualifying this case, again, as an exceptional one, the Court recognized the NGO's standing to act as Valentin's representative, notwithstanding the fact that it had no power of attorney to act on his behalf and that he died before the application was lodged under the Convention.

'To find otherwise would amount to preventing such serious allegations of a violation of the Convention from being examined at an international level, with the risk that the respondent State might escape accountability under the Convention as a result of its own failure to appoint a legal representative to act on his behalf as it was required to do under national law [...]. Allowing the respondent State to escape accountability in this manner would not be consistent with the general spirit of the Convention, nor with the High Contracting Parties' obligation under Article 34 of the Convention not to hinder in any way the effective exercise of the right to bring an application before the Court.'¹⁵

The Court reasoned that granting standing to the CLR to act as a representative for Valentin was consonant with access to court rights under Article 5 § 4 of the Convention. Mental illness could not justify impairing the very essence of the right to be heard by a court. Indeed, the Court admitted, special procedural safeguards may be called for in order to protect the interests of persons who, due to mental disabilities, are not capable of acting for themselves. Valentin's vulnerability, coupled with the authorities' failure to provide him with legal support, were factors for the exceptional recognition of the CLR's *locus standi*, the Court held. Had it not been for the CLR, the case of Valentin would never have been brought to the attention of the authorities, whether national or international.

The Court went on to find a violation of Valentin's right to life: a continuous failure of the medical staff to provide him with the appropriate care and treatment was a decisive factor in his death. His death was not exceptional: the Court found that at the relevant time 109 deaths were reported at the same psychiatric hospital in little more than a year (2003-2004).¹⁶ The Court expressly held that the authorities' response to that general situation was inadequate, while they were fully aware that the lack of heating and appropriate food and the shortage of medical staff and resources, had led to an increase in the number of deaths. By placing Valentin in that hospital, notwithstanding his already heightened state of vulnerability at the time, the authorities unreasonably put his life in danger.

The Court further considered that the authorities not only failed to meet Valentin's most basic medical needs while he was alive, but also to elucidate the circumstances of his death, or find those responsible. This was a violation of the procedural duty inherent in protection of his right to life under Article 2 of the Convention. The Court took note of the CLR's assertion that in the case of the 129 deaths at the hospital between 2002 and 2004 the criminal investigations were all terminated without anyone being identified or held civilly or criminally liable. According to the CLR, despite highly credible allegations concerning suspicious deaths in psychiatric institutions in Romania, there had never been any final decision declaring a staff member criminally or civilly liable in relation to such deaths.¹⁷

The Court further found that the Romanian legal framework relating to the rights of mentally disabled individuals was ill-suited to address their specific needs, notably regarding the practical possibility for them to have access to any available remedy. The Court had previously found Romania to be in breach of Articles 3 and 5 of the Convention on account of the lack of adequate remedies concerning people with disabilities, including their limited access to any potential remedies.¹⁸ Therefore, the Court considered that the State had failed to provide a legal mechanism able to afford redress to people with mental disabilities claiming to be victims under Article 2 (right to life) of the Convention: a violation of Article 13 (right to an effective remedy) in conjunction with Article 2 of the Convention.

¹⁵ Paragraph 112 of the judgment.

¹⁶ Paragraph 141 of the judgment.

¹⁷ Paragraph 121 of the judgment.

¹⁸ Inter alia, *C.B. v. Romania* and *B. v. Romania* (No. 2), cited below.

The Court established that the State's failure to secure and implement an appropriate legal framework that would have enabled complaints concerning breaches of Valentin's right to life to be examined by an independent authority revealed the existence of a wider problem calling for the Court to indicate general measures for the execution of its judgment. It recommended that the State envisage general measures to ensure that mentally disabled persons in a situation comparable to that of Valentin are afforded independent representation enabling them to have Convention complaints relating to their healthcare and treatment examined before a court or other independent body.

An exception or the rule?

In other words, the Court established that in Romania persons with mental disabilities lacking families and held under institutional control generally did not have access to a legal remedy, and needed outside representation. The general situation was such that Valentin's case was illustrative.

At the same time, the Court termed this illustrative case an 'exceptional' one, and granted the NGO standing on those terms only. The ruling is, therefore, marred by an internal conflict between a limited, case-specific approach to representative standing, and the Court's own admission that the situation generally is inconsistent with the rights not just of Valentin but of many like him: the abnormal death rate, the lack of remedies, the lack of social and legal representation, the lack of (effective) investigation; the inadequacy of the law as a whole to provide redress to persons like Valentin.

Ionel – one too many for an exception?

After *Câmpeanu*, the Court decided the case of *Association for the Defence of Human Rights in Romania – Helsinki Committee on behalf of Ionel Garcea v. Romania*:¹⁹ another 'exceptional' case in a row. The Court reiterated that 'in exceptional circumstances and in cases of allegations of a serious nature, it should be open to associations to represent victims, in the absence of a power of attorney and notwithstanding that the victim may have died before the application was lodged under the Convention.'²⁰ It considered that 'to find otherwise would amount to preventing such serious allegations of a violation of the Convention from being examined at an international level, with the risk that the respondent State might escape accountability under the Convention.'²¹

Like Valentin, Ionel died in state custody and left no known relatives. He also suffered from mental illness. In his case too, there were serious allegations of a breach of the rights under Articles 2, 3 and 13 of the Convention (right to life, freedom from inhuman/degrading treatment, right to an effective remedy). Similarly, the only person ever to represent Ionel was an NGO – the APADOR-CH, which assisted him on several occasions before the authorities. Ionel had a closer connection with the APADOR-CH than Valentin had with CLR – one of the differences between their cases. The other one was that Ionel was able, during his life, to lodge complaints. Still, the Court recognized that APADOR-CH should be granted standing to represent him before it.

On the merits, the Court found a violation of the procedural head of Article 2 – the State's duty to effectively investigate Ionel's death. Ionel died in prison, serving a sentence. He self-harmed by inserting a nail in his head. He attempted suicide by overdose and fell into a coma. In APADOR-CH's view, through their defective manner of approaching his situation, the authorities had exposed him to serious and prolonged suffering. Instead of being treated for his mental illness, he had been punished for having harmed himself and for his occasional aggressive behaviour. Rather than offering support, the State chose as a matter of policy to punish prisoners who, like Ionel, harmed themselves, by not ensuring that they received appropriate medical treatment if such treatment was not available in the prison system.

19 Judgment of 24 March 2015, application number: 2959/11.

20 Paragraph 42 of the judgment.

21 Paragraph 42 of the judgment.

Uniformity: no access to criminal justice, so many deaths

In all of the ‘exceptional’ cases outlined above, the domestic justice system’s response to the deaths was a non-variable: none of the cases were brought to a criminal court (effectively). Therefore, the exceptions disclose a rule: the death of a disabled person in a home is not an issue under criminal law.

The violations found are not exceptional either. The deaths in the decided cases were followed by a host of other deaths. While the court was reviewing the cases of *Nencheva*, *Câmpeanu* and *Garcea*, between 1 June 2010 and 31 December 2014, in Bulgaria, according to official statistics, in just one type of institution (medical care homes for children under the age of 3 both with and without disabilities (where some older children live too)), 292 children died.²² Following the rule, these deaths have not been investigated.

The exclusion of persons with mental disabilities from implementation and enforcement of the law has been reflected at UN level as well. The Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman and degrading treatment has found that ‘[persons with disabilities], often segregated from society in institutions, including prisons, social care centres, orphanages and mental health institutions, are targets for neglect and abuse’.²³ According to the Special Rapporteur, they often find themselves in the very situation ‘of powerlessness, whereby the victim is under the total control of another person’ that ‘torture, as the most serious violation of the human right to personal integrity and dignity, presupposes: for instance, when they are deprived of their liberty, or when they are under the control of their caregivers or legal guardians.’²⁴ They are deprived of their liberty for long periods, including for a lifetime, against their will or without free and informed consent, he has held.

‘Inside these institutions, persons with disabilities are frequently subjected to unspeakable indignities, neglect, severe forms of restraint and seclusion, as well as physical, mental and sexual violence. [...] The Special Rapporteur is concerned that in many cases such practices, when perpetrated against persons with disabilities, remain invisible or are being justified, and are not recognized as torture or other cruel, inhuman or degrading treatment or punishment.’²⁵

The Special Rapporteur has noted that discriminatory legal frameworks and practices depriving persons with disabilities of legal capacity or failing to secure their equal access to justice, resulting in impunity for violence against them, are a form of acquiescence with such violence.²⁶ He has stressed States’ duties under Article 16 of the Convention on the Rights of Persons with Disabilities (CRPD) to prevent and protect persons with disabilities from all forms of violence, abuse and exploitation, and to investigate and prosecute those responsible.

A court (slowly) evolving: Not seeing the forest for the trees

Contrary to what the Court has been willing to admit, the above cases of persons with mental disabilities barred from justice are not exceptional but representative in Eastern Europe; they are the rule. And they require a procedural rule, not a procedural exception.

22 See BHC’s release on the matter (in BG): <http://www.bghelsinki.org/bg/novini/press/single/pressobshenie-bhk-prikanva-dazd-da-razsledva-292-smrti-sluchai-na-deca-v-domove-mezhdu-yuni-2010-i-dekemvri-2014-g/>, accessed 28 October 2015.

23 Report of 28 July 2008, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/440/75/PDF/N0844075.pdf?OpenElement>.

24 Report of 28 July 2008, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/440/75/PDF/N0844075.pdf?OpenElement>, paragraph 50.

25 Report of 28 July 2008, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/440/75/PDF/N0844075.pdf?OpenElement>, paragraphs 38 and 41.

26 Report of 28 July 2008, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/440/75/PDF/N0844075.pdf?OpenElement>, paragraph 69.

A class of outcasts

The constitutive element of this class of cases is the victims' lack of access to justice at the national level. The cases reflect a class of victims cast by the State in a non-space outside of the protection of the law. These people were physically removed from the territory where the law is operative, and held in a spatially defined vacuum where there is no law in practice, where the reality of law is out of reach; an embassy of non-law where annihilation of legal personhood is normalised through systemic denial of procedural rights. Institutionalised persons with mental disabilities are continuously dehumanized through practical denial of their possession of rights. Where there is no hope of enforcement, there is no right. Access to remedial mechanisms is an integral part of the recognition of rights. Where there are no rights, there is not a human being: a human is defined by being the subject of rights; an emanation of mankind's innate dignity. By being denied access to rights, persons with mental disabilities in institutions are excluded from humanity as defined by (human rights) law. They suffer a comprehensive denial of personhood: a dismissal of their right to recognition as persons before the law.²⁷

The essence of the right to recognition as a person before the law is acknowledging the human as a rights holder. Non-recognition of a person as a possessor of rights amounts to telling her or him: 'You are nothing'. This is what justice institutions do to persons with mental disabilities.

Persons with mental disabilities in institutions are dispossessed of recognition as law's subjects because the institutions function as places of hidden interruption of the law. They are a legal limbo, where humans are held in complete powerlessness through a removal of their legal agency. Mental care facilities are extra-legal spaces reducing people to non-persons, in a manner comparable to an act of forced disappearance. Similarly to enforced disappearance, institutionalization places persons outside of the remit of the law, and diminishes them to a state of effective non-existence, an existence outside humanity.

Recognition as a person before the law is fundamental to a dignified life. It flows from the principle of equality, the inherent value of all who are people. Where one person is denied, personhood for the entire world is negated.

No access to the civil courts

In many cases, persons with mental disabilities are barred from accessing a court in respect of their institutionalization, which the Court has repeatedly recognized to be unlawful and unjustified deprivation of liberty. In the cases of *Stanev v. Bulgaria* and *Stefan Stankov v. Bulgaria*, the Court found violations of the applicants' rights under Article 5 § 1 and Article 5 § 4 of the Convention.²⁸ It also found that the applicants were deprived of accessing their right to compensation for their unlawful deprivation of liberty and for their denied access to a court in respect of that deprivation: a violation of Article 5 § 5.²⁹ Because the applicants were deprived of a legal remedy for the inhuman or degrading living conditions in the

27 The Universal Declaration of Human Rights, Article 6: *Everyone has the right to recognition everywhere as a person before the law.* The International Covenant on Civil and Political Rights, Article 16: *Everyone shall have the right to recognition everywhere as a person before the law.* The Convention on the Rights of Persons with Disabilities, Article 12(1): *States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.*

28 Respectively, judgments of 17 January 2012 and 17 March 2015, application numbers: 36760/06 and 25820/07. Article 5 § 1 reads: 'Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: [...] (e) the lawful detention of [...] persons of unsound mind [...]; [...]'. Article 5 § 4 reads: 'Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.'

29 Article 5 § 5 reads: 'Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.'

institutions, the Court also found a violation of Article 13 of the Convention.³⁰ Furthermore, the Court found a violation of the applicants' right under Article 6 § 1 (fair trial) of the Convention because they had no possibility of applying to a court for restoration of their legal capacity.³¹

In the case of *Stanev*, the Court issued an injunction for the State to take the necessary general measures to afford access to court in respect of the latter issue.³² It acknowledged in that way that *Stanev* exemplified a general situation. In the case of *Stankov*, the Court found that this injunction was not implemented.³³ Therefore, the general situation has continued, unremedied.

This non-implementation of a ruling after justice was done by the Court raises a further issue: persons with mental disabilities' access to implementation as a separate aspect of their access to justice. Where a person has had access to a (supranational) court, and has won a ruling in her or his favour, the question still remains whether they effectively had access to justice as long as the ruling remains unimplemented.

In the case of *Mihailovs v. Latvia*, the Court found the same violations of Article 5 § 1 and Article 5 § 4 of the Convention as in the above cases.³⁴ In the case of *B. v. Romania (No. 2)*, the Court found a violation of the applicant's right to private life (Article 8 of the Convention) because of the inadequacy of the procedural safeguards and of the remedies in respect of her psychiatric detention.³⁵ In the case of *D. D. v. Lithuania*, the Court found a violation of Article 6 § 1 in respect of the applicant's access to a fair trial to change her legal guardian, as well as a violation of Article 5 § 4 because she was deprived of an opportunity to contest her continued involuntary institutionalization before a court.³⁶ In the cases of *Filip v. Romania* and *C.B. v. Romania*, the Court found violations of the applicants' rights to access court protection in respect of their unlawful psychiatric confinement: violations of Articles 5 § 1 and Article 5 § 4 of the Convention.³⁷ In the *Filip c. Roumanie* case, the Court additionally found a violation of Article 3 of the Convention (prohibition of inhuman/degrading treatment – procedural aspect) because of the failure of the State to properly investigate the applicant's ill-treatment in the psychiatric hospital where he was detained.

All of these cases are indicative of a pattern. This is evidenced by their number and factual and legal similarity. The pattern consists in persons with mental disabilities being prevented from having recourse to procedures and remedies concerning basic rights.

Deontology

All humans are equal before the law, and entitled without any discrimination to equal protection of the law. Recognition of every person as a subject of the right to be protected by law and of the right to be equal before the judiciary is the basis of the rule of law. To ensure everyone's recognition as a person before the law, States have a duty to secure implementation mechanisms – effective remedies.

Effective remedies require adjustment: procedural accommodation of persons with disabilities' special needs in order for them to access justice on an equal footing.

30 Article 13 reads: 'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority [...].'

31 Article 6 § 1 reads: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. [...].'

32 Paragraph 258 of the judgment.

33 Paragraph 186 of the judgment.

34 Judgment of 22 January 2013, application number: 35939/10.

35 Judgment of 19 May 2013, application number: 1285/03.

36 Judgment of 14 February 2012, application number: 13469/06.

37 Respectively, judgment of 14 March 2007 and of 20 April 2010, application numbers: 41124/02 and 21207/03.

Under Article 2 CRPD, States have a general duty to take all legal measures needed for the implementation of CRPD rights, as well as to abolish all discriminatory provisions and to refrain from any act inconsistent with the CRPD. They must take all appropriate measures to eliminate disability discrimination. Under Article 5, States recognize that all persons are equal before and under the law, and are entitled without any discrimination to the equal protection and equal benefit of the law. They shall prohibit all disability discrimination and guarantee to persons with disabilities equal and effective legal protection against discrimination. In order to eliminate discrimination, States shall take all appropriate steps to ensure that reasonable accommodation is provided. Specific measures which are necessary for de facto equality of persons with disabilities are not discrimination. Under Article 12, States recognize the right of persons with disabilities to equal recognition everywhere as persons before the law. Under Article 13, States shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through procedural accommodations, in order to facilitate their effective role as participants in all legal proceedings. Under Article 16, States shall take all appropriate legislative and other measures to protect persons with disabilities from all forms of violence and abuse. They shall take all appropriate prevention measures by ensuring assistance, including through provision of information on how to recognize and report violence and abuse. States shall put in place effective legislation to ensure that violence and abuse are identified, investigated and prosecuted.

Therefore, States have a clear duty under international law to ensure access to justice for persons with disabilities by providing procedural accommodations. Other authorities agree. In his concurring opinion in the *Câmpeanu* case, Judge Pinto de Albuquerque reasoned that institutionalised persons' lack of access to justice, as exemplified by Valentin's case, required a principled approach by the Court: establishment of standing rules flexibility as a matter of course to accommodate persons with mental disabilities' factually unequal situation as regards recourse to remedies. He advocated NGO standing assimilation in comparable cases as a rule, and not as an exception. Here is an excerpt of his criticism of the judgment of the Court:

'[A]n intolerable legal gap in the protection of human rights emerged [...] in view of Mr Câmpeanu's lifelong state of extreme vulnerability, the absence of any relatives, legal guardians or representatives and the unwillingness of the respondent State to investigate his death and bring to justice those responsible. This legal black hole, where extremely vulnerable victims of serious breaches of human rights committed by public officials may linger for the rest of their lives without any possible way of exercising their rights, warranted a principled response by the Court. [...]

Furthermore, in relation to Article 2 [right to life] cases, I do not agree with the statement that the applicant must have become involved as a representative before the alleged victim's death. [...] [T]he Court does not have to consider whether the applicant has ever interviewed the alleged victim [...] or even seen him or her alive, because that would make the application depend on fortuitous facts which are not within the applicant's power.

More importantly, the majority's reasoning is logically contradictory in itself. On the one hand, they affirm that the case at hand is 'exceptional' [...] but on the other hand, they consider that this case reveals 'the existence of a wider problem calling for [the Court] to indicate general measures for the execution of its judgment' [...]. If the case reveals a wider problem, then it is not exceptional. Ultimately, the majority acknowledge that this is not an exceptional case [...].

[...] [I]n stressing the 'exceptional' character of the case, the majority regrettably close the door to any future extension of the present finding, concerning the situation of a mentally disabled person, to cover other victims of human rights violations [...] who might have had no access to justice in their own countries. [...] Instead of relying on the 'exceptional circumstances' of the case [...] I would have preferred to rise above the specificities of the case, and address the question of principle raised by the case: what are the contours of the concept of representation of extremely

vulnerable persons before the Court? It seems to me that this question could, and should, have been answered on the basis of the general principle of equality before the law [...].

[...] [T]he Court has to interpret the conditions of admissibility of applications in the broadest possible way in order to ensure that the victim's right of access to the European human rights protection system is effective. Only such an interpretation of [...] the Convention accommodates the intrinsically different factual situation of extremely vulnerable persons who are or have been victims of human rights violations and are deprived of legal representation. Any other interpretation, which would equate the situation of extremely vulnerable persons to that of other victims of human rights violations, would in fact result in discriminatory treatment of the former. Different situations must be treated differently. Thus, the right of access to court for extremely vulnerable persons warrants positive discrimination in favour of these persons when assessing their representation requirements before the Court.

[This construction] is supported by a literal interpretation of the final sentence of Article 34 of the Convention. Extremely vulnerable persons who have been hindered 'in any way' – that is, by actions or omissions on the part of the respondent State – in the exercise of their rights must be provided with an alternative means of access to the Court. [...] [...] *[T]he Court should have established a concept of de facto representation, for cases involving extremely vulnerable victims who have no relatives, legal guardians or representatives.* [...] [T]he Court should have addressed the case on the basis of [...] the principle of equality before the law [...] distilling from the principle of equality [...] a rule on "*de facto* representation" [...].'

The Council of Europe Commissioner for Human Rights made a broadly similar submission to the Court regarding Article 13 CRPD and the obligation on States to ensure equal access to justice for persons with disabilities, stressing the NGO factor:

'The CRPD is grounded in the premise that public authorities should go further than to just help persons with disabilities to adjust to existing conditions: they should seek to adapt the conditions in order to accommodate everyone, including those with special needs.

The Council of Europe *2006-2015 Action Plan to promote the rights and full participation of people with disabilities in society* noted that people with disabilities often face a number of barriers in access to the legal system, requiring a range of measures and positive actions. The Action Plan states that when assistance is needed to exercise legal capacity, member states must ensure that this is appropriately safeguarded by law. A specific action to be taken by member states in this respect is "to encourage non-governmental advocacy networks working in defence of people with disabilities' human rights."³⁸

The Commissioner noted 'a tendency in domestic law to accept that a third person or organisation takes legal action in the name of victims of alleged human rights violations in domestic courts, especially in cases concerning vulnerable groups of people. Research findings show that in many Member States of the European Union, NGOs are able to initiate court proceedings either in the name of the victim or on their own behalf, in certain circumstances without the consent of the victim.' He stated that mental health facilities should be open to independent public scrutiny to prevent human rights violations; in this sense, NGOs should be given access to monitor practices otherwise hidden from society and NGO monitors should be able to bring legal action on behalf of victims who are unable to do so.

Relying on the principle of effectiveness and the need to adapt standing requirements, the Commissioner took the view that 'strict application of standing requirements to persons with disabilities, and in

38 Amicus curiae submission by the Commissioner before the Court, available at: <https://wcd.coe.int/ViewDoc.jsp?id=1851457>, accessed 28 October 2015.

particular intellectual disabilities, would have the undesired effect of depriving a particularly vulnerable group of any reasonable prospect of seeking and obtaining redress for violations of their human rights and fundamental freedoms set forth in the Convention. It would also run counter to the Convention's objective of preventing the occurrence or recurrence of human rights violations by the States parties.' He argued that NGOs should have standing 'when there is an identified victim [...] in a situation of extreme vulnerability, for example persons detained in psychiatric and social care institutions; [and] in the absence of family, when no means of representation are available – no guardian, or when there is a conflict of interest between the alleged victim and the legal representative.'

The way ahead

Reasonable accommodation in access to justice: a matter of equal justice

As vulnerable victims lacking legal agency (competence and/or capacity, as well as liberty and social integration), institutionalised persons with mental disabilities are entitled to reasonable accommodation in terms of procedural rules granting legal standing to NGOs where no one else is willing or able to bring legal action in a person's defence. Bringing such action is in all cases a matter of public interest because the public interest cannot be unaffected if violations of the basic rights of the most vulnerable people remain unaccounted for. Unless NGOs are allowed, as a rule, to legally act on behalf of persons with mental disabilities who cannot act for themselves and for whom there is no one else to act, those people will never obtain basic access to remedies, the authorities that should be acting *ex officio* in their defence serving as a shield for their abusers instead. The factual and legal inability of individuals with intellectual disabilities to access justice means impunity for the violators, and no curbing of future violations.

Standing rules to access both national and international courts should be adapted as a matter of principle – not simply in 'exceptional circumstances', as the Court's case law has it today – to allow NGOs to bring legal action on behalf of institutionalised persons, regardless of victim consent (excluding cases where there is proof that a victim disagrees) or whether they are living or dead; especially if they are children.

Such reasonable accommodation is a prerequisite to enable persons with mental disabilities to exercise their rights on the same basis as others. Without it they are denied (procedural) equality before the law. It is an essential component of non-discrimination because proceedings are structurally discriminatory, designed in such a way that disability is excluded. NGO standing on behalf of persons with mental disabilities should be de-exceptionalised; it should be rooted as a norm of access to justice. No remedy can be considered effective or fair if it excludes persons with mental disabilities. A practical way to complete a remedy with accessibility, is to provide for representative NGO standing as a matter of course. Remedy normalcy should integrate NGO standing.

No prior connection should be required between the NGO lodging the complaint and the alleged victim, since an NGO may uncover a case when the victim is beyond communication (dying; dead; too young; or suffering from severe conditions preventing information exchange). This should not prevent the NGO from pursuing justice for that individual.

No separate requirement of a general interest in a case should be made either. Abuses committed against people with disabilities in social care homes or psychiatric hospitals affect the public interest by definition.

An entelechy of rights for persons with disabilities requires removing the barriers that separate them from the courts of law and prevent them from overcoming their enforced segregation in order to claim equal liberty. Not removing those barriers to justice makes sure the abuses and the impunity continue.

‘In order to prevent and put an end to these abuses, the important role played by NGOs in shedding light on the human rights violations experienced by vulnerable persons and facilitating the latter’s access to justice must be officially recognised. Allowing NGOs to lodge applications with the Court on behalf of persons with disabilities is fully in line with the principle of effectiveness in which the Convention is grounded.’³⁹

Denial of reasonable accommodation is, in general, a serious form of inequality and ill-treatment. When such denial concerns access to justice, it amounts to institutionalised revictimisation. When legal processes refuse to take into account their inbuilt hurdles for persons with mental disabilities, and refuse to allow for compensatory measures, such as special representation, the law as practised now becomes a tool of punishment of the victims, and doubles the original abuse for which justice is not being done.

Such law becomes a vehicle of nullification of the personhood of the victims. Blind law that withholds recognition from a human facing it loses its own face. This faceless law is a reflection of a collective loss of humanity when we neglect to see the harm done by the processes designed to exclude persons with mental disabilities and to treat them as nothing.

Before the law

In Kafka’s parable ‘Before the law’, a person comes from afar to reach the law. But there is a door there, and a gatekeeper who stops him. The doorman says the person will have to wait to be let in. Though the door is open, the person submits. He waits for many years, and never defies the gatekeeper’s rule. At the end of his life, he asks the gatekeeper why no one else ever came to try and gain entry to the law. The gatekeeper tells him that the door was only made for him, and he will now close it.

As long as we adhere to wrongful provisions, and fail to disown them, we are that wasting person, ceding to petty, arbitrary authority our brief, unique chance to do justice to the moral law within.

39 Amicus curiae submission by the Commissioner before the Court, available at: <https://wcd.coe.int/ViewDoc.jsp?id=1851457>, accessed 28 October 2015.

Gender identity and registration of sex by public authorities

Marjolein van den Brink and Jet Tigchelaar*

Introduction

Gender identity and trans¹ rights are high on many agendas these days, including political and legal agendas. New reports are published, resolutions adopted, judgments published and national laws introduced in quick succession.² Many of the initiatives are aimed at combating discrimination and marginalisation of gender-nonconform people.³ Health issues also increasingly receive attention, one example being the genital surgeries performed on intersex children to adapt them physically to the prevailing gender standards.⁴ Similarly, the so-called sterilisation requirement as a condition to change one's legal sex is increasingly being questioned, and has found its way to the European Court of Human

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- 1 The University of California (UCLA) glossary of LGBTQI terminology explains the term 'trans' as 'an abbreviation that is sometimes used to refer to a gender variant person. This use allows a person to state a gender variant identity without having to disclose hormonal or surgical status/intentions. According to the same glossary a gender variant person is someone who 'by nature or by choice does not conform to gender-based expectations of society (e.g. transgender, transsexual, intersex, genderqueer, cross-dresser, etc.)'. The term trans sometimes refers to the gender variant community as a whole. It is in the third, broad sense that 'trans' is used here. See: <http://www.lgbt.ucla.edu/documents/LGBTterminology.pdf>. All websites mentioned in this article were accessed 27 October 2015.
- 2 Some examples: Castagnoli, C. (2010), *Transgender persons' rights in the EU member states*, Directorate General for Internal Policies, Policy Department Citizens' Rights and Constitutional Affairs, Note, available at: <http://www.lgbt-ep.eu/wp-content/uploads/2010/07/NOTE-20100601-PE425.621-Transgender-Persons-Rights-in-the-EU-Member-States.pdf>; Human Rights Watch (2011), *Controlling bodies, denying identities; Human rights violations against trans people in the Netherlands*, New York: Human Rights Watch, available at: <https://www.hrw.org/report/2011/09/13/controlling-bodies-denying-identities/human-rights-violations-against-trans-people>; Hammarberg, T. (2011), *Discrimination on grounds of sexual orientation and gender identity in Europe*, Brussel: Council of Europe Publishing Editions, available at: http://www.coe.int/t/Commissioner/Source/LGBT/LGBTStudy2011_en.pdf; International Commission of Jurists (ICJ) (2013), *Sexual orientation and gender identity in international human rights law: The ICJ UN compilation*, 5th updated edition, Geneva, available at: http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/06/SOGI-UN-Compil_electronic-version.pdf; UN OHCHR (2012), *Born Free and Equal. Sexual Orientation and Gender Identity in International Human Rights Law*, New York / Geneva, available at: <http://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf>; Commissioner for Human Rights, Council of Europe (2015), *Human rights and intersex people* [issue paper], available at: <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2768767&SecMode=1&DocId=2282716&Usage=2>; EU Agency for Fundamental Rights (FRA) (2015), *The fundamental rights situation of intersex people*, FRA Focus 04/2015, available at: <http://fra.europa.eu/sites/default/files/fra-2015-focus-04-intersex.pdf>; for a list of UN Human Rights Council and General Assembly resolutions on LGBT rights see: <http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBTUNResolutions.aspx>.
- 3 Recently the European Commission explicitly stated in a report to the European Parliament, the Council and the European Economic and Social Committee, that EU sex discrimination law is relevant not only to gender reassignment discrimination but also to other forms of gender identity discrimination: 'There is no case law concerning gender identity more generally speaking as covered by the protection against sex discrimination but the Commission considers that the approach should be materially similar.' European Commission (2015), *Report on the application of Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services*, Brussels, 5.5.2015 COM(2015) 190 final, paragraph 3.3, p. 4.
- 4 For example: Ghorayshi, A. (2015), *Should doctors operate on intersex babies?*, posted on 6 August 2015, at: <http://www.buzzfeed.com/azeenghorayshi/born-in-between>.

Rights (ECtHR).⁵ A third area is sex registration, meaning the practice of attribution and record keeping of legal sex by public authorities. In 2014 two cases, one from the Australian High Court and one from the Indian Supreme Court, drew worldwide media attention. The Australian High Court concluded that it should be possible to register applicant *Norrie's* sex as 'non-specific'.⁶ The Indian Supreme Court ordered both the national and regional state authorities to recognise a 'third gender' and develop policies to improve the lives of the people concerned.⁷

There are many developments concerning sex registration in Europe. In 2014, following the example set in 2012 by Argentina, Denmark introduced the possibility to change one's legal sex without submitting a declaration of a medical professional.⁸ In Sweden the Administrative Court of Stockholm concluded that the mere fact that no (medical) examination has taken place, is not sufficient to deny a request for a legal change of gender.⁹ Germany introduced the possibility to leave the legal sex of a child undetermined until it can be established.¹⁰ In the Netherlands, sterilisation as a condition for a legal change of sex was dropped on 1 July 2014.¹¹ In April 2015 Malta adopted the 'Gender Identity, Gender Expression and Sex Characteristics Act', which has been hailed as 'a historic break-through for the rights of trans and intersex persons in Malta and Europe'.¹² Also in spring 2015 an advisory committee established by the Norwegian Ministry of Health published its recommendations, advising among other things to raise the age of intersex children for the purposes of the attribution of legal gender. Most recently, on 7 August 2015, the Polish Senate adopted the first gender-recognition legislation in the country.¹³

This article focuses on the widespread practice of States – taking the Netherlands as a starting point and briefly describing some other countries – to register the sex of their population, and, moreover, to register it in a binary way: the gender options to choose from are limited to M(ale) and F(emale).¹⁴ The few recent exceptions to this rule will be discussed below. The possibilities and impossibilities to change the way in which sex is registered in national population registers will be explored, including the consequences of putting an end to the practice of sex registration as such. What would, for example, be the consequences – if any – of deleting a gender entry in a birth certificate without replacing it by 'the other sex', i.e. replace M(ale) by F(emale) or vice versa, as is currently prescribed by most legal systems? The primary concern is with transgenders whose appearance, expression or self-identified gender does not correspond with the legal gender options M or F. However, there is a wider relevance. Raising questions about the engrained habit of attributing a legal sex to every individual might also be welcomed by transitioning

5 ECtHR, *Y.Y. v. Turkey* (Application No. 14793/08), 10 March 2015. Three cases against France are pending (Applications Nos 79885/12, 52471/13 and 52596/13).

6 High Court of Australia, *NSW Registrar of Births, Deaths and Marriages v. Norrie*, [2014] HCA 11, 2 April 2014, S273/2013.

7 Supreme Court of India, *National Legal Services Authority v. Union of India and others*, writ petition (civil) No. 400 of 2012 with writ petition (civil) No. 604 of 2013, New Delhi, 15 April 2014.

8 A motion to amend the Act on the [Danish] Civil Registration System was adopted by the Danish Parliament on 11 June 2014. The law entered into force on 1 September 2014. See <http://tgeu.org/tgeu-statement-historic-danish-gender-recognition-law-comes-into-force/>.

9 Administrative Court in Stockholm, *N.N. v National Board of Health and Welfare*, Case No. 24931-13, 16 May 2014. Both the official Swedish text and an unofficial English translation are available at: <http://tgeu.org/administrative-court-in-stockholm-striking-out-diagnosis-in-gender-recognition-16-05-2014/>.

10 This change was introduced on 1 November 2013, No. 21.4.3 *Allgemeine Verwaltungsvorschrift zum Personenstandsgesetz* (General Administrative Regulation on the Personal Status Law).

11 Netherlands, Act of 18 December 2013 on changing Book 1 of the Civil Code and the Municipal Database (Personal Records) Act in connection with changes in the conditions and the competences related to legal change of sex in the birth certificate (*Wet van 18 december 2013 tot wijziging van Boek 1 van het Burgerlijk Wetboek en de Wet gemeentelijke basisadministratie persoonsgegevens in verband met het wijzigen van de voorwaarden voor en de bevoegdheid ter zake van wijziging van de vermelding van het geslacht in de akte van geboorte*), Stb. 2014, 1.

12 Transgender Europe (TGEU) press release 1 April 2015, <http://tgeu.org/malta-adopts-ground-breaking-trans-intersex-law/>.

13 TGEU, 'Transgender Europe acknowledges first Polish gender recognition law, posted 7 August 2015, <http://tgeu.org/transgender-europe-acknowledges-first-polish-gender-recognition-law>.

14 This article draws on the results of a study commissioned by the Dutch Deputy Minister of Security and Justice: Brink, M. van den, Tigchelaar, J. (2014), *M/V en verder; Seksregistratie door de overheid en de juridische positie van transgenders* (M/F and beyond; Sex registration and the legal position of transgenders), Den Haag: BJU, 2014. The report is also available at: <https://www.wodc.nl/onderzoeksdatabank/2393-de-mogelijkheid-en-consequenties-van-het-onbepaald-laten-van-het-geslacht.aspx?cp=44&cs=6796>. The report is in Dutch, with a summary in English. The six reports on other countries have been included as appendices and are in English.

transsexuals – people who as such do not, at least not per se, suffer from the binary perception of gender, but self-identify with the ‘other’ gender and wish to be recognised as such. The issue may also be of relevance to people with an intersex condition, since a more flexible way of registering sex at birth – or not registering sex at all – may take some of the pressure away that is caused by the necessity to decide on a child’s gender for the purpose of registering its birth, in case of doubts regarding the child’s sex.¹⁵ Last but not least, the issue also has relevance from a feminist perspective. Several (Dutch) feminists have argued in favour of abolition of the practice of gender registration as such because of its implicit message that gender does matter, that there is some kind of core difference between men and women.¹⁶ Such a message goes directly against the basic tenet of legal sex equality, which presumes that sex/gender is *not* relevant.

It is important to note that in this article no distinction is made between the concepts of sex and gender, since the two are very much intertwined, overlapping and contested. For the purposes of this article, the distinction is not particularly relevant.

First, the legal history of sex registration in the Netherlands and the current Dutch legal framework will be described. Then the different types of legal provisions that are prevalent at the national level and that refer to gender in one way or another will be discussed, including whether distinctive results according to sex are intended by those provisions. The article then turns to the international level and explores whether international agreements and obligations may be expected to restrict national possibilities to change sex registration systems. After this, relevant developments in five countries are analysed, to see whether any lessons can be learned. The article will conclude with an indication of the expected legal and practical consequences of changing gender registration, by widening the options or abolishing it altogether, and with some short-term possibilities to reduce the burden of the binary gender registration system for trans persons.

Rationale and current legal framework of sex registration in the Netherlands

Population registration was introduced in the Netherlands in 1811 by Napoleon.¹⁷ From the start, information about people’s sex was one of the identity characteristics to be registered. Although

- 15 Greenberg, J.A. (2012), *Intersexuality and the law: why sex matters*, NYU Press; Lisdonk, J. van (2014), *Living with intersex/ DSD. An exploratory study of the social situation of persons with intersex/DSD*, SCP, 18 June 2014 (publication date English translation 25 August 2014). Available at: http://www.scp.nl/english/Publications/Publications_by_year/Publications_2014/Living_with_intersex_DSD. For an extensive exploration of the issue see also the E.MA doctorate thesis of Lena Holzer, *Making Room for the Rights of Intersex Children Legal perspectives on intersex genital surgeries*, Utrecht, 14 July 2015. On file with the authors.
- 16 Brink, M. van den (2000), ‘De inbedding van sekse(on)gelijkheid in het recht. Als je geen Barbie wilt zijn, hoe weet je dan dat je een vrouw bent?’ (The embedding of sex (in)equality in the law. If you don’t want to look like Barbie, how do you know you’re a woman?), in: Holtmaat, R. (ed.), *De toekomst van gelijkheid. De juridische en maatschappelijke inbedding van de gelijkebehandelingsnorm* (The future of equality. The legal and social embeddedness of principle of legal equality), Deventer: Kluwer, pp. 29-44; Hondt, I. de (2002), ‘Abolitionisme ten aanzien van sekseaanduidingen in het familierecht’ (Abolitionism with regard to references to sex in family law), *Tijdschrift voor Familie- en Jeugdrecht*, 2002, pp. 219-224. Graven, M., Brink, M. van den (2008), ‘Trans m/v. Genderdiversiteit, seksegelijkheid en het recht’ (Trans M/F, Gender diversity, sex equality and the law), *Tijdschrift voor Genderstudies*, pp. 52-66. See also: Felten, H. (2013), *Wat heeft de overheid te zoeken in onze onderbroek?* (What business is our underwear to the authorities?) [opinion], *De Volkskrant*, 5 April 2013. Also see: Spade, D. (2007-2008), ‘Documenting gender’, *Hastings Law Journal*, vol. 59, pp. 731-842. Note however, that other feminists are vehemently opposed to dropping the gender distinction or equating sex and gender. See for example the open letter of Cathy Brennan and Elizabeth Hungerford to the UN Commission on the Status of Women, of 1 August 2011, at: <http://sexnotgender.com/gender-identity-legislation-and-the-erosion-of-sex-based-legal-protections-for-females/>. See also Hungerford’s follow-up letter to the CSW of 26 July 2012 at: https://gendertrender.files.wordpress.com/2012/08/hungerford_csw_communication_2012_8-28-2012.pdf.
- 17 For more background information on the civil registry see e.g. Elenbaas, J.N. (1952), *Handboek voor de burgerlijke stand, deel 1* (Handbook for the civil registry, part 1), revised by Septer, A.J.G.P., Schouten, J.C., Alphen aan de Rijn: N. Samsom N.V.; Plasschaert, J.N.E. (2002), *Burgerlijke stand; Serie Burgerzaken* (Civil registry; Series Civil Affairs Department), Amsterdam: Stadsdrukkerij Amsterdam N.V.; Kampers, J. (2010), *Inleiding tot de burgerlijke stand* (Introduction to the civil registry), revised by Evers, L.J.V., Vat, H., Alphen aan de Rijn: Kluwer.

information on the rationale behind this practice is scant, it probably has to do with gender-specific rights (or lack thereof) and duties, such as military conscription for men. For a short time, it was even mandatory to bring a baby along when registering its birth, to prove the baby's gender to the registration officer. This requirement was probably introduced because too many people registered their male child as female, to avoid their sons being conscripted into Napoleon's army later in life. In the 200 years that have passed since the introduction of personal record keeping by the State, many legal provisions that directly distinguished on the basis of sex, have been repealed, but not all, as is also illustrated by the size of the inventory of legal provisions mentioning sex, discussed further below. Some gender-specific rules remain. One example is the different ways to establish legal fatherhood or motherhood, another is the (currently suspended) military draft that exclusively focuses on men. Sex equality legislation paradoxically depends on gender categorisation as well.

Sex registration has always been binary: people were identified either as male or as female, without any exceptions. The first dent in this binary structure was introduced in 1970, when Article 1:17(2) of the new Civil Code (*Burgerlijk Wetboek*) provided for the situation that a new-born baby's features raised doubts as to its sex. A possibility was created to indicate on the birth certificate that the child's sex 'cannot be determined'. After the child's sex had become clear, the entry on the certificate could be changed. That change, however, remained visible. Because this was regarded as undesirable by those involved (including the parents and public prosecutor) the option was mostly rejected. The registration of the child would just be postponed until its sex could be determined. This practice, which strictly speaking was illegal, came to an end when the revised Civil Code entered into force in 1995. The new Article 1:19d, that presents the law as it currently stands, stipulates that if a child's sex is unclear, a provisional certificate may be drawn up indicating that the child's sex could not be established. Within three months after birth, and as soon as the sex has been determined, a definite certificate must be issued. If the child's sex cannot be determined within three months, the definite certificate will indicate that sex determination was not possible. Changes in the certificate will only be visible if the attribution of sex occurs after the end of the three-month period. If nobody turns up to change the original entry, the provisional certificate will be made final. If, in later years, the attributed sex turns out to have been a mistake, the legal sex can be changed by 'correcting' it. At the time, the association of civil registrars suggested to delete the three-month period so as to avoid any undue pressure on parents. This proposal, however, was rejected because legal certainty was considered to be more important.¹⁸

The procedure regarding the 'correction of mistakes' in case of intersex conditions, differs from the procedure prescribed for transsexual people who wish to change their legal sex from male to female or vice versa (Articles 1:24, 24a and 24b of the Civil Code).¹⁹ The possibility to change one's legal sex (Articles 1:28 – 28c of the Civil Code) was introduced in 1985. The most important requirements for such a change were a medical declaration, not being married, the *permanent* conviction of belonging to the 'other' sex, and the impossibility to procreate (commonly referred to as the 'sterilisation requirement'). The requirement regarding marriage became meaningless after classic marriage was opened up to same-sex couples in 2001.²⁰ In July 2014 the sterilisation requirement was dropped, as was already mentioned above.

The current preconditions for a legal change of sex for a person aged sixteen or older are: the sense of belonging to the sex 'other' than the one registered and the declaration of an expert in gender dysphoria that the person concerned shows a well-considered sense of belonging to the 'other' sex and understands what the implications of a legal sex change entails. The Government has repeatedly stressed that the declaration requirement is not meant to question trans people's experiences or self-identification.

¹⁸ See *Kamerstukken II*, 1990-1991, 21847, No. 3. See also Plasschaert, J.N.E. (2002), pp. 12-13.

¹⁹ The UCLA glossary of LGBTIQ Terminology defines 'transsexual' as 'a person who identifies psychologically as a gender/sex other than the one to which they were assigned at birth. Transsexuals often wish to transform their bodies hormonally and surgically to match their inner sense of gender/sex.' See: <http://www.lgbt.ucla.edu/documents/LGBTTerminology.pdf>.

²⁰ Netherlands, *Wet Openstelling van het huwelijk voor personen van hetzelfde geslacht*, Stb. 2001, 9. This Act allows couples of the same sex to marry.

Rather, it is to ensure that people with a mental disorder do not mistakenly ask for gender reassignment treatment.²¹ The trans people concerned, however, experience it differently.

The requirement of a well-considered conviction is closely linked to the foundations of the Dutch registration system, which is strongly centralised. The Netherlands has two major record-keeping systems that include information on legal gender: the civil registry (*Burgerlijke stand*) and the population registration (*Basisregistratie personen*). The certificates contained in the civil registry, such as birth certificates, are static in character and may be used as legal proof (Article 1:22 Civil Code). The registry primarily serves as a formal source of information for the population registration. The static character of the documents contained in the civil registry explains the caution with which the Dutch authorities approach changes in people's legal sex: it is possible, but only once.

The population registration, which is administered by the municipal authorities, contains most (not all) information from the civil registry records plus additional information such as citizen service numbers and place of residence. It also contains information on people residing temporarily in the Netherlands, e.g. exchange students. The two systems are organised in such a way that a change in one of the systems will automatically be reflected in the other. That is, if people change the sex as indicated on their birth certificate from M to F or vice versa, that change will be copied into the population registration, which in turn will inform other records, like those regarding drivers licences and travel documents.

This kind of highly centralised registration is typical of civil-law countries, such as the Netherlands and Germany.²² Common-law systems tend to keep their records separate, meaning that a change of the gender entry in a birth certificate will not automatically be reflected in another document.²³ Thus, the people concerned will need to change the gender entry separately for different records. However, this does not necessarily entail an advantage for trans persons in the Netherlands, as sometimes seems to be suggested,²⁴ since they would be saved the administrative hassle: changing the legal sex in a birth certificate will be reflected in the registry on driver's licenses. This in turn implies that the licence (or other identity document) will lose its validity immediately after the change. Continued use of the old document might even give rise to criminal prosecution.²⁵

This difference in record-keeping seems to explain at least to some extent the apparent ease with which countries like Australia and New Zealand (both common-law countries) introduced the third option of an X on passports and other travelling documents. Since the different records are not linked, the change will not impact on marriage law for example. This issue will be discussed further below in the section on experiences in other countries.

Except for the first entry on the birth certificate for intersex babies as described above, it is not possible to have an entry other than M or F. In 2007 an individual, 'K.', asked the Dutch Supreme Court (*Hoge Raad*) to order the registrar to delete the gender entry on K's birth certificate (M) without replacing it by

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- 21 *Kamerstukken II*, 2011-2012, 33351, No. 3, pp. 3-4. See also Brink, M. van den (2015), 'De X-factor: genderidentiteit en geslachtsregistratie' (The X-factor: gender identity and registration of sex), in: Boele-Woelki, K., Jonker, M. (eds), *Actuele ontwikkelingen in het familierecht* (Recent developments in family law), Nijmegen: Ars Aequi Libri, pp. 11-22, on p. 14.
- 22 On the comparative aspects see e.g. Brink, M. van den, Reuß, P., Tigchelaar, J. (2015), 'Out of the box? Domestic and private international law aspects of gender registration. A comparative analysis of Germany and the Netherlands', *European Journal of Law Reform*, Vol. 17, No. 2, pp. 282-293.
- 23 See Gössl, S.L., (2013), 'Intersexuelle Menschen im Internationale Privatrecht' (Intersex persons in international private law), *Das Standesamt (StAZ)*, pp. 301-305.
- 24 *Kamerstukken I*, 2012-2013, 33219 C, pp. 2-3. In answer to questions about purpose and necessity of sex registration, the Minister states that diverging information in multiple records 'would not be efficient and would not positively affect the protection of the private sphere'.
- 25 See the information on: <http://www.transvisie.nl/transvisie.nl/index.php/transgenders-juridisch>.

F. K described their²⁶ gender as ‘desexualised’.²⁷ The Supreme Court turned K’s request down, since at that time there was no clear trend towards legal recognition of a neutral gender identity and granting the request would imply a fundamental change of the legal system, which could only be brought about after careful considerations of the legal consequences by the legislator.

However, there are exceptions to the rule that only M or F is possible, apart from the provision for intersex babies discussed above. The most common situation (even if rare) is that foreign people are unable to ‘prove’ their legal sex when registering with the local Dutch authorities. Their sex must be noted as ‘unknown’, although in practice sometimes registrars seem to take people’s statements on their sex (only M or F of course) at face value. A second exception is the recording of a foreign birth certificate, which indicates a gender different from M or F (unknown, non-specific etc.) in the Dutch civil registry: the gender as noted in the original certificate will be copied in the Dutch records (Article 1:25 Civil Code). Research of the population registration showed that in December 2013, 67 individuals were registered with ‘unknown gender’ (December 2013). Of these, 24 had been born in the Federal Republic of Germany and 20 in Italy. This relatively high number of Germans and Italians can probably be explained by the fact that German and Italian identity cards do not have a gender entry. Thus, an Italian who uses an identity card to prove personal data when registering with the local authorities, will not be able to prove legal gender identity.²⁸ Only one of the 67 people that turned up in the query had been born in the Netherlands. Due to considerations of privacy, it was not possible to further explore the reasons for the gender entries as ‘unknown’. It is likely, however, that most if not all entries were motivated by lack of sufficiently authoritative evidence of legal sex.

Dutch gender-related legal provisions and current use of gender information

The Dutch national laws and regulations that either mention the neutral concept of gender (*geslacht*) or refer to sex-specific terms (husband/wife) can be classified under a number of themes.

Most provisions mentioning gender in a neutral way (*geslacht*), serve either identification or policy purposes, an exception being sex-equality law which is discussed below. Information on gender is required, for example, to obtain a driver’s licence, a passport, or a registration at the Chamber of Commerce. The information thus collected seems primarily aimed at the identification of individuals. Data on gender is also collected for practical and policy purposes, in areas such as education, health and youth care. There is a relatively high incidence of this kind of provisions in lower regulations. This arguably shows the relevance of gender-specific data for implementation purposes.

Most provisions containing sex-specific terms appear in social security legislation, for example regarding retirement pensions and other social benefits, in regulations regarding civil servants and on compensation for wartime damages. Some of these provisions focus on one specific sex, such as male prisoners of war. This makes sense if such provisions regard a period in which prisoners of war were male by definition. In other instances, such gender-specific provisions have been ‘equalised’ by adding the ‘second’ gender. An example is the provision for widows’ pensions, which after the well-known *Barber* judgment by the European Court of Justice,²⁹ was extended to widowers: instead of drafting a new provision, providing for a benefit for the surviving partner, equality was achieved by adding a reference to widowers.

26 Trans people who do not identify as male or female are increasingly frequently referred to in the plural, at least in English. See for example Petrow, S. (2014), ‘Gender-neutral pronouns: When ‘they’ doesn’t identify as either male or female’, *The Washington Post*, 27 October 2014, https://www.washingtonpost.com/lifestyle/style/gender-neutral-pronouns-when-they-doesnt-identify-as-either-male-or-female/2014/10/27/41965f5e-5ac0-11e4-b812-38518ae74c67_story.html.

27 Hoge Raad 30 March 2007, ECLI:NL:HR:2007:AZ5686, Paragraph 3.5.3.

28 This of course may be the perfect solution for genderqueer individuals who move to the Netherlands and would prefer not to be registered as M or F.

29 ECJ, *Barber v. Guardian Royal Exchange Assurance Group* (1990), C-262/88.

Another category consists of provisions referring to fathers or fatherhood and mothers or motherhood, for example in the context of legal affiliation and obtaining the Dutch nationality. A specific group of provisions relates to the legal accommodation of pregnancy, such as pregnancy and maternity leave, as well as specific benefits and protections, for example against work which involves health risks. Abortion laws and laws prohibiting infanticide are another example. The law on infanticide prescribes lower sentences for the *mother* who kills her newly born child for fear of discovery of her pregnancy, but not for the *father* of that child or that mother's partner.

In addition, a considerable number of provisions with references to gender can be found in equality legislation. These provisions are mostly intended to protect everyone regardless of gender, and are thus comprehensive in the sense that different treatment based on sex is prohibited, irrespective of whether women or men would be disadvantaged by such distinct treatment. However, this body of law also contains a number of sex-specific provisions, for example regarding preferential treatment,³⁰ genuine occupational requirements and sports. Finally there are miscellaneous provisions regarding the royal family, regarding sex-segregated facilities such as prisons and on other very specific issues, such as military service (only for men), and health-related issues, for example regarding preventive checks on cervical cancer.³¹

A notable feature of this collection of gender-related provisions is that references to gender are far more frequent in lower regulations, such as regulations issued by Ministers, than in national statute.³² This seems to indicate that information on gender is most frequently used for implementation purposes. Quite often this seems to be a matter of convenience and common practice, rather than anything else.

The inventory shows that there is a wide range of provisions that make reference to gender. Sometimes, the provisions aim to achieve sex-specific effects such as the military draft, and the prohibition of pregnancy discrimination because of its disproportionate effects on women. Affiliation law, distinguishing between fatherhood and motherhood is another example. This is reminiscent of the days of Napoleon. Of a more 'modern' character are the provisions aimed at identification and for policy and research purposes. Also noteworthy is that a large number of provisions that use gender-related terms does not seem intent on different treatment at all. This is true for example for all provisions that mention the male and female terms (widow/widower) in one breath. Obviously, the very purpose of equal treatment legislation is the elimination of sex-based discrimination, and thus no difference in treatment on the basis of sex is intended by this body of law either.

International legal impediments to changing binary sex-registration systems

States are increasingly bound by international legal obligations. It is therefore useful to explore the legal impediments to changes in national practices of record keeping, before modifying such systems.

An interesting example of an international agreement regarding gender registration that has been the focus of some gender-specific research is Document 9303 of the International Civil Aviation Organisation (ICAO).³³ The ICAO is a specialised agency of the United Nations. Document 9303 lists non-binding

30 The Netherlands has not broadened the scope of the national legal provision for preferential treatment, which in the past was restricted by EU law to women, after EU law introduced the possibility for national authorities to allow for preferential treatment for underrepresented *men* (Article 157(4) Treaty on the Functioning of Europe).

31 On the basis of the *Wet van 29 oktober 1992, houdende regels betreffende bevolkingsonderzoek* (Act of 29 October 1992 containing rules concerning population screening), licensed health organisations may receive gender-specific information to distribute invitations for breast cancer screening or cervical cancer screening to women only.

32 The full inventory of provisions referring to 'gender' or using sex-specific references (father/mother) in national statutes and regulations is available at: https://www.wodc.nl/images/2393-bijlage_tcm44-573684.pdf.

33 ICAO Document 9303 on Machine Readable Travel Documents (7th edition), is available at: <http://www.icao.int/publications/pages/publication.aspx?docnum=9303>. The EU has also adopted the approach as outlined in ICAO

standards for travel documents. The document was adopted in 1980, around the time the first machine-readable travel documents were introduced. It was important to decide on standard documents, to prevent the necessity to design machines that would be able to read a myriad of differently designed documents. The ICAO guidelines mention gender as one of the mandatory personal data and provide for three options: M, F or X. The 2008 version of the guidelines states: 'Where a person does not wish his/her [sic] sex to be identified or where a State does not want to show this data, the filler character (<) shall be used in this field in the MRZ and an x in this field in the VIZ.'³⁴

In 2012 New Zealand presented a report on the question whether the mention of gender on travel documents was still acceptable, particularly in light of the human dignity of trans people, and given technological developments that might make the use of gender data superfluous, such as biometric data.³⁵ However, after balancing the pros and cons of eliminating the gender box on travel documents, New Zealand concluded that the benefits, especially in terms of improvements of the position of trans people, are outweighed by the disadvantages. The loss of the availability of information on gender will lead to a significant decrease in the possibilities to assess risks, there will be more 'errors' when identifying individuals, and the queues, for instance at airports, will get longer. Moreover, replacing the current technical equipment to read travel documents will involve considerable costs, even if all member states of the ICAO would agree to skip the gender entry.

There are many other international agreements, including EU regulations relating to transnational movement (like border controls) and exchange of information regarding foreign individuals.³⁶ Most of these documents do not seem to present insurmountable obstacles to changing the current practice of binary sex registration. Generally, such documents do demand information on the individual's biographical data, sometimes on a person's sex, but they hardly ever specify the form that information should take. That is to say, States are mostly not requested to state whether an individual is male or female, but to provide information on that individual's sex/gender.³⁷ Even though this lack of precision may very well be the result of the self-evident understanding of sex as binary, that does not imply per se that the interpretation of acceptable information on gender identity cannot be expanded to include an X for example. This is also apparent from (still rare) current practices in a number of countries, such as Australia, which allow people to choose an X on their travel documents. So far, this practice has not disrupted the international system. Although people with an X in their passports certainly should expect difficulties crossing borders, this is not so much different from the current situation confronted by people whose legal gender does not match their gender appearance or expression.

Arguably, if the provisions are taken literally, a State could even identify all individuals as X, while still complying with its international obligations. However, it must be noted that underlying documents and regulations are often more specific, using for example M and F boxes that must be ticked. Then again, this kind of document is easier to change than an international treaty.

A problem of a different nature is the legal framework regarding pregnancy and maternity, especially within the context of EU law. On the one hand, it is probably not hard to read legal provisions protecting

document 9303: Council Regulation (EC No. 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States, *OJ L* 385, 29 December 2004; and Regulation (EC) No. 444/2009 of the European Parliament and of the Council of 28 May 2009, amending Council Regulation (EC) No. 2252/2004 on standards for security features and biometrics in passports and travel documents issued by Member States.

34 See Part 3, Volume 1, p. V-4 and footnote f on p. V-9. Part 2 of the document on machine-readable visa (2005) has the same text in footnote f, on p. V-12.

35 Technical Advisory Group on Machine Readable Travel Documents, *Information paper*, ICAO, TAG/MRTD/21-IP/4, 10-12 December 2012. Appendix A contains the executive summary of the research of New Zealand 'Displaying the holder's gender on travel documents: Is it still appropriate in the age of e-travel documents?'

36 For example: Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between member states, article 11 paragraph 1 (a) (i).

37 However, sometimes a form specifies the gender with the boxes F and M. This is the case with the form referred to in Articles 6, 7, 8, 9 and 10 of the above-mentioned Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between member states.

pregnant women workers in such a way as to encompass *all* pregnant workers, and it is unlikely that there will be major difficulties in dealing with pregnant persons who have no *legal* gender, since it is unlikely that such a change in the legal system will affect the number of pregnancies in any way.³⁸ It is also clear that the protection is focusing on the pregnancy, rather than on the gender of the person concerned. On the other hand, the EU prohibition of pregnancy discrimination is currently based on the premise that pregnancy affects women only, resulting in pregnancy discrimination being equated with women's discrimination. If pregnant persons were no longer identified as women, pregnancy discrimination could be rephrased as a separate non-discrimination ground, but it would need a different justification, since that justification is currently based on the equation of pregnancy discrimination with women's discrimination.³⁹

Other international agreements that mention gender include the Geneva Conventions,⁴⁰ the Rome Statute on the International Criminal Court⁴¹ and many of the conventions of the International Labour Organisation. These documents can mostly not be regarded as limiting national possibilities to change national sex registration systems, since States are generally free to offer more protection than the minimum prescribed by those international instruments. Therefore, it may be argued that extending the gender-specific protection offered by those treaties to gender-nonconform people, must be considered as being in line with the purpose of those instruments

In human rights law the categories of men and women seem to be taken for granted, as is evident just from the title of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Even though trans rights currently enjoy increased attention, so far there is no legally binding document of international human rights law that includes gender identity as a 'suspect' ground for discrimination, although this is different in case law.⁴² As yet there is no positive obligation to recognise other genders than male and female, nor is there any explicit indication that gender should be regarded as a sensitive identity characteristic or that gender can no longer be registered. However, the so-called Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity (2007)⁴³ are increasingly invoked and endorsed by state representatives, including those from the Netherlands.⁴⁴ This, arguably, paves the way for moral (albeit not yet legal) obligations vis-à-vis trans rights, including of those of gender-nonconform individuals.

Treaty bodies, including the Committee that monitors implementation of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), regularly demand that States Parties provide information that is segregated by sex. Just as discussed above, this kind of requirement does not stand in the way of national changes in the registration system. Data collection can take place in other ways. However, without further consultation with experts it is difficult to predict the consequences for statistical and other sex-specific research.

38 Note that this is already necessary to some extent in EU countries that have dropped the sterilisation requirement for transsexuals: this change implies that now persons who are legally male may become pregnant. See Brink, M. van den, Tigchelaar, J., 'The equality of the (non) trans-parent: women who father children'. In: Brink, M. van den, Burri, S., Goldschmidt, J. (eds), *Equality and human rights: nothing but trouble?*, Utrecht: SIM Special No. 38, 2015, pp. 247-260. The article can be found at: <http://sim.rebo.uu.nl/wp-content/uploads/2015/04/van-den-Brink-and-Tigchelaar-Equality-of-the-non-trans-parent.pdf>.

39 Court of Justice EU, *Elisabeth Johanna Pacifica Dekker v. Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*, Case C-177/88, 8 November 1990, ECLI:EU:C:1990:383.

40 1949 Geneva Conventions I, II, III and IV and Additional Protocols, available at: <https://www.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp>.

41 Rome Statute of the International Criminal Court, A/CONF.183/9, adopted 17 July 1988, into force 1 July 2002, United Nations, Treaty Series, vol. 2187, No. 38544, Depositary: Secretary-General of the United Nations, <http://treaties.un.org>.

42 The European Court of Human Rights has an impressive list of judgments. For an overview see the Court's Factsheet on Gender Identity Issues, the latest version currently dating from May 2015, at: http://www.echr.coe.int/Documents/FS_Gender_identity_ENG.pdf.

43 The Yogyakarta Principles can be found at: http://www.yogyakartaprinciples.org/principles_en.pdf.

44 An overview of the Principles' impact between 2007 and 2010 can be found at: http://ypinaction.org/files/02/57/Yogyakarta_Principles_Impact_Tracking_Report.pdf.

Experiences in Australia, Germany, India, Nepal, and New Zealand

Developments in Australia, Germany, India, Nepal, and New Zealand clearly show the increased attention for the restrictions and disadvantages of the common binary conception of sex. This interest in the gender dichotomy has led to a variety of measures and approaches. The highest courts in both India and Nepal have ordered their respective governments to recognise a third gender.⁴⁵ In both countries ‘third genders’ have throughout the centuries formed a separate and highly visible group that especially in the last decades has become increasingly marginalised. Because of their perceived nonconform gender identity, individuals often do not receive identity documents, thus being deprived of access to education, healthcare and many other facilities. It is this situation that the highest courts of these countries wished to address. Although there is a big gap between the aspirations of the judgments on the one hand and the harsh reality of the ‘hijra’s’ daily life on the other, there are indications that even the mere legal interpretation has already had some positive effects on members of the group(s) concerned in terms of awareness and empowerment.⁴⁶

However, there is a clear difference between the situation in these two countries and the position of trans people in Western Europe, where trans people (or third genders) have never been very visible, nor been regarded as a more or less clearly defined group. Therefore, chances are that now identifying gender-nonconform people in Western Europe as ‘third gender’ might increase stigmatisation and exclusion, rather than improve their status, as is expected to happen in India and Nepal.

Australia and New Zealand have introduced the possibility to obtain a passport with an X, merely based on a statutory declaration. As mentioned above, this is possible, since the different records (on travel documents, on marriage etc.) are not linked, and thus people obtaining this X on their passports will retain their designated sex (F or M) for all other purposes. Also, different options have been introduced to register babies with unclear gender characteristics. In Australia these options differ from state to state, with the Australian Capital Territory heading the list with five different possibilities: m, f, unspecified, indeterminate or intersex.⁴⁷

The event that drew most international attention in Australia was the judgment of the Australian High Court in the case of *Norrie* (April 2014), already mentioned above. Norrie, more or less like ‘K.’ in the Dutch Supreme Court case of 2007, asked the registrar to change Norrie’s sex into something that the law did not provide for, i.e. non-specific. After having undergone a sex affirmation procedure, Norrie decided that they was not male, but also not female. This self-identification was backed up by medical declarations, as required for a ‘regular’ change of legal sex (i.e. from M to F or vice versa). The High Court ruled that the law applicable to the civil registry could not possibly demand that clearly incorrect facts – such as Norrie being male or female – would be registered. Therefore, because Norrie fulfilled all requirements for a legal change of sex, Norrie’s sex should be registered as nonspecific. The objections of the registrar that this might result in unforeseen problems were brushed aside, since such problems could be dealt with once they occurred. Again, this is different in a civil-law registration system such as that of the Netherlands, where all records are linked, and where it is impossible to have different genders for different purposes.

45 Supreme Court of India, *National Legal Services Authority v. Union of India and others*, writ petition (civil) No. 400 of 2012 with writ petition (civil) No. 604 of 2013, New Delhi, 15 April 2014; and Supreme Court of Nepal, *Sunil Babu Panta v. the Government of Nepal*, Writ No. 9172007 (2064) 2007.

46 For example, in India’s federal elections after the judgment, hijras and other transgender people were permitted to publicly declare their gender identities when voting. See: Seervai, S. (2015), ‘India’s Third Gender. Shanoor Seervai interviews Laxmi Narayan Tripathi’, *Guernica, a magazine of art and politics*, 16 March 2015, available at: <https://www.guernicamag.com/interviews/indias-third-gender/>.

47 This change was made possible on 26 April 2014. See Keyes, M. (2014), ‘Country Report for Australia’, in: *M/F and beyond* (2014), pp. 157-170, on p. 167. (The link provided on p. 167 in footnote 56 no longer seems to work.)

As for Germany, research carried out by German legal experts within the context of the Dutch research into sex registration M/F, mentioned above, showed that the German provision on intersex babies was probably not intended to pave the way for a general introduction of a 'third gender'.⁴⁸ Different from the Dutch provision on the attribution of sex to intersex babies as discussed above, the German provision has received quite a bit of criticism. Organisations of intersex people are afraid that the provision will lead to more, instead of fewer, surgical interventions.⁴⁹ This difference in reception is arguably caused by the fact that in Germany a medical declaration is demanded for birth registration. It is feared that medical staff will feel obliged to fill out the declaration truthfully, stating an unspecified sex, whereas parents may prefer clarity about their child's sex. In the Netherlands, a medical declaration is not required.

Overall, it has become clear that in the countries where changes to the binary registration system have been made, no prior assessment was carried out of international legal impediments, or other problems to be expected.

Conclusions

Breaking the gender dichotomy in population registrations would certainly coincide with an international trend of increased recognition of the human dignity of trans people and the importance of gender identity. International law seems to pose relatively few limitations, although, as with travel documents, it might not always be possible to ignore gender altogether. Often it seems possible to provide for more options than just M and F, and even – depending on how far one is willing to stretch it – to just attribute an X to all citizens.

However, because references to gender permeate the legal landscape – as the Dutch example has shown – an infinite number of smaller and larger changes must be reckoned with. The exact extent of such changes depends on the scope of the changes in the registration system. If the possibility to register differently, for example as X or as 'third gender' is introduced but limited to a clearly defined group of people, the effects will probably be 'manageable'. Dropping the practice of registration of gender altogether, on the other hand, will have quite far-reaching consequences if nothing is done in advance to remove expected difficulties. Difficulties may occur for example as regards sex-segregated facilities (like prisons or psychiatric institutions) and legal provisions of motherhood and fatherhood.

The use of information on gender in travel and other identity documents is widespread and any changes in the system will be noticed here. Again, much depends on the scale of the changes. Relatively minor changes, such as the Australian possibility to have an X on one's passport instead of an M or an F, will primarily affect the individual holder of that passport, who will frequently if not always be asked to step out of the line at the airport or elsewhere, because the system or the officers in charge (or both) are unable to digest such information.

A step forward, however, that can and quite likely will be made in the near future,⁵⁰ with only few adverse consequences, is to introduce much more restraint in the dissemination of information on individuals' gender. The authorisation in the Netherlands for both governmental and non-governmental agencies, to receive information on gender drawn from the population registration, is also provided when it does not seem strictly necessary. A major reason for the more or less automatic inclusion of information on

48 See Dethloff, N., Gössl, S. (2014), *Country report for Germany*, in: Brink, M. van den, Tigchelaar, J. (2014), *M/V en verder; Sekserregistratie door de overheid en de juridische positie van transgenders* (M/F and beyond; Sex registration and the legal position of transgenders), Den Haag: Bju, 2014, pp. 171-183.

49 See for example: NNID (2013), *Geen derde geslacht in Duitsland* (No third gender in Germany), 20 August 2013, <http://nnid.nl/2013/08/20/geen-derde-geslacht-in-duitsland/>.

50 Especially since the ruling party (VVD) supported such a stance. See for example: COC '*bijzonder gelukkig*' met VVD-steun voor afschaffing geslachtsregistratie (COC very happy with VVD support for abolishing gender registration). The COC is the Dutch national LGBT rights NGO; the VVD is the liberal party. See: <http://www.coc.nl/politiek-2/coc-bijzonder-gelukkig-met-vvd-steun-voor-afschaffing-geslachtsregistratie>.

gender, is that it is considered to be indispensable to properly address individuals, i.e. to enable a letter to address the recipient with 'Dear Sir' or 'Dear Madam'. This cannot be regarded as a major interest when weighed against the position of trans people and their wish to not be identified or spoken to as different from their self-identified gender. Therefore, a first step that can and should be taken immediately is to restrict the dissemination of information on gender – not just trans people's gender, but everyone's gender. Secondly, gender should be identified, also within the EU, as a sensitive personal identity marker. Even if for the time being it might be impossible to protect gender information as protectively as other sensitive information, the effort should at least be made.

Combating sexual orientation discrimination in the European Union

Christa Tobler*

Introduction

Discrimination on grounds of sexual orientation remains a serious problem in the EU and, very worryingly, has been on the rise recently. Even in the narrow field of employment and occupation, statistics and surveys show that a high level of sexual orientation discrimination prevails, in spite of the fact that Union legislation in this field has been in existence for 15 years. Against this background, the European Network of Legal Experts in the Non-Discrimination Field, on behalf of DG Justice and Consumers of the European Commission, published a thematic report entitled 'Combating Sexual Orientation Discrimination in the European Union'. The report was drafted by Dorota Pudzianowska and Krzysztof Śmiszek.

In the EU, Directive 2000/78¹ requires all EU Member States to provide for protection against discrimination on grounds of sexual orientation in employment and occupation. The report by Pudzianowska and Śmiszek describes the scope of protection provided by the Directive and its normative impact on the national legal systems of the Member States against the background of international human rights law. It begins with an overview on the international legal framework and then turns to the development of the law in the EU Member States and on the level of the EU itself. Thereafter, the report discusses the prohibition of discrimination on grounds of sexual orientation under Directive 2000/78, including the case law of the Court of Justice of the European Union (CJEU) in this field, and the provisions on enforcement. A further chapter deals with the situation in the EU Member States with respect to the implementation of Directive 2000/78 and beyond. The report concludes with a look at potential future developments.

The present article aims to provide a summary of this report, though to the exclusion of the part on the legislative development. The full text of the report, including all references (of which only a few are included in this summary) is available online.²

The international legal framework

In the part on the international legal framework, the report emphasises that the prohibition of discrimination on grounds of sexual orientation is firmly embedded in the law of the United Nations and of the Council of Europe.

According to Article 1 of the Universal Declaration of Human Rights, 'all human beings are born free and equal in dignity and rights'. In the UN human rights context, it is recognised that this includes Lesbian, Gay

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1 Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, pp. 16–22.

2 Pudzianowska, P., Śmiszek, K. (2015), *Combating Sexual Orientation Discrimination in the European Union*, written for the European Commission's European Network of Legal Experts in the Non-Discrimination Field, Luxembourg: Publications Office of the European Union, http://ec.europa.eu/justice/discrimination/files/sexual_orientation_en.pdf, accessed 30 July 2015.

and Bisexual (LGB) people, even though the relevant provisions of the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights do not explicitly mention sexual orientation. The prohibition of discrimination applies within the very broad field of application of the UN Conventions. With respect to the substance of the prohibition, the UN bodies rely on the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity.³ In particular, several UN entities have used the definition of ‘sexual orientation’ given in this document, as referring ‘to each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.’

With respect to the Council of Europe, Article 14 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) guarantees equal enjoyment of the rights and freedoms set out in the Convention. General protection against discrimination is granted under Protocol No. 12 in those states that have ratified it (which does not include all EU Member States). Whilst Article 14 ECHR does not explicitly mention sexual orientation in its open list of discrimination grounds, it has long been recognised in the case law of the European Court of Human Rights that sexual orientation is indeed covered (e.g. *Salgueiro da Silva Mouta v. Portugal*).⁴ Importantly, the Court’s understanding of the Convention as a living instrument has opened up a field of application for the prohibition of discrimination on grounds of sexual orientation under Article 14 ECHR that is considerably broader than that of EU law. However, with respect to justification EU law is stricter than the Convention (and EU law may be more effective in terms of enforcement).

For those states that have signed and ratified it, the protection against discrimination on grounds of sexual orientation under the ECHR is complemented by a further instrument of the Council of Europe, namely the European Social Charter. It may be helpful in particular in fields not covered by the ECHR (or EU law for the EU Member States).

There are important links between international human rights law and EU law. First, the Universal Declaration of Human Rights, various UN Conventions and the ECHR are mentioned in the Preamble of EU Directive 2000/78. Second and specifically with respect to the ECHR, Article 6 TEU incorporates the ECHR into the EU legal system. According to Article 6(3) TEU, fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, constitute general principles of the Union’s law. According to Article 6(2) TEU, the Union shall accede to the ECHR. At the time of writing of the report, this process was on-going. It has since encountered a major obstacle in the form of a negative Opinion of the CJEU on the draft accession agreement.⁵ Finally, the Union’s own Charter of Fundamental Rights and Freedoms is largely modelled on the ECHR.

The prohibition of discrimination on grounds of sexual orientation under Directive 2000/78 and implementation in the Member States

In the parts of the report that discuss the reach and meaning of the prohibition of discrimination on grounds of sexual orientation under Directive 2000/78 as well as its enforcement provisions, it becomes clear that many parallels exist with EU gender equality law. Originating long before the existence of Directive 2000/78 and having developed over decades, today’s EU gender equality law includes a large body of case law of the Court of Justice of the European Union (CJEU), much of which is also relevant for the interpretation of Directive 2000/78. Similarly, CJEU case law on discrimination on grounds other than sexual orientation under Directive 2000/78 and under Directive 2000/43⁶ is also relevant for understanding the prohibition

3 Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, available online at <http://www.yogyakartaprinciples.org/>, accessed 30 July 2015.

4 ECtHR, *Salgueiro da Silva Mouta v. Portugal*, Application No 33290/96, Judgment of 21 December 1999.

5 CJEU, Opinion 2/13 (Accession to the ECHR), ECLI:EU:C:2014:2454. The Opinion concerns the draft accession agreement that was submitted to the Court of Justice of the European Union pursuant to Article 218(11) TFEU.

6 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, pp. 22-26.

of discrimination on grounds of sexual orientation. As for the implementation of Directive 2000/78 in the Member States, the report shows that whilst by and large the implementation is correct on the level of the national legislation and sometimes even goes beyond it, certain shortcomings remain, particularly in the practical application but sometimes also on the level of the law itself.

Scope of the Directive

Article 3 of Directive 2000/78 defines the Directive's scope. In terms of the personal scope, Article 3(1) refers to 'all persons, as regards both the public and private sectors, including public bodies.' According to CJEU case law, this also includes the social partners (i.e. management and labour; as confirmed in *Hay*⁷ in the context of sexual orientation, with references to previous age discrimination case law). The report argues that the Directive should be construed so as to comprise both physical and legal persons among those protected, as is the case under the law of Poland.

According to Article 3(1), the Directive's material scope includes the following aspects of employment and occupation: (a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion; (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience; (c) employment and working conditions, including dismissals and pay, and (d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.

Article 3(3) of Directive 2000/78 in conjunction with Consideration 13 in the Directive's preamble excludes social security and social protection schemes that do not fall under the notion of pay within the meaning of Article 157 TFEU on equal pay for men and women. Generally, the notion of pay under the Directive is interpreted in the same broad manner as under Article 157 TFEU with respect to gender equality, meaning that CJEU case law on this latter issue is also relevant for the purposes of the Directive (see e.g. the Court's reasoning in the above-mentioned sexual orientation case *Hay*). Similarly, the concepts of 'access to employment' and 'employment and working conditions' have been interpreted broadly by the CJEU already in the context of gender equality case law. Again, this case law is also relevant in the framework of Directive 2000/78.

Covering only employment and occupation, the material field of application of Directive 2000/78 is considerably narrower than that of other EU anti-discrimination legislation, notably Directive 2000/43. Protection against discrimination on the ground of sexual orientation is not yet provided in the fields of social protection, social advantages, education, access to and supply of goods and services, including housing and access to public infrastructure. However, many EU Member States have legislated outside the scope of the Directive awarding protection on the ground of sexual orientation also in these areas. Nevertheless, the protection remains uneven. A proposal⁸ to extend the protection against discrimination beyond the Directive has been pending for some years. This will be discussed at the end of this article.

Discrimination on grounds of sexual orientation

The term 'sexual orientation'

Directive 2000/78 prohibits discrimination based on, among others, sexual orientation. The meaning of this term is not defined in the law. The report states that it therefore remains open whether, in addition

7 CJEU, Case C-267/12 *Frédéric Hay v. Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, ECLI:EU:C:2013:823.

8 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008) 426 final.

to heterosexual, homosexual and bisexual orientation, broader issues of non-hetero normativity are also covered (e.g. dress style, manners of expression or behaviour that deviate from stereotypical social roles or expectations). There is no CJEU case law on the matter yet.

The majority of EU Member States have adopted the model of the Directive by not including a legal definition of ‘sexual orientation’. The report argues that, on the one hand, it might be better that there is no legal definition, as this enables a broad interpretation in practice. On the other hand, the lack of a legal definition might lead to a limiting and strict interpretation by the national courts, leaving some groups with a specific sexual orientation without protection. It is therefore important for the authorities, courts and equality bodies in the Member States to recall the broad definition under the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, as mentioned above.

Discrimination ‘on grounds of’ sexual orientation: different forms of discrimination

Four basic forms of discrimination

Directive 2000/78 prohibits the usual four forms of discrimination of modern EU anti-discrimination law, namely direct and indirect discrimination, harassment and instruction to discriminate. For the first three of these, Article 2 of the Directive provides legal definitions.

So far, CJEU case law on discrimination on grounds of sexual orientation relates to direct discrimination only, defined in Article 2(2)(a) of the Directive as the situation ‘where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on [among others, sexual orientation]’. On three occasions, the Court ruled that excluding unmarried homosexual employees from certain work-related benefits and reserving them to married partners constitutes direct discrimination on grounds of sexual orientation (*Maruko*,⁹ *Römer*¹⁰ and *Hay*, already mentioned). In this context, the Court’s approach evolved from vaguely structuring the delimitation between direct and indirect discrimination to a much more explicit approach. The culminating point so far is *Hay*. According to this decision, the fact that a certain type of partnership (in casu the French Civil Solidarity Pact, *pacte civil de solidarité*, PACS) is open to both same-sex and different-sex couples does not change the nature of the discrimination against homosexual couples because they, unlike heterosexual couples, at the material time could not legally enter into marriage.

Another form of direct discrimination that appears in the Court’s case law is a speech act or hate speech. In *ACCEPT*,¹¹ the Court built on the earlier case of *Feryn*,¹² which fell under Directive 2000/43 and concerned discrimination on grounds of ethnic origin. In that case, the Court held that a mere statement can in and of itself amount to discrimination. However, this must be distinguished from the question of whether in addition there is also an actual discriminatory hiring practice. To this previous case law, the sexual orientation case *ACCEPT* adds that, under certain circumstances, an employer may be held responsible for discriminatory statements made by a third person who is perceived as being closely connected to the employer, especially where the employer does not clearly distance itself from the statements in question.

Indirect discrimination on grounds of sexual orientation was argued before the Court in several cases, though so far never found. It is defined in Article 2(2)(b) of Directive 2000/78 as relating to the situation ‘where an apparently neutral provision, criterion or practice would put persons having a particular

9 CJEU, Case C-267/06 *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen*, ECLI:EU:C:2008:179.

10 CJEU, Case C-147/08 *Jürgen Römer v. Freie und Hansestadt Hamburg*, ECLI:EU:C:2011:286.

11 CJEU, Case C-81/12 *Asociația ACCEPT v. Consiliul Național pentru Combaterea Discriminării*, ECLI:EU:C:2013:275.

12 CJEU, Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV* [2008] ECR I-5187.

religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless: (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or (ii) [...] this part does not relate to sexual orientation].’ Again, there is no CJEU case law on indirect discrimination on grounds of sexual orientation yet, and according to the report it is also difficult to find examples in the field of employment and occupation under national law.

Article 2(3) of Directive 2000/78 defines harassment as ‘unwanted conduct related to any of the grounds referred to in Article 1 [...] with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment’. There is no CJEU case law on harassment in the context of sexual orientation yet, but the report mentions some examples under national law. Referring to literature,¹³ the report further explains that the concept of harassment as related to sexual orientation encompasses expressions of homophobia, entailing negative or derogatory comments, innuendos, offensive nicknaming or name-calling, insults or slurs about gay, lesbian or bisexual persons by the employer, co-workers or even clients.

Neither is there any CJEU case law involving the situation where one person instructed another to discriminate against a third person on grounds of sexual orientation (Article 2(3) of Directive 2000/78). The report argues that, in the interest of the effectiveness of the Directive, the term ‘instruction’ should not be understood narrowly so as to require the author to have the requisite authority and for the instruction to actually have the desired effect. Rather, it should include situations where the quality of an instruction to discriminate is contextual and springs from an expressed preference or an encouragement to treat other individuals less favourably on grounds of sexual orientation.

Generally, the report finds that the four concepts of discrimination have been implemented properly in the Member States, though in some countries problems exist, for example with respect to the important issue of the comparator required under the legal definition of direct discrimination. The Directive requires that, in order to be discriminatory, the treatment has to be unfavourable by comparison to a person who is in a comparable situation but does not have the specific characteristic that is the ground of the discrimination in question. In this framework, unfavourable treatment of homosexuals and of bisexual persons will be compared to that of heterosexual persons. In cases concerning employment-related benefits for homosexual partners in registered partnerships, the CJEU has held that assessment of comparability must not be carried out in a global and abstract manner. Rather than examining whether national law generally and comprehensively treats registered partnership as legally equivalent to marriage, the analysis should be case-specific and it should take account of the particular benefit concerned and of the circumstances of the case (*Hay*). In practice, this means that situations may be comparable in the case of one particular benefit but not in the case of another. Also, for the same kind of benefit the analysis might be different where partnerships under different legal regimes are compared.

Discrimination by association and based on assumption

Directive 2000/78 covers not only discrimination based on the victim’s actual sexual orientation but also on the basis of association and assumption. The report finds that in this respect national implementation is problematic as quite often there is no explicit law on these issues.

With respect to discrimination based on an assumption, the fact that Directive 2000/78 grants protection against discrimination on the grounds of sexual orientation also to persons who do not themselves have the sexual orientation in question, but are perceived in the workplace to do so, is confirmed by the Court’s

13 Bell, M. (2001), ‘Sexual Orientation Discrimination in Employment: An Evolving Role for the European Union’, in: Wintemute, R., Andenaes, M. (eds.), *Legal Recognition of Same-Sex Couples. A Study of National, European and International Law*, Oxford and Portland: Hart Publishing, at p. 661.

approach in the above-mentioned case *ACCEPT*. This case concerned homophobic speech with regard a professional footballer and the supposed sexual orientation of that player.

The concept of discrimination by association is based on the CJEU judgment in the disability discrimination case of *Coleman*,¹⁴ concerning the mother of a severely disabled child. Here, the Court held that the prohibition of direct discrimination under Directive 2000/78 is not limited only to people who are themselves disabled. Rather, where an employer treats an employee who is not himself disabled less favourably than another employee is, has been or would be treated in a comparable situation, and it is established that the less favourable treatment of that employee is based on the disability of his child, whose care is provided primarily by that employee, such treatment is contrary to the prohibition of direct discrimination laid down by Article 2(2)(a). The same applies with respect to harassment and in the context of the other discrimination grounds covered by the Directive. This case law has now been confirmed in the case of *Nikolova*¹⁵ which concerned a non-Roma person who, keeping a shop in a city district predominantly inhabited by Roma people, suffered the same disadvantageous treatment. The approach reflected in these decisions is also relevant in the context of discrimination on grounds of sexual orientation.

Derogations

Directive 2000/78 provides for a number of derogations that may justify unfavourable treatment of people because of their sexual orientation, namely a general exception related to public security, public order, the prevention of criminal offences, the protection of health and the protection of the rights and freedoms of others (Article 2(5) of the Directive), and further specific exceptions related to genuine and determining occupational requirements (Article 4(1) of the Directive) and positive action (Article 7(1) of the Directive). For all of these, the general standards developed by the CJEU with respect to derogations apply. Accordingly, any exception must be narrowly construed and must not be taken to allow for a generalised approach. In a recruitment process, the requirements in question must be identified at the beginning of the process and must be clearly stated in the recruitment material.

There is also a provision on the position of churches and ethos-based organisations in relation to their employment policies which is sometimes misunderstood and which in fact cannot serve as a derogation in the context of sexual orientation (Article 4(2) of the Directive).

General exception of Article 2(5) of the Directive

According to Article 2(5) of the Directive, the Directive is ‘without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.’ It is clear that this provision is inspired by similar provisions in international human rights law, notably the European Convention of Human Rights.

There is no CJEU case law on this derogation yet specifically in the context of sexual orientation. However, in *Prigge*, an age discrimination case, the Court explained that ‘[i]n adopting that provision, the EU legislature, in the area of employment and occupation, intended to prevent and arbitrate a conflict between, on the one hand, the principle of equal treatment and, on the other hand, the necessity of ensuring public order, security and health, the prevention of criminal offences and the protection of individual rights and freedoms, which are necessary for the functioning of a democratic society. The legislature decided that, in certain cases set out in Article 2(5) of the Directive, the principles set out

14 CJEU, Case C-303/06 *S. Coleman v. Attridge Law and Steve Law*, ECLI:EU:C:2008:415.

15 CJEU, Case C-83/14, *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia* (third parties: Anelia Nikolova, Darzhavna Komisia za energiyno i vodno regulirane), ECLI:EU:C:2015:480.

by that latter do not apply to measures containing differences in treatment on one of the grounds referred to Article 1 of the Directive, on condition, however, that those measures are 'necessary' for the achievement of the abovementioned objectives. Moreover, as Article 2(5) establishes an exception to the principle of the prohibition of discrimination, it must be interpreted strictly [...].¹⁶

Article 4(1): genuine and determining occupational requirements

According to Article 4(1) of Directive 2000/78, '[n]otwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.'

It is important to note that this derogation does not relate to an absolute impediment in respect to a particular occupation, but rather relates to the ability of a person to perform the job effectively in comparison to other persons. In its gender equality case law, the Court has emphasised the importance of the facts of the individual case. Specifically with respect to sexual orientation, the report argues that there appear to be very few professional or vocational activities where this characteristic could be considered to fall under the notion of a genuine and determining occupational requirement.

A rare actual example from national law concerns the position of a counsellor for men who have sex with other men in Sweden. This case concerned the search of the Swedish national LGBT rights organisation for a person to carry out safer-sex outreach work among men who have sex with other men. This was in the framework of a project that sought to use peer education and thus inherently required that the person responsible for the outreach be a member of the community to which the people targeted by the project belonged, i.e. a man who had sex with men. A heterosexual woman expressed her interest in the vacancy but was told that she did not qualify. The case was brought before the Swedish Ombudsman against Discrimination on Grounds of Sexual Orientation (Sweden at the time had a special ombudsperson for this ground). The Ombudsman decided that refusing to hire the female candidate came within the exception for genuine and determining occupational requirements. The very nature of the work and the context in which it was to be carried out made it necessary that the prospective employee be a man who had sex with other men.¹⁷

In the Directive, the general provision on genuine and determining occupational requirements in Article 4(1) is followed by a special provision concerning churches and ethos-based organisations. In the present context, it is important to note that Article 4(2) does not allow for derogations to the prohibition of discrimination on grounds of sexual orientation, as is evident from its wording: 'Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.'

¹⁶ CJEU, Case C-447/09 *Reinhard Prigge and Others v. Deutsche Lufthansa AG*, [ECLI:EU:C:2011:573, Paragraphs 55 and 56.

¹⁷ Information provided to the authors of the report by Hans Ytterberg, former Swedish Ombudsman against Discrimination on Grounds of Sexual Orientation.

Accordingly, the Directive explicitly states that this derogation cannot be relied on in order to justify unfavourable treatment on any other ground than religion or belief. However, a number of Member States fail to make an explicit disposition to this effect. There are practical examples showing that this creates a potential threat to the non-discrimination principle with regard to sexual orientation.

The exception under Article 4(2) has not yet been considered in CJEU case law. However, with respect to faith-based schools, the European Commission has stated in response to a parliamentary question that it fails to see how a teacher's sexual orientation could reasonably constitute a genuine and determining occupational requirement.¹⁸ Indeed, given the provision's wording it is clear that there is discrimination on grounds of sexual orientation where religious organisations refuse to employ persons because of their sexual orientation.

Article 7(1): positive action

Article 7(1) of Directive 2000/78 provides: 'With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1.'

The report notes that this so-called positive action exception is one of the instruments of EU law intended to allow for non-discrimination policy to reach beyond formal equality. It provides for a key element of equality in as much as equality standards require affirmative provision of equality of opportunity in law as well as in fact. Again, there is no CJEU case law on positive action in the context of sexual orientation yet. According to the report, a practical example of action aimed at levelling the playing field for the non-hetero-normative employees could involve the situation where the employer, in the framework of the employment conditions, facilitates or sets up a support group aimed at alleviating a homophobic atmosphere in the workplace.

Some national legal systems provide for positive action not only as a derogation from the principle of non-discrimination but in fact as a positive obligation. This is in line with the character of the Directive as an instrument providing minimum protection.

Not a defence: voluntary disclosure of one's sexual orientation

Finally, given certain national case law mentioned in the report, it is important to note that it is not a defence for an employer faced with a claim of discrimination that the claimant voluntarily disclosed his or her sexual orientation, thus provoking the discrimination. It is obvious that such an approach is not in line with the equality principle under the Directive and that it breaches fundamental human rights standards. Indeed, it is clear that the prohibition of discrimination on grounds of sexual orientation in the Directive covers both cases where information on sexual orientation is disclosed against the will of the employee and cases of voluntary coming out.

Enforcement

Burden of proof

Directive 2000/78 contains a number of provisions on the enforcement of a discrimination claim. One particularly important issue concerns the burden of proof. According to Article 10(1) of the Directive provides for the so-called reversal of the burden of proof. Under this provision, Member States are obliged to 'take such measures as are necessary, in accordance with their national judicial systems, to

¹⁸ Response of Commissioner Reding to the question by Member of the European Parliament Cashman concerning the possibility of limiting the rights of access of homosexual persons to the vocation of a teacher, OJ 2011, C 243 E.

ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.’

As the report explains, this means that once the applicant has established facts from which it may be presumed that there has been direct or indirect discrimination, there is a rebuttable presumption of discrimination (*prima facie* discrimination). The burden of proof then shifts to the respondent, who has to show that there has been no breach of the equality principle of equal treatment. The shift in the burden of proof facilitates the claimant’s efforts to seek judicial protection against discrimination by requiring no more than the making of a *prima facie* case of discrimination. In this manner, the standard of protection is enhanced.

There is rich case law from the field of gender equality law on the issue of the burden of proof. In the context of sexual orientation, the Court’s decision in *ACCEPT* confirms that access to evidence for alleged discrimination may be limited by considerations of data protection. More specifically, the rebuttal of the presumption of discrimination in recruitment proceedings where an alleged homosexual was refused employment does not require the respondent to show that homosexuals had actually been hired in the past, as this might violate the right to privacy of the employees concerned. However, the Court noted that there are other ways for the employer to prove that there had been no discrimination, for example by showing that the recruitment policy is in fact based on parameters that have nothing to do with sexual orientation.

Remedies and sanctions

According to Article 17 of Directive 2000/78, ‘Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive. [...]’

CJEU case law from the field of gender equality law shows that whilst there must be a regime of protection based on remedies for the harms of discrimination, in principle the Member States are free to choose the type of remedies and sanctions. In the sexual orientation case *ACCEPT*, the Court reiterated that purely symbolic penalties cannot be regarded as correct and effective implementation of Directive 2000/78. The Court also noted that in proceedings in which an association empowered by law to that effect seeks a finding of discrimination and the imposition of a sanction, the sanctions must be effective, proportionate and dissuasive, regardless of whether there is an identifiable victim.

On the level of national law, whilst most EU Member States regulate the remedies and sanctions attached to violations of the prohibition of discrimination on grounds of sexual orientation, many do not explicitly and directly refer to the Directive’s standard according to which the sanctions are to be effective, proportionate and dissuasive. In practice, compensation tends to be rather low – in fact, too low to be proportionate and dissuasive. More generally, the remedies and sanctions chosen under national law reflect the legal traditions of the particular States and may be made available under civil, administrative or criminal law. Most of the Member States leave the decision concerning the level and form of the sanction to the national courts and/or to the complainant.

Equality bodies

In contrast with other EU anti-discrimination law, Directive 2000/78 does not oblige the Member States to establish an equality body, i.e. an independent body for the promotion of equal treatment in the

Directive's field of application. Despite the absence of such an obligation, a number of Member States have set up general equality authorities also covering sexual orientation discrimination.

Future developments

Overall, the report states that the EU's anti-discrimination directives have contributed significantly to the realisation of the view of the European Union as an area where human rights are effectively protected. In its 2014 Report on the application of, inter alia, Directive 2000/78,¹⁹ the European Commission noted that this Directive has been transposed into the national laws of all 28 Member States. However, the Commission also indicates that improved judicial practice and the education of the general public and the judiciary is essential for the power of the prohibition of discrimination to fully unfold. This is confirmed by the report by Pudzianowska and Śmiszek.

The report further notes that the scope of protection afforded by Directive 2000/78 remains limited, particularly when compared to other EU anti-discrimination law. In order to equalise the standard of protection, the Commission in 2008 presented an equality package aimed at combating discrimination outside of the field of employment.²⁰ The most important instrument in this context is the above-mentioned Commission's proposal for a new directive on equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, which goes beyond the field of employment and occupation. The proposal has been pending for some time, but has recently been given renewed hope of life by the President of the European Commission, Jean-Claude Juncker, who made it one of the top political priorities on his agenda.²¹

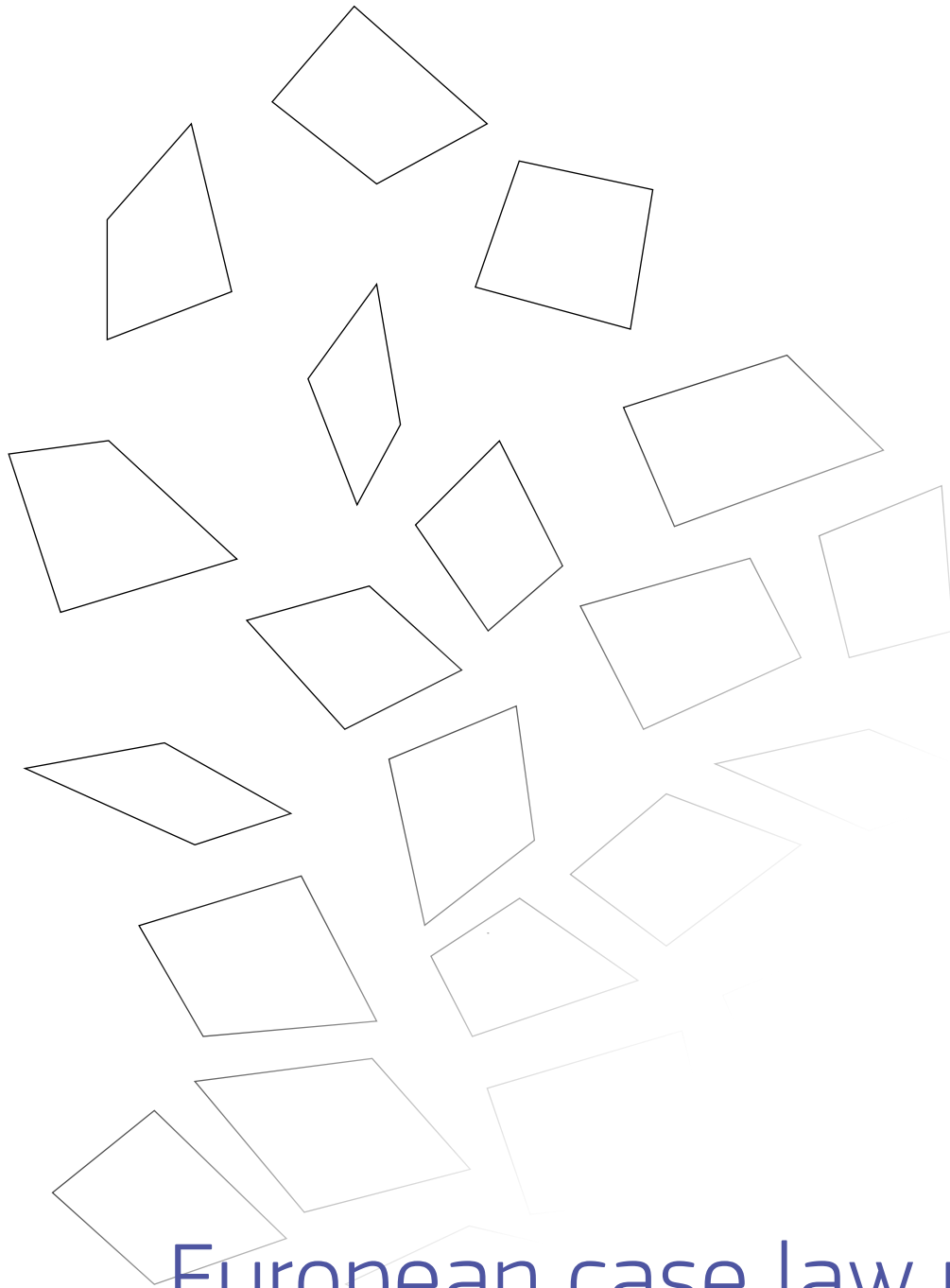
The report calls the proposal a necessary element complementing Directive 2000/78 by bringing the scope of non-discrimination to the level of Directive 2000/43 (though leaving behind, it should be added, gender equality law, since the latter does not include education, see Article 3(3) of Directive 2004/113). The proposal also includes the obligation of establishing national equality bodies. At the same time, the report regrets that the proposal does not include rules on multiple discrimination, which is a matter of particular importance in the context of sexual orientation.

The report concludes by stating that the future development of the standard of protection against discrimination on grounds of sexual orientation is contingent on the much-awaited new Directive. The report argues that in order to minimise the risk of ineffectiveness of this new instrument, additional measures should be taken in order to raise awareness and to build a culture of rights among lesbian, gay and bisexual communities in Europe. Additional measures should also include guidance to service providers as well as training for judges and other enforcement bodies, in order to contribute to the proper implementation and execution of the Union's legal measures in this field.

19 Report from the Commission to the European Parliament and the Council: Joint Report on the application of 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') and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('Employment Equality Directive'), 17 January 2014, COM(2014) 2 final.

20 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Non-discrimination and equal opportunities: A renewed commitment*, COM(2008) 420 final.

21 Juncker J.-C. (2014), *A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change. Political Guidelines for the Next European Commission*, opening statement in the European Parliament Plenary Session, Strasbourg, 15 July 2014, p. 9, http://ec.europa.eu/about/juncker-commission/docs/pg_en.pdf, accessed 30 July 2015.



European case law update

This section provides, as far as possible, an overview of the main latest developments in gender equality and non-discrimination cases pending or decided by the Court of Justice of the EU and the European Court of Human Rights, from 1 January to 30 June 2015.

Court of Justice of the European Union

REFERENCES FOR PRELIMINARY RULINGS – ADVOCATE GENERAL OPINIONS

Case C-83/14, CHEZ Razpredelenie Bulgaria AD contra Komisia za zashtita ot diskriminatsia, Advocate General Kokott's Opinion of 12 March 2015, ECLI:EU:C:2015:170

Racial or ethnic origin

Ms Nikolova was the owner of a small business in a Roma-majority neighbourhood called Gizdova mahala. The electricity meters in that neighbourhood were installed at a height of 6-7 metres in order to combat illegal practices related to electricity consumption, according to CHEZ, which was the electricity supplier, but this measure was only taken in some specific districts. In the other districts the meters were placed at a height which enabled consumers to monitor consumption (1.70m). Ms Nikolova filed a complaint against CHEZ at the Commission for the Protection against Discrimination arguing that her electricity bill had been excessive and that the position of the meters (as required by EU law) did not allow her to check them regularly. Moreover, she stated that the decision to position the meters at such a height had only been taken because the majority of the residents in that district were Roma. In that sense she said that she had been discriminated against based on ethnic origin, even if she herself was not Roma. In its decision the Commission for the Protection against Discrimination upheld the complainant's allegations,¹ but CHEZ lodged an appeal at the Sofia City Administrative Court, which raised a series of questions for the CJEU.

AG Kokott studied the 10 preliminary questions raised by the referring Court analysing, first of all, the scope of the prohibition on discrimination, then the concept of discrimination itself and, finally, the grounds for a possible justification.

As for the scope of the prohibition, the AG first established that the facts of the case do in fact fall within the material scope of Directive 43/2000, as she had already stated in the *Belov* case.² She then examined the personal scope of the case, confirming that Ms Nikolova was not herself Roma while examining whether the applicant can be considered to have suffered 'discrimination by association.' On this issue she started by noting that the relevant EU provisions have been formulated in general terms and are not to be restrictively defined, while she also referred to the *Coleman* case, in which discrimination by association was found in the ground of disability in Directive 2000/78.³ She then confirmed that both directives are 'twin Directives' in this sense and she confirmed that 'discrimination by association' would also entail measures that because of their wholesale and collective character would not only affect the person possessing one of the characteristics mentioned in Article 21 of the Charter of Fundamental Rights of the European Union, but also persons who are affected by the practice as 'collateral damage'. AG Kokott also confirmed that the fact that Ms Nikolova was affected by this practice as a legal person because she did not live in the district but had a grocery shop there, was irrelevant since she would in any case be covered by the scope of the Directive. Thus she concluded that the case in question did fall within the scope of the Directive.

While analysing the concept of discrimination, AG Kokott outlined the importance of considering whether the facts of the case would fall within the concept of direct or indirect discrimination, as the possible justifications would vary. First, she established that in order for discrimination to occur, it is sufficient that a person or a group of persons is treated less favourably than another is, has been or would

1 KZD decision No. 77 of 06.04.2010 in case No. 258/2008 of K3Д.

2 See *European Anti-Discrimination Law Review*, issue 14, 2013, p. 41.

3 See *European Anti-Discrimination Law Review*, issue 6/7, 2008, pp. 62-63.

be treated in a similar situation. Secondly, she excluded direct discrimination from the present case, explaining that the contested practice affects consumers whose electricity is supplied by CHEZ in the Gizdova mahala district solely by reason of their status as local residents and it is consequently not inextricably linked to their ethnic origin. Thirdly, she analysed whether the actions by CHEZ could qualify as indirect discrimination, clarifying that an ‘apparently neutral provision in Article 2(2)(b) of Directive 2000/43 can only be interpreted as referring to a *prima facie* neutral provision. As regards the wording ‘put ... at a particular disadvantage’, clarifies that means that that practice affects members of a certain racial or ethnic group *more adversely* than others. The contested practice certainly affected all electricity consumers who were resident in that district in the same way, irrespective of whether or not they belonged to the Roma ethnic group. However, the crucial factor in the relevant discrimination test is not the comparison between persons who all suffer the same disadvantage but the comparison between persons who are placed at a disadvantage, on the one hand, and persons who are not, on the other. Then the Advocate General checked whether ‘discrimination by association’ can occur on the basis of an indirect difference in treatment and she confirmed that although there has been no case law supporting such a case, this is simply because the Court has not had the opportunity to address this issue but that there is nothing in the phrasing of Article 2(2)(b) of Directive 2000/43 which might suggest otherwise.

She finally looked at whether there could be a possible justification for the contested practice, in the sense that it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, that is to say, proportionate. CHEZ explained that the meters had been installed at such a height because of the many cases of tampering with electricity meters and unauthorised electricity consumption. This followed the aim of preventing and combating fraud and abuse and ensuring the security and quality of the energy supply which are legitimate aims recognised by EU law. Then she went on to check whether that aim was being pursued in a proportional way. In her analysis, while the practice was found to be ‘appropriate’, she also found that it may not have been ‘necessary’, since other types of electricity meters are available on the market which would enable this objective to be attained and would involve no stigmatization of the population of certain areas, such as Gizdova mahala. The AG nonetheless left it to the referring Court to decide whether the installation of that ‘new type of electricity meter’ was feasible at a financially reasonable cost or whether it would generate considerable additional costs, in which case it could not be cited as a less restrictive but equally suitable alternative due to technical and financial burdens.

With regard to the undue adverse effects that the practice had for the residents of Gizdova mahala, she reiterated that it must not result in disadvantages for the individual which are disproportionate to the aims being pursued. In this sense, the stigmatising character of the measure taken was underlined, in the sense that all the inhabitants of the neighbourhood had to suffer it, independent of them being guilty or not guilty of any illegal interference with the electricity supply, thereby fuelling the impression that all or at least most of the inhabitants of that district are involved in fraudulent activities, therefore encouraging the stigmatization of the Roma population. It was then stated that in balancing the conflicting interests in a case like the present one, purely economic considerations must take secondary importance and prioritise less cost-efficient measures than installing electricity meters at an inaccessible height of approximately 6 m in order to combat fraud and abuse and to ensure the security and quality of the energy supply.

The Advocate General then reiterated the requirements of EU Directives 2006/32 and 2009/72 that state that final customers supplied with electricity should be regularly informed about their consumption and she asked the referring court to check if, in the present case, the alternatives to checking their own meters were a valid alternative.

Summarizing, Advocate General Kokott argued in favour of reinforcing the concept of discrimination by association. This would be done by means of extending the concept only used once in *Coleman* on the basis of Directive 2000/78, in which involved direct discrimination based on disability, to indirect discrimination based on ethnic origin covered by Directive 2000/43. This approach strengthens the

similarity of both Directives and a unitary approach to non-discrimination law in the EU and supports the broadening of the concept understood from a wider perspective, the cornerstone of its interpretation being the objective of the directive.

Case C-222/14, Konstantinos Maïstrellis v. Ypourgos Dikaïosynis, Diafaneias kai Anthropinon Dikaïomaton, Advocate General Kokott's Opinion, 16 April 2015, ECLI:EU:C:2015:241

Gender

Under Greek law, a pregnant magistrate is entitled to leave before and after childbirth, according to the provisions that apply to state civil servants. She may also request paid leave for up to nine months in order to raise her child. Male judges who become fathers could in principle also be entitled to parental leave, by analogy with the legislation applicable to women.

However, Article 53 (3), third paragraph of the Civil Service Code, which, in the absence of specific provisions for judges, was applicable by analogy, includes the following restriction:

'If the civil servant's wife does not work or exercise any profession, the male spouse shall not be entitled to use the procedures available under paragraph 2 (including obtaining paid parental leave for childcare), unless it is considered that, due to a serious illness or injury, the wife is unable to meet the needs related to the upbringing of the child, as confirmed by a certificate issued by the Superior Medical Commission having jurisdiction over the particular civil servant.'

The applicant in the proceedings was a Greek judge. In December 2010, he applied for paid leave to care for his child born on 24 October 2010. On the grounds of Article 53 (3) of the Civil Service Code, his request was rejected. The applicant challenged the decision by stating that the Article is not compatible with Directives 96/34/EC and 92/85/EC. He commenced proceedings and the Court referred the following question for a preliminary ruling:

'Must the provisions of Directive 96/34 and Directive 2006/54, in so far as they are applicable, be interpreted as precluding national regulations, such as the contested provision of the third sentence of Article 53(3) of the Civil Service Code, providing that if the civil servant's wife does not work or exercise any profession the male spouse is not entitled to parental leave, unless it is considered that due to a serious illness or injury the wife is unable to meet the needs related to the upbringing of the child?'

Although the question concerned civil servants in general and not judges specifically, the AG still considered the request to be admissible. In referring to the case law of the Court of Justice, the AG noted that the application of the Parental Leave Directive is not limited to private law employment relationships. By analogy of a civil servant being considered a worker within the meaning of Clause 1 Point 2 of the Framework Agreement, the AG considered that a similar approach should be applied to judges. The AG did not consider that the particular legal nature of the profession of a magistrate should preclude judges from falling under the scope of the Parental Leave Directive.

The AG disagreed with the Greek Government's approach, which interpreted 'working parents' as meaning that *both* parents had to work in order to be entitled to parental leave. In particular, the AG considered Clause 2 Paragraph 1 of the Framework Agreement, which refers to 'working men and women' and an 'individual right to parental leave' the wording of which indicates that each parent is considered separately. In addition, it was noted that the Framework Agreement explicitly encourages men to take parental leave.

In relying on the case of *Chatzi*, the AG emphasised that the right to parental leave is not a child's right, but the right of each parent, and therefore whether or not child support is guaranteed in the absence

of parental leave is not the central question. The AG also noted that Clause 2 Paragraph 3 of the Framework Agreement, despite entrusting Member States with the task of defining the conditions of access to parental leave, does not allow Member States to completely deprive a parent of parental leave. The AG therefore considered that Clause 2 of the Framework Agreement precludes rules which provide that a male judge is not entitled to parental leave when his wife does not work or does not exercise a professional activity, unless, because of a serious illness or disability, the wife is judged to be unable to meet the needs related to the upbringing of the child.

Finally, the AG considered that Article 53 (3) paragraph 3 of the Civil Service Code amounts to direct discrimination, contrary to Article 14 (1) (c) of the Equal Treatment Directive.

REFERENCES FOR PRELIMINARY RULINGS – JUDGMENTS

Case C-529/13, Georg Felber v. Bundesministerin für Unterricht, Kunst und Kultur, Judgment of 21 January 2015, ECLI:EU:C:2015:20

This request for a preliminary ruling concerns a case dealing with age discrimination. The case dealt with a refusal by the Bundesministerin für Unterricht, Kunst und Kultur⁴ to take into account periods of study preceding Mr Felber's (an Austrian civil servant) 'entry into service into account', for the purpose of calculating his pension rights.

Age

The relevant Austrian law stated that periods of 'intermediate school, secondary school, academy or related educational establishment'⁵ would be taken into account while calculating the pension of civil servants if these periods were completed over the age of 18, which is the minimum age for becoming a civil servant. Mr Felber completed secondary school before reaching the age of 18 and for that reason that period was not taken into account. Based on this he filed a complaint so that those three years that had not been taken into account could be credited or purchased by paying a special contribution based on the decision in the *Hütter*⁶ case.

The Court first considered whether the Directive was applicable in this case, and then analysed if it would constitute discrimination on the ground of age. After answering both questions in the positive, the Court then examined whether it would fall within the meaning of Article 6 of 2000/78 Directive and would consequently be justified as pursuing a legitimate aim in an appropriate and necessary manner.

The Court first admitted that the Member States have broad discretion when it comes to legitimising an aim in the field of social and employment policy together with the definition of those measures, and confirmed that the aim of ensuring the observance of the principle of equal treatment for all persons in a specific sector, which relates to an essential element of their employment relationship, constitutes a legitimate employment policy objective.

It also stated that since civil servants can only participate in and contribute to a civil servants' pension scheme after they have reached the age of 18 the choice of that specific age was appropriate since it enables all members of the civil servants' pension scheme to begin to contribute at the same age and to acquire the right to receive a full retirement pension, thus guaranteeing the equal treatment of civil servants.

4 Federal Minister for Education, Art and Culture.

5 Paragraphs 53, 54 and 56 of the *Bundesgesetz über die Pensionsansprüche der Bundesbeamten, ihrer Hinterbliebenen und Angehörigen (Pensionsgesetz 1965)* (Federal Law on the Pension Rights of Federal Civil Servants, their Survivors and the Members of their Families (Law on Pensions 1965)) of 18 November 1965 (BGBl. 340/1965; 'the PG 1965').

6 See *European Anti-Discrimination Law Review*, Issue 9, December 2009, pp. 37-38.

Finally, as regards the necessity requirement, the Court made a clear distinction between the situation in the *Hütter* case in which periods of employment had not been taken into account as opposed to study periods. In that sense the legislation was found to be coherent with the objective pursued.

Case C-417/13, ÖBB Personenverkehr AG v. Gotthard Starjakob, Judgment of 28 January 2015, ECLI:EU:C:2015:38

This request was made in proceedings between Mr Starjakob and the ÖBB-Personenverkehr AG ('the ÖBB') concerning the lawfulness of the occupational remuneration system adopted by the Austrian legislature with a view to ending discrimination based on age, and requires an interpretation of Article 21 of the Charter of Fundamental Rights of the European Union ('the Charter') and Articles 7(1), 16 and 17 of Council Directive 2000/78/EC.

Mr Starjakob was born in 1965 and started working for the predecessor of the ÖBB on 1 February 1990. His date of reference for the purposes of advancement was determined by taking into account the period of apprenticeship completed after reaching the age of 18, which was accredited at 50 %, while the period completed prior to that was disregarded. In 2012, on the basis of the judgment in *Hütter*,⁷ Mr Starjakob commenced proceedings against the ÖBB claiming the payment of the difference that would have been payable to him for the period from 2007 to 2012 if the calculation of his date of reference for the purposes of advancement had taken into account the period of apprenticeship completed before his 18th birthday. The Landesgericht Innsbruck (Regional Court of Innsbruck) dismissed the action, and Mr Starjakob appealed to the Oberlandesgericht Innsbruck (Higher Regional Court of Innsbruck) which referred a series of prejudicial questions to the Court.

The Court held that the Directive had to be interpreted as precluding national legislation that did not take into account Mr Starjakob's periods of apprenticeship that had been completed before he was 18. Additionally, he was found not to have the right to the compensation that he was requesting, only to have his conditions and benefits made the same as those who were not affected by the provisions of the law. The Court also mentioned that even if it is logical to ask Mr Starjakob to cooperate by asking for information about his periods of apprenticeship, his refusal to provide such information could not be interpreted as an abuse of law. Finally, the Court proclaimed that the principle of effectiveness should be interpreted so as not to preclude Court decisions from being applied retroactively, but that is also not a requirement.

Case C-515/13, Ingeniørforeningen i Danmark, acting on behalf of Poul Landin v. Tekniq, Judgment of 26 February 2015, ECLI:EU:C:2015:115

The question referred to the Court of Justice dealt with the case of Mr Landin concerning Tekniq's rejection of Mr Landin's claim for a severance allowance following his dismissal. Mr Landin is a Danish man who had been working for Tekniq as an engineer from 11 January 1999. When he reached the retirement age of 65 he decided to continue working in order to increase his pension entitlement. Tekniq notified the decision to dismiss Mr Landin on 30 of November 2011 which would have effect from the end of May 2012 (Mr Landin was 67 years of age on the date of notification). Mr Landin started working as an engineer for another enterprise after his dismissal.

Resembling the *Ingeniørforeningen i Danmark*⁸ case, the contested legislation relates to the provision on severance allowances in the Law on Salaried Employees. According to Paragraph 2a(1) of the Law on

⁷ See *European Anti-Discrimination Law Review*, Issue 9, December 2009, pp. 37-38.

⁸ In its ruling the CJEU relied heavily on the judgment delivered in *Ingeniørforeningen i Danmark*, EU:C:2010:600. For an analysis on this case see *European Anti-Discrimination Law Review* issue 12, July 2011, p. 39.

Salaried Employees, those who had been working for 12, 15 or 18 years have the right to receive the sum of one, two or three months' salary in the event of dismissal, which Teqnik did not subsequently pay to Mr Landin. The employer interpreted subparagraph 2a(2) as freeing it from the obligation to pay that sum since the employee was entitled to a State retirement pension upon termination of the employment relationship. Mr Landin then contended that this was against EU law (Directive 2000/78) and brought a claim before the Østre Landsret which turned to the Court of Justice of the EU in order to clarify whether excluding employees who are entitled to receive a State retirement pension from the right to receive a statutory severance payment is unlawful age discrimination.

The Court followed the reasoning in *Ingeniørforeningen i Danmark*, establishing that it was in fact a difference based on age and then studied whether it would however entail an exception protected by Article 6 of the 2000/78 Directive, being an appropriate and necessary means for achieving a legitimate aim. The Court answered in the same way as it had done in the *Ingeniørforeningen i Danmark* case, thereby affirming that those measures contained in the law are objective and reasonable as well as within the context of national law. Regarding the necessity test, the Court made a clear differentiation between this case and the one in *Ingeniørforeningen i Danmark*, since in this latter case the employee would risk receiving a reduction in his pension entitlement on the ground of taking early retirement and that is not the case in the main proceedings. The Court added that since the allowance would entail one, two or three months' salary, that would not involve a significant loss of income for the departing employee. Nevertheless, the court also asserted that it is up to the National Court to verify whether the provision is in fact both objectively and reasonably justified by a legitimate aim relating to employment and labour market policy as well as constituting an appropriate and necessary means of achieving that aim.

Case C-137/15, María Pilar Plaza Bravo v. Servicio Público de Empleo Estatal y Dirección Provincial de Álava, 20 March 2015, ECLI not yet published

The referring court asked the Court of Justice whether, in order to calculate the amount of total unemployment benefit for an employee who has lost her only part-time employment, it is contrary to Article 4(1) of Directive 79/7/EEC for national legislation to apply a reduction coefficient for part-time work that corresponds to the percentage represented by the part-time working hours in relation to the hours completed by a comparable full-time worker, to the maximum amount of unemployment benefit generally laid down by law. Special attention was given to the fact that in Spain, the Member State concerned, the vast majority of part-time workers are women.

Gender

Case C-527/13 Lourdes Cachaldora Fernández v. Instituto Nacional de la Seguridad Social (INSS), Tesorería General de la Seguridad Social (TGSS) ECR n.y.r., 14 April 2015 ECLI:EU:C:2015:215

Under Spanish law, permanent invalidity pensions are to be calculated according to the contributions paid in the eight years prior to the event that gave rise to the invalidity. The law also provides for a corrective mechanism if during some months of the calculation period the person concerned has not paid contributions to the social security scheme. If the person concerned was working part time during the period prior to when the contributions were interrupted, a reduced contribution calculates the integration of the periods during which that person did not pay contributions. This is the application of the part-time work coefficient.

Gender

Ms Lourdes Cachaldora Fernández paid contributions to the Spanish social security scheme from 15 September 1971 until 25 April 2010. During that period she was mostly engaged in full-time employment, except when she worked part time between 1 September 1998 and 23 January 2002, and when she was not employed in any professional capacity between 23 January 2002 and 30 November 2005. During this latter period she did not pay any contributions to the social security scheme.

In 2010 Ms Cachaldora Fernández applied to the Spanish National Institute of Social Security (INSS) for an invalidity pension. The monthly basic amount was fixed at EUR 347.03 applying the coefficient at 55 %. Ms Cachaldora Fernández lodged a complaint in this respect, arguing that the full amount of the minimum contributions should have been taken into account for the years in which the contribution payments were interrupted, rather than the reduced amounts. This would make the monthly basic amount EUR 763.76. Both her complaint and her action against the complaint were rejected, and she then appealed to the High Court of Justice (Tribunal Superior de Justicia de Galicia).

The High Court asked the Court of Justice to assess whether the Spanish methods for calculating permanent invalidity pensions are compatible with the EU rules that prohibit discrimination between men and women in matters of social security⁹ and discrimination between full-time and part-time workers.¹⁰ As there are significantly more female part-time workers than male part-time workers, it seems that women could be particularly affected by these methods of calculation.

The Court of Justice decided that the Spanish law in question cannot be considered to be either directly or indirectly discriminatory. The Court reasoned that the law is not applicable to all part-time workers but only to those who have had a gap in the calculation period of eight years prior to the event giving rise to the invalidity. It also noted that some part-time workers may actually benefit from the law, for instance if they worked part-time for their entire working lives, except during the contract that directly preceded the event giving rise to the professional inactivity where they worked full time. The Court also considered that the pension claimed by Ms Cachaldora Fernández did not fall within the scope of the Framework Agreement, as the pension claimed is a social security pension.

Case C-528/13, Geoffrey Léger v. Ministre des Affaires sociales, de la Santé et des Droits des femmes, Judgment of 29 April 2015, ECLI:EU:C:2015:288

This preliminary ruling concerns the interpretation of point 2.1 of Annex III to Commission Directive 2004/33/EC of 22 March 2004 implementing Directive 2002/98/EC of the European Parliament and of the Council as regards certain technical requirements for blood and blood components¹¹ and its transposition into French law. The case dealt with the permanent French ban on blood donation by men who have sexual relations with other men as a possible case of discrimination based on sexual orientation. The Court of Justice ruled that a permanent deferral of the donation of blood by men who have sexual relationships with other men, although discriminatory, may be justified in certain circumstances because of the need to ensure a high level of health protection. The ruling followed the main elements of the reasoning proposed by AG Mengozzi.¹²

Mr Léger commenced proceedings against the Ministry of Health and the Rights of Women and the French Blood Agency because he was refused from donating his blood based on the fact that he had had sexual relations with another man. The Directive establishing the measures for protecting the quality of blood established two kind of possible exceptions (Temporary deferral /Permanent deferral) based on the characteristics of the donor. In the first kind a temporary deferral was proposed for ‘persons whose behaviour or activity places them at risk of acquiring infectious diseases that may be transmitted by blood,’ while the permanent deferral included ‘persons whose sexual behaviour puts them at a high risk of acquiring severe infectious diseases that can be transmitted by blood’ (among others). The French

9 Article 4 of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24).

10 Clause 5(1)(a) of Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC (OJ 1998 L 14, p. 9).

11 Directive 2004/33/EC of 22 March 2004 implementing Directive 2002/98/EC of the European Parliament and of the Council as regards certain technical requirements for blood and blood components (OJ 2004 L 91, p. 25).

12 See the analysis of AG Mengozzi’s opinion in the *European Equality Law Review*, no. 1, 2015, p. 55.

decree that transposed the Directive into French law¹³ imposed a permanent deferral for men who have sexual relationships with other men while other groups such as persons who have had unprotected sex or have multiple sexual partners are only temporarily prohibited from donating blood.

The Court first stated that those groups included in the permanent deferral should clearly constitute a higher risk group than the one affected by the temporal deferral, thereby establishing the need for the referring Court to take into account current medical, scientific, and epidemiological knowledge, as well as the fundamental rights protected under EU law, particularly non-discrimination when deciding. Article 21 of the European Union Charter of Fundamental Rights may thus be in breach due to discrimination on the basis of sexual orientation but should be balanced against the justification contained in Article 52(1) of the Charter.

The Court recognised that the present rules have been proven to minimise the risk of contaminated blood, but that these measures should always be proportional in order to be justified. It should thus be proven that by no other means can the human immunodeficiency virus (HIV) be detected, that this burden is proportional and, finally, that there is no other less onerous way of ensuring the quality of blood. In that sense the Court reminded the National Court that it should analyse whether the ways proposed by the Directive to ensure the quality of blood (a questionnaire and an individual interview with a medical professional) are enough to detect the risk concerning each individual person instead of excluding a whole group of the population from donating blood on the basis of their sexual orientation.

The Court ruled that the Directive may actually cover the permanent deferral from donating as long as there is current medical, scientific and epidemiological knowledge and data to justify that decision and respects the principle of proportionality in the sense that there is no other proportionate way of controlling the quality of blood. Nonetheless, the CJEU left the decision as to whether or not these conditions have been met in the present case to the national court.

Case C-65/14 Charlotte Rosselle v. Institut national d'assurance maladie-invalidité (INAMI), Union nationale des mutualités libres (UNM), intervening party: Institut pour l'égalité des femmes et des hommes (IEFH), 21 May 2015, ECLI:EU:C:2015:339

In September 2003, Ms Rosselle began working as a teacher in Ternat, Belgium, and in September 2008 she was appointed as an established public servant by the Flemish Community. Ms Rosselle obtained a non-active status from 1 September 2009 as a salaried employee, and she continued to work as a salaried employee until her maternity leave started on 11 January 2010. She applied to the UNM (*Union nationale des mutualités libres*) for a maternity allowance as from 11 January 2010.

Gender

The UNM rejected her request, stating that Ms Rosselle had changed her status on 1 September 2009 in order to become a salaried employee, and that in order to receive a maternity allowance, a minimum contribution period of 120 days in the six months prior to the date of confinement must have been completed. Ms Rosselle had not fulfilled this requirement as a salaried employee.

Ms Rosselle brought an action against this decision at the Labour Court of Nivelles, invoking Articles 1, 2, 8, and 11; as well as recitals 9 and 17 of Directive 92/85. These state, *inter alia*, that pregnant women and women who have just given birth cannot be treated unfavourably on the labour market; and that women workers are entitled to at least 14 weeks of continuous maternity leave.

Although Belgian law provides for an exemption from the minimum contribution period for established public servants who have resigned or been dismissed, no exemption exists in relation to established public servants with a non-active status. The Labour Court therefore asked the Court of Justice whether

¹³ L'Arrêté du 12 Janvier 2009 fixant les critères de sélection des donneurs de sang.

the omission of an exemption applicable to a public servant with a non-active status, who is on maternity leave, is contrary to Directives 92/85 and 2006/54.

In its decision, the Court emphasised the established nature of the right to maternity leave, and the fact that an adequate maternity allowance is crucial in guaranteeing the health and safety of a pregnant worker. With reference to the rule laid down in Article 11(4) of Directive 92/95, which states that a Member State may not make an entitlement to maternity pay conditional upon periods of employment in excess of 12 months, the Court questioned whether the second subparagraph of this Article precludes a Member State from imposing an additional six-month contribution period when an established public servant is given a non-active status in order to work as a salaried employee, even though that public servant has worked for more than 12 months immediately prior to the date of confinement.

The Court considered that the wording ‘periods of previous employment’ cannot be limited solely to the employment prior to the date of confinement; and a Member State therefore cannot impose an additional six-month contribution period. In reaching its conclusion, the Court also emphasised the importance of considering the context of each specific case, and the aims and objectives of Directive 92/85. It did not consider it necessary to answer the same question in light of Directive 2006/54.

Case F-79/14, EG v. European Parliament, Judgment of 18 June 2015, ECLI:EU:F:2015:63

This is a judgment from the Civil Service Tribunal. The EG brought the present action for an annulment of the decision of the European Parliament to refuse the granting of the household allowance and to limit the installation allowance to an amount equivalent to one month of his basic salary.

EG, of French nationality, is a European public servant who started working for the European Commission on 18 June 2008. He registered his legal cohabitation with Mr A., of Belgian nationality, in Belgium on the 29th of September 2011. On 16 May 2013 he was transferred to the European Parliament Office in Luxembourg.

In the Staff Regulations of Officials of the EU, it is established that a household allowance will be granted to employees registered as being in a stable non-marital partnership, provided that marriage was not available to them. In this case, on the date of their partnership registration Belgian law authorized marriage between persons of the same sex and they had specifically chosen not to enter into a marriage, the effect of this being that EG was refused the household allowance.

As for the installation allowance, the Court outlined the fact that it had not been proven that his partner had also moved to Luxembourg, but that if there had been an error (and he had in fact moved), it would not affect the legality of granting one month of pay.

European Court of Human Rights

Sidabras and others v. Lithuania, application Nos 50421/08 and 56213/08, Judgment of 23 June 2015

The applicants alleged that they had been discriminated against on account of their former employment as KGB agents, in breach of Articles 8 and 14 of the European Convention on Human Rights. They also complained that, in breach of Article 46 of the Convention, the State had not respected their rights, even after the Court had ruled in their favour. Finally, they referred to Article 13 in their complaints.

Other
ground

The applicants, Juozas Sidabras, Kęstutis Džiautas, and Raimundas Rainys, are Lithuanian nationals who used to work for the KGB and after its dissolution they were employed in different posts in both the private and the public sector. Mr Sidabras was a tax inspector, Mr Džiautas a prosecutor and Mr Rainys a lawyer in a private telecommunications company until they were dismissed from their posts in 1999 (the first two complainants) and in 2000 (the third complaint), after they were all found to have the status of 'former KGB officers.' This fact was revealed to their employers after the entry in force of the KGB Act, by which former KGB workers were banned from many jobs, including some in the private sector. All three brought cases before the National Courts but they were unsuccessful and finally turned to the ECHR. The Court delivered its judgments on 27 July 2004 (in the case of *Sidabras and Džiautas v. Lithuania*)¹ and 7 April 2005 (in the case of *Rainys and Gasparavičius v. Lithuania*),² holding that there had been violations of Article 14 (the prohibition of discrimination) in conjunction with Article 8 (the right to respect for private and family life) with regard to the ban on Sidabras, Džiautas and Rainys finding employment in the private sector on the ground that they had been former KGB officers.

The three applicants received pecuniary compensation which was paid by the Lithuanian state, but the first and the second applicant were not able to find employment during the years which followed. They alleged that their dismissal because of their former KGB status was affecting their private lives due to the stigma which had been created, that they were being discriminated against in their access to employment and were not hired because of their former KGB status. The third applicant, who had in fact found another job, contended that there had been a breach since he had not been reinstated in his former post although his dismissal had been declared unlawful. It was also pointed out in the judicial process that Lithuania had not changed the KGB Act, thus breaching, in the complainants' view, the requirement of executing a judgment 'without undue delay and within the shortest time possible,' an argument that was not upheld by the Lithuanian government and the Courts which stated that since the judgments of the ECHR were directly applicable, this requirement had been dealt with.

The Supreme Administrative Court ultimately concluded in April 2008 that there was no evidence that they had in fact been prevented from obtaining a private sector job because of the restrictions in the KGB Act, and that this was proven by the fact that they had both (the first and second applicants) been given job interviews and there was evidence that they had not been selected due to their lack of qualifications. In the case of Mr Rainys, though, the Court found that there had in fact been an unlawful dismissal, but pointed out that while the KGB Act was still in force he could not be reinstated in his former post.

In its judgment of 23 June 2015, the ECHR ruled that the complaint was admissible. The Court made a distinction, however, between the cases of Mr Sidabras and Mr Džiautas (the first two applicants) and the case of Mr Rainys (the third applicant). In the case of the first two applicants the ECHR found that they were unable to find a job not because of the restrictions as former KGB agents but because of their lack

¹ Application nos. 55480/00 and 59330/00.

² Applications nos. 70665/01 and 74345/01.

of qualifications (a four against three majority decision). In the case of Mr Rainys, on the other hand, the Court unanimously found that there had been a violation of Article 14 of the Convention, in conjunction with Article 8, on account of his inability to obtain employment in the private sector, and that Lithuania had to pay him EURO 6 000 in respect of non-pecuniary damage, plus EURO 2 000 in respect of costs and expenses, while dismissing his reminder for just justification.

Y. v. Slovenia, Application No. 41107/10, judgment of 28 May 2015

Gender

When the applicant was 14, in 2001, she was allegedly the victim of repeated sexual assaults by a family friend (X) who was more than 40 years her senior. Following a criminal complaint by the applicant's mother, investigations started in 2003 and criminal proceedings were brought against X in 2007. In 2009, after 12 hearings in total, the domestic courts acquitted X of all charges on the ground that some of the applicant's allegations concerning X's physical aspects had been disproved by an expert, thus making it impossible, in the domestic courts' view, to prove X's guilt beyond reasonable doubt.

The ECtHR had to examine whether Slovenia had afforded sufficient protection for the applicant's right to respect for her private life (Article 8 ECHR), and especially for her personal integrity, with respect to the manner in which she had been questioned during the criminal proceedings against her alleged sexual abuser. In so doing, the Court observed that it had to strike a fair balance between the rights of the applicant as a victim called upon to testify in criminal proceedings, protected by Article 8, and those of the defence, namely the right of the accused to call and cross-examine witnesses as laid down in Article 6 § 3(d) ECHR. Unlike the position in other similar cases previously examined by the Court, which had all been brought by the accused persons, in the present case the Court had to examine this issue from the perspective of the alleged victim.

In the case in question, the interests of securing a fair trial required X to be provided with an opportunity to cross-examine the applicant, especially as the applicant's testimony during the trial provided the only direct evidence in the case and the other evidence presented was conflicting. However, given that criminal proceedings concerning sexual offences were perceived as a very unpleasant and prolonged experience by the victims, and that a direct confrontation between those charged with sexual abuse and their alleged victims involved a risk of further traumatising for the victims, personal cross-examination by the defendant had to be subject to the most careful assessment by the national courts. Indeed, several international instruments, including European Union law (Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime), provide that certain rights should be granted to victims of, *inter alia*, sexual abuse, including the duty of the State to protect them from intimidation and repeat victimisation when providing testimony relating to the abuse.

The Court noted that the applicant's questioning had stretched over four trial hearings held over seven months, a lengthy period which in itself raised concerns, especially given the absence of any apparent reason for the long intervals between the hearings. Moreover, at two of those hearings X had personally cross-examined the applicant, continuously contesting the veracity of her answers and subjecting her to questions of a personal nature. In the Court's view, those questions were aimed at attacking the applicant's credibility as well as degrading her character. However, the presiding judge's intervention had been insufficient to mitigate what had clearly been a distressing experience for the applicant.

The Court also noted the inappropriateness of the questions put to the applicant by the gynaecologist appointed by the district court to establish whether she had engaged in sexual intercourse at the material time. In this regard, the authorities were required to ensure that all participants in the proceedings called upon to assist them in the investigation or the decision-making process treated victims and other witnesses with dignity and did not cause them unnecessary inconvenience.

Even though the domestic authorities had taken a number of measures to prevent any further traumatisation of the applicant, such measures had ultimately proved insufficient to afford her the protection necessary to strike an appropriate balance between her rights and interests protected by Article 8 and X's defence rights protected by Article 6 of the Convention. The Court found a violation of Article 8 and held that Slovenia had to pay Ms Y. EUR 9 500 in respect of non-pecuniary damage and EUR 4 000 in respect of costs and expenses.

Y.Y. v. Turkey (Application No. 14793/08), judgment of 10 March 2015

The applicant (Y.Y.) is a transsexual man. Early on in life, he had become aware of feeling more like a boy than a girl, regardless of his anatomical features. Y.Y. therefore applied for authorisation to undergo gender reassignment surgery. In 2006 this was denied by a domestic court, on the ground that Y.Y. was not permanently unable to procreate. The applicant ultimately obtained authorisation to undergo the operation in 2013, five years and seven months after the first request had been denied. The domestic courts then granted the request without considering whether or not the applicant was permanently unable to procreate.



Gender

In this case the inability to procreate was a prerequisite for gender reassignment surgery. The Court had to rule on the question whether this requirement complied with Article 8 ECHR.

First, the Court held that by adopting such legislation, the Government had pursued the legitimate aim of protecting the health and interests of the individuals concerned, having regard to the risks incurred by such operations for physical and moral security. However, the Court could not understand why an inability to procreate would have to be established – for a person wishing to change gender – before the physical sex change process could begin. The Court took the view that the principle of respect for the applicant's physical integrity precluded any obligation for him to undergo treatment aimed at permanent sterilisation. That prerequisite did not appear to be necessary, as the Government had argued, for the protection of the general interest and the interests of the individual, to justify the regulation of gender reassignment operations. Thus, even supposing that the rejection of the initial request for access to such surgery was based on a relevant ground, it was not based on a sufficient ground. The resulting interference with the applicant's right to respect for his private life could not therefore be considered 'necessary' in a democratic society.

In denying the applicant, for many years, the possibility of undergoing a gender reassignment operation, the State had breached the applicant's right to respect for his private life. The Court thus found that there had been a violation of Article 8.



Key developments at national level in legislation, case law and policy

This section provides as far as possible an overview of the main latest developments in gender equality and non-discrimination law (including case law) and policy on the national level in the 28 EU Member States, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Montenegro, Norway, Serbia and Turkey, from 1 January to 3 June 2015.

The text has been drafted on the basis of information provided by the national experts of the European network of legal experts in gender equality and non-discrimination.

BE

Belgium

CASE LAW

'Women only' fitness centre not illegal

Gender

When a fitness centre that had previously been open to persons of both sexes was converted into a 'women only' facility, a male customer brought a claim against the fitness centre, stating that this change constituted discrimination on the ground of gender.

On 23 January 2014, the Civil Court in Liège applied Article 8 of the federal Gender Act, found that there was direct discrimination and ordered the owner of the facility to put an end to the claimant's exclusion.

However, on 4 November 2014 the Court of Appeal in Liège quashed that judgment. The Court found that under Article 35 of the *décret* (act of a federate parliament) of 12 December 2008, which transposed Article 4(5) of Directive 2004/113/EC within the French-speaking Community's jurisdiction, the disputed difference in treatment was justified by the legitimate aim of enabling women to perform fitness exercise in privacy and with apparatus adapted to their morphology ('morphology' was the exact wording used by the Court). The 'women only' policy was an effective and appropriate means to achieve that purpose, and did not result in a disproportionate inconvenience for the claimant as he had access to another facility within a reasonable distance.

Access to goods and services falls within the scope of the federal Gender Act of 10 May 2007, with the exclusion of matters on which the various federate authorities have jurisdiction. Under Article 8, direct discrimination grounded on gender is prohibited. By way of exception, Article 9 stipulates that certain goods and services may be intended for persons of one sex or the other, but an ancillary Royal Decree must establish an exhaustive list of those goods and services. In the absence of such a Decree (which has not been adopted so far), the courts have no power to apply the justification test. Now, 'sport' falls within the scope of the *décret* of 12 December 2008, under which the courts do have such a power. However, there is no unanimous opinion on the inclusion of fitness in the notion of 'sport', hence the discrepancy between the analyses of the Civil Court (which applied the federal Act) and the Court of Appeal (which opted for the federate *décret*).

Internet sources:

All legal texts are available in French and Dutch via: <http://www.juridat.be>, accessed 20 July 2015.

Conviction for discrimination on the grounds of race and ethnic origin in the temporary employment sector

Racial or ethnic origin

In 2001, an employee of a well-known temporary work agency lodged a complaint arguing that the company was listing job seekers depending on their race and ethnic origin, with the aim of pleasing certain clients who did not want to hire people of foreign origin.¹

In 2009, a French NGO (S.R.) which was involved in another procedure in France against the same company for similar facts, together with a Belgian trade union, launched a procedure before the Court of First Instance of Brussels. They claimed that thousands of job seekers had been discriminated against on the grounds of their race and ethnic origin. The Court of First Instance acknowledged the discrimination and convicted the company to pay EUR 25 000 of damages to the first applicant and EUR 1 to the second

¹ Native Belgian people without foreign roots were registered in the computer system under the code 'BBB'; a reference to the Belgian cattle breed 'Blanc Bleu Belge' ('White Blue Belgian').

applicant. In 2011, the work agency lodged an appeal against the decision before the Appeal Court of Brussels.

On 10 February 2015, the Appeal Court of Brussels first confirmed the decision of the Court of First Instance on the grounds of admissibility, rejecting the defendant's argument that the French NGO would lack legal standing because its interest would be restricted to discrimination taking place in France. Interpreting Article 32, 1° of the Racial Equality Federal Act (providing that associations willing to claim damages on behalf or in support of claimants, in case of violation of the anti-discrimination legislations, must have had a legal personality for at least three years and must have a legal interest in the protection of human rights or in combating discrimination) in the light of European Law, the Court held that there was no territorial requirement and that an association could bring a non-discrimination claim before the Belgian courts irrespective of the location of its head office. On the merits of the case, the Court upheld the Court of First Instance's decision regarding the defendant's liability for discrimination. The liability was assessed under a provision of the Civil Code (Article 1384, paragraph 3) according to which an employer is liable for his/her employees' civil offences committed during the employment relationship (irrefutable presumption of liability). However, the Court did not establish the direct liability of the company itself as it rejected the allegation of systemic and intentional racial discrimination organised by the company. As to damages, the Appeal Court of Brussels raised the compensation to EUR 25 000 for each applicant, stressing that a mere symbolic sentence of EUR 1 does not meet the requirement of effective and dissuasive sanctions as imposed by EU Law.

Internet source:

<http://www.diversite.be/cour-dappel-bruxelles-10-fevrier-2015>, accessed 13 July 2015.

Preliminary question to the CJEU on the prohibition to wear the headscarf at work

The claimant had been working as a receptionist for a security services company for three years when she started wearing the Islamic headscarf to work. She was informed that the headscarf was contrary to the company's neutrality policy, and its work regulations were at that moment amended to forbid workers from wearing any visible symbols expressing political, philosophical or religious beliefs. The employee was dismissed and brought an action, together with the Centre for Equal Opportunities and Opposition to Racism, against the employer. At first and second instance before the Labour Court of Antwerp and the Labour Court of Appeal, the applicant's claim was rejected as the courts found neither direct nor indirect discrimination on the ground of religion or belief.² The applicants launched an appeal before the Belgian Supreme Court (*Cour de cassation*).

Religion
or belief

In a ruling of 9 March 2015, the Belgian Supreme Court considered the applicants' claim that the lower instance courts' findings were not compatible with the Employment Equality Directive, and suspended the proceedings to submit a reference for a preliminary ruling to the Court of Justice of the EU. The question referred to the Court is limited to determining whether the Directive can be interpreted to mean that a prohibition for employees to wear inter alia religious symbols at work does not constitute direct discrimination. It therefore does not raise the issue of potential indirect discrimination on the ground of religion or belief.


Internet source:

<http://www.diversite.be/cour-de-cassation-9-mars-2015>, accessed 13 July 2015.

² See *European Anti-Discrimination Law Review*, Issue 15, pp. 45-46.

LEGISLATIVE DEVELOPMENT

Anti-discrimination law amendments adopted



On 25 March 2015, Parliament adopted at second and final hearing a bill to amend two provisions of the Protection against Discrimination Act. Firstly, Article 9 on the shift of the burden of proof was amended and now reads: 'In proceedings for protection against discrimination, after the party claiming to have been discriminated against *produces (presents)* facts from which an *inference* that discrimination is at hand can be made, the respondent party has to prove that the principle of equal treatment was not breached' (emphasis added). Secondly, a new subsection 17 was added to Paragraph 1 of the Additional Provision, and reads: 'Within the meaning of art. 4, section 1 [listing the protected grounds], the ground of 'sex' includes also gender reassignment cases.'


Prior to the amendment, Article 9 regarding the burden of proof required that the claimant '*proves* facts from which a *conclusion* that discrimination is at hand can be made' (emphasis added). The aim of the amendment of this provision, which was first introduced in Parliament by the Government in January 2014,³ was therefore to bring national law in line with the intention of the Directives. Similarly, the new definition of 'sex' which explicitly includes transgender, aims at bringing national law in stricter compliance with Recast Directive 2006/54/EC.

Internet source:

<http://dv.parliament.bg/DVWeb/showMaterialDV.jsp?idMat=93361>, accessed 13 July 2015.

CASE LAW

Supreme Court Confirms Architectural Inaccessibility as a Form of Discrimination



A person with limited mobility complained before the equality body that the 'dolphinarium' in Varna was not architecturally accessible. The equality body ruled that the defendant company running the dolphinarium was liable, as maintaining architectural inaccessibility constitutes a form of discrimination under the Protection against Discrimination Act. It issued a fine of EUR 250 (BGN 500), which is the minimum amount possible according to the Act. It also issued an instruction for the defendant company to 'abort the discrimination' and to 'undertake the necessary action for constructing access for persons with disabilities to and inside the building'. This decision was confirmed on appeal by the first-instance court, and the defendant company then appealed this decision before the Supreme Administrative Court.

The Court found that the ramps installed by the company did not secure independent access for people with disabilities, and that access was limited and dependent on external assistance. In addition, the ramps could not be moved and could not be adjusted to different types of wheelchairs. The Court found that such architectural inaccessibility constitutes discrimination on the ground of disability, and held that the special privilege afforded for people with disabilities in terms of free admission had no legal relevance. The Supreme Administrative Court *inter alia* confirmed the financial penalty imposed on the company by the equality body, as well as the instruction for correctional measures.⁴

³ See *European Anti-Discrimination Law Review*, Issue 19, pp. 53-54.

⁴ Decision No. 158 of 8 January 2015 in administrative case No. 7092/2014, Supreme Administrative Court.

Internet source:

[http://www.sac.government.bg/court22.nsf/\(\\$All\)/5D9119021B4CAB8FC2257CE70027A2F1](http://www.sac.government.bg/court22.nsf/($All)/5D9119021B4CAB8FC2257CE70027A2F1).

Accessed 4 September 2015.

Vital healthcare deprivation of cancer patients constitutes harassment

The claimants were three close relatives of deceased cancer patients in a small city and an NGO defending health rights. They complained before the equality body that the Minister of Healthcare did not provide facilities for equal quality cancer treatment for all patients. In particular, all patients did not have access to contemporary medical equipment and were not always duly informed of available treatment possibilities. The claimants alleged that their close relatives had been discriminated against on grounds of disability and personal status. The deceased had not been informed about contemporary treatments that were only available in the two biggest cities, and had been treated with the outdated equipment available locally.

Disability

The equality body ruled that the Minister was liable for harassment on grounds of disability: unwanted conduct consisting of an omission resulting in the creation of a threatening (intimidating) environment for cancer patients. It issued an injunction for the Minister to take positive and special measures to secure such patients timely and quality treatment on an equal basis. It recommended the Council of Ministers to propose legislation regulating in detail and with better safeguards the equal rights of all cancer patients to health information. The equality body reasoned that cancer patients were a highly vulnerable group, and cancer was a form of disability; the authorities were therefore under a duty under national and international law to take measures to equalise their opportunities. Such measures should secure accessible health services and the patients' right to life, as at least 8000 cancer patients per year did not receive vital timely treatment due to insufficient equipment. By omitting to ensure that such measures were taken, the Minister thus violated the patients' right to equal treatment and to equal opportunities, while the threatening (intimidating) environment consisted of being subjected to waiting lists and missing the optimal times for treatment, as well as a lack of sufficient and contemporary equipment, a lack of sufficient public funding for treatment, a lack of social workers, a lack of up-to-date statistical data, availability of specific apparatus in only two locations, etc. Cancer patients in areas where no high technology for treatment was available were found by the equality body to suffer multiple discrimination on grounds of disability and personal status, the latter construed to include a person's place of residence. On appeal, the first-instance court repealed this decision and the claimants appealed the lower court's decision before the Supreme Administrative Court.

The Court held that while a sickness did not equate disability, certain cancers did meet the definition of disability under international law, but it rejected the equality body's reasoning that a person's place of residence was part of the protected ground of 'personal status'. The Court confirmed however that the Minister's 'unwanted conduct' consisted of his omission to take the necessary action to guarantee persons with disabilities due to cancer the right to healthcare, as expressly required under Articles 10 and 11 of the Protection Against Discrimination Act (providing public authorities' general equality duty, including the adoption of positive measures). The Court held that any conduct hindering the right to health was 'unwanted' within the meaning of the harassment ban, and finally upheld the equality body's injunction to the Minister to take the requisite action under Articles 10 and 11 of the Protection against Discrimination Act.⁵


Internet source:

<http://www.sac.government.bg/court22.nsf/d038edcf49190344c2256b7600367606/04093ee4486c151dc2257dd200418a39?OpenDocument>, accessed 16 July 2015.

5 Decision No. 820 of 26 January 2015 in administrative case No. 3498/2014.

POLICY DEVELOPMENT

National Equality Body publishes 2014 report



In April 2015, the People's Ombudswoman, acting also as the national equality body, published her report for the year 2014. The report includes data regarding discrimination cases and complaints, before the equality body itself and before the courts, as well as other specialised ombudsmen (for people with disabilities, gender equality and for children).

In 2014, the equality body received 263 discrimination complaints. Most of those were related to unprotected grounds while race/ethnicity/colour/national origin was the most common protected ground alleging discrimination. Most complaints related to the fields of employment (49 %), and access to goods and services (8 %). In most cases, the alleged discriminator was a public authority or administrative body.

The equality body decided on 139 complaints: 29 were inadmissible; 30 were forwarded to specialised ombudspersons; 45 were considered unfounded and in 35 cases the equality body found discrimination. Out of these 35 cases the equality body issued an opinion in 12 cases, a recommendation in 22 cases and a public announcement in 1 case (the report does not provide any more details).⁶

The Ombudswoman for Persons with Disability received 26 complaints on discrimination in 2014; the Gender Equality Ombudswoman received 314 new complaints that related to discrimination on the ground of sex and 18 complaints on discrimination based on sexual orientation⁷ and the Ombudswoman for Children received 14 complaints on discrimination against children (in 2 cases discrimination was based on ethnicity/race and in 12 cases on religion).

The equality body noted that only a small number of discrimination cases are reported. As explanatory factors the report noted for instance a general lack of awareness both of rights and of available mechanisms of protection, as well as lack of trust in institutions and fear of the length, costs and uncertain outcome of the courts' proceedings. The report finds that such fears are not unfounded.

Firstly, access to decisions of the municipal and county courts is still restricted even for the equality body. Secondly, among the very few final court decisions adopted in cases of alleged discrimination (22), none were in favour of the claimant. Case law is scarce and incoherent; the shift of the burden of proof is often not applied and judges need training in anti-discrimination legislation. Courts are still reluctant to find discrimination when there are no indications of the discriminator's intent to discriminate, and the length of the proceedings is still significant. Finally, no cases pending in 2014 related to indirect discrimination and no actions were brought by an organisation or association.

In 2014, most anti-discrimination cases were pending before misdemeanour courts (dealing with minor offences), and the report noted that sanctions in misdemeanour cases do not have a preventive effect, as the courts generally mitigate sanctions provided by law so that the usual sanction is a fine of between EUR 40 and 400 (although for instance the sanction prescribed by law for harassment is between

6 When the equality body establishes discrimination on the basis of a complaint, a case report is delivered to the defendant body and to the complainant, containing a description of the facts and circumstances of the case and an assessment of whether and how the complainant's rights have been violated. Where possible, the equality body recommends or proposes to the defendant body how to avert the threat or the violation of the right in question. If no measures are taken in accordance with the recommendation or proposal the equality body may notify Parliament and the general public.

7 The Ombudswoman for Gender Equality is responsible for both gender-related complaints and complaints regarding sexual orientation.

EUR 684.93 and EUR 41 095.89). The severity of the offence, circumstances and consequences are often ignored.

Internet source:

<http://www.ombudsman.hr/attachments/article/517/Izvje%C5%A1%C4%87e%20pu%C4%8Dke%20pravobraniteljice%20za%202014.%20godinu.pdf>, accessed 16 July 2015.

UN Committee on the Rights of Persons with Disabilities published its Concluding observations on the initial report of Croatia

In April 2015, the UN Committee on the Rights of Persons with Disabilities published its Concluding observations on the initial report of Croatia.⁸

The Committee commended Croatia for several strategic and legislative measures, such as the National Strategy of Equalization of Opportunities for Persons with Disabilities 2007-2015,⁹ the National Plan for Deinstitutionalisation and Transformation of Social Welfare Institutions and Other Legal Persons Providing Social Welfare,¹⁰ the 2012 amendments to the Antidiscrimination Act,¹¹ and the new Social Welfare Act.¹²

However, it also expressed its concern about a number of issues such as:

- lack of understanding of the concepts of reasonable accommodation and universal design in areas such as education, health, employment and built environment;
- the distinction made between different causes of impairments, such as war or accidents for the entitlement to social services and benefits;
- exclusion and segregation in education, work or residential living not being regarded as a form of discrimination;
- the insufficiency of awareness-raising measures on the rights of persons with disabilities;
- low accessibility to buildings, places, transportation and information and communication;
- substituted decision making has not been replaced by supported decision making in law and in social practice (Constitutional Court has suspended the new Family Act which abolished plenary guardianship);
- involuntary detention and admission in institutions of persons with psycho-social and intellectual disabilities;
- a large number of persons with disabilities have not completed primary education, less than 30 % have completed secondary education, and measures to provide reasonable accommodation to students with disabilities in mainstream educational facilities are insufficient; exclusionary and segregated education of persons with disabilities is not considered discriminatory;
- majority of persons with disabilities are either unemployed or have low-income employment;
- many persons with disabilities live under conditions of poverty, especially those in rural areas and those of Roma origin;
- the system of data collection does not enable the authorities to gather information needed for the fulfilment of its duties under the Convention;
- the independent monitoring body, the ombudswoman for persons with disabilities, is not designated as such by law and it has no outreach possibilities to rural areas;
- civil society organisations are not sufficiently supported by the Government to participate in national implementation and monitoring.

8 Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Croatia, adopted at the Committee's thirteenth session (25 March-17 April 2015).

9 Official Gazette of the Republic of Croatia No. 63/2007.

10 *Plan deinstitutionalizacije i transformacije domova socijalne skrbi i drugih pravnih osoba koje obavljaju djelatnost socijalne skrbi u Republici Hrvatskoj 2011-2016* (2010), available at http://www.mspm.hr/djelokrug_aktivnosti/socijalna_skrb/reforma_sustava_socijalne_skrbi.

11 See *European Anti-Discrimination Law Review*, Issue 15, p. 47.

12 Official Gazette of the Republic of Croatia Nos 157/2013 and 152/2014.

Internet source:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fHRV%2fCO%2f1&Lang=en, accessed 16 July 2015.

CY

Cyprus

LEGISLATIVE DEVELOPMENT

Government of Cyprus signs Istanbul Convention

On 16 June 2015, the Government of Cyprus signed the Istanbul Convention, over four years after it opened for signature on 11 May 2011. Through this Convention, Cyprus can begin to increase action against all forms of violence against women including domestic violence, from a gender equality perspective. The police keep statistical data on violence in the family. Statistical data is also kept by the Association for Prevention and Handling of Violence in the Family.

Grave human rights violations against women and girls are becoming more prevalent and visible everyday:

- 1 in 5 women has experienced physical and/or sexual violence in Cyprus;
- 28 % of Cypriot women have experienced some form of abuse by current or former spouse or partner;
- 82 % of domestic violence victims are women and girls;
- over 30 women have been killed by partners or ex-partners in the last 10 years.

However, the Convention can only fully come into force in Cyprus once it is ratified. This will require extensive legislative changes, the development of specialist support services, the implementation of prevention programmes, robust data collection and research, and comprehensive and coordinated policies across all Government services. All national women's organisations were pleased with the signing of the Convention. It is hoped that the ratification will not be delayed, and that the proper legal measures will be taken.

For the purposes of ratification, the Attorney General is responsible for the amendments of the law, and the Government is obliged to establish more shelters for victims of domestic violence.

Internet sources:

Statistical data available at:

http://www.police.gov.cy/police/police.nsf/dmlstatistical_gr/dmlstatistical_gr?OpenDocument

[http://www.police.gov.cy/police/police.nsf/All/CA09FD4ED28D8E87C2257E1B003ABC64/\\$file/%CE%92%CE%AF%CE%B1%20%CF%83%CF%84%CE%B7%CE%BD%20%CE%BF%CE%B9%CE%BA%CE%BF%CE%B3%CE%AD%CE%BD%CE%B5%CE%B9%CE%B1.pdf](http://www.police.gov.cy/police/police.nsf/All/CA09FD4ED28D8E87C2257E1B003ABC64/$file/%CE%92%CE%AF%CE%B1%20%CF%83%CF%84%CE%B7%CE%BD%20%CE%BF%CE%B9%CE%BA%CE%BF%CE%B3%CE%AD%CE%BD%CE%B5%CE%B9%CE%B1.pdf).

<http://www.domviolence.org.cy/?lang=GR&cat=4&subcat=26>.

All accessed 26 August 2015.

Gender

CASE LAW

Discrimination in Social Services' procedures regarding the adoption of children by persons with disabilities

The complainants are a married couple where both spouses have physical disabilities. In February 2014 they lodged a complaint with the Ombudsman's office,¹³ claiming discrimination by the Social Welfare Services (SWS) in relation to their application for a permit to adopt a child. While the complainants' application to the SWS was still pending, the Ombudsman's office in its capacity as monitoring body for the CRPD issued an opinion regarding the right of persons with disabilities to adopt children, based on its investigation into the procedure of the SWS.¹⁴ The opinion included the following findings:

- The SWS asked the complainants to undergo an assessment of functionality by the Department for the Social Integration of Persons with Disabilities of the Ministry of Labour.¹⁵ When they refused, the SWS asked them to undergo an assessment by a psychologist from the Mental Health Department. The SWS did not clarify whether it asked all applicants for adoption to undergo this test or whether only persons with disability had to undergo this assessment.
- Throughout their contact with the complainants, the SWS repeatedly demonstrated prejudice and expressed doubts as to the complainants' ability to respond to parental duties, focusing on the couple's 'inability' to 'properly' participate in society in accordance with standards referring to non-disabled persons. The correspondence between the parties demonstrated further that the SWS did not accept the duty to provide reasonable accommodation, although this duty was extended by law in 2014 to fields beyond employment.¹⁶
- The SWS did not examine the possibility of the provision of state support or assistance in the exercise of the complainants' parental duties.

The opinion found that this approach violated the non-discrimination provisions of the CRPD and in particular Articles 5 (respect for family life) and 23 (elimination of discrimination in matters relating to marriage, family and parenthood). Considering the wide margin of discretion of SWS officers throughout the adoption procedure, the Ombudsman recommended to the Minister of Labour and Social Insurance that the competent authorities:

- provide training and education to all SWS officers on the rights and concepts of the CRPD, with emphasis on combating discrimination, stereotypes and prejudices relating to disability;
- design the process of assessment of the suitability of persons with disability as regards adoption of children to include safeguards against discrimination. The assessment must take place *after* the adoption of measures in support of persons with disability.

Internet source:

[http://www.ombudsman.gov.cy/ombudsman/ombudsman.nsf/All/05C51EDC7B19224EC2257E7B00285521/\\$file/%CE%91%CE%A0343.2014-31012015.doc?OpenElement](http://www.ombudsman.gov.cy/ombudsman/ombudsman.nsf/All/05C51EDC7B19224EC2257E7B00285521/$file/%CE%91%CE%A0343.2014-31012015.doc?OpenElement), accessed 16 July 2015.

13 The Ombudsman's office also performs functions of the Equality Body, the independent mechanism for the monitoring of the implementation of the CRPD and NHRI. A complaint lodged with the Ombudsman's office may be investigated in any of these capacities and often in more than one.

14 Position of the Ombudsman/Independent Mechanism for the monitoring of the implementation of the CRPD regarding the assessment of the suitability of persons with disabilities by the Social Welfare Services for the purpose of adopting children, File No. A/P 343/2014, decision dated 31 January 2015.

15 The assessment is based on the International Classification of Functioning, Disability and Health (ICF), and aims at determining people with disabilities' degree of functionality and thereby their eligibility to welfare benefits. It has been criticised as being based on the medical rather than the social model of disability.

16 Law amending the Law on Persons with Disabilities No. 63(I)/2014.

Supreme Court rules that age seniority as a criterion for promotion is a ‘fair and objective regulation’

Age

The appellant is a public servant who had applied for a promotion which was finally awarded to another, more senior, candidate. The applicant filed an appeal against this decision claiming that to the extent that it relied on age seniority it violated the Employment Equality Directive and the law transposing it.¹⁷

The Court rejected the application, finding that the Public Service Committee’s reference to age seniority did not appear to be the determining factor in the selection of the candidate for promotion. The Court added that taking age seniority into account is not only lawful but also sanctioned by the public service law which provides that between employees with the same date of appointment seniority is determined on the basis of their age.¹⁸ The appellant appealed against the Court’s decision, arguing (1) that the Court’s decision failed to examine whether the criterion of seniority as foreseen by national law amounted to discrimination on the ground of age and (2) that the conclusion that seniority based on biological age was not the determining factor in the decision was wrong. She also requested a referral to the CJEU for a preliminary ruling regarding the potential existence of discrimination in a case such as that at hand.

The Supreme Court rejected the appellant’s request for referral to the CJEU, finding that the issue is ‘*acte clair*’ and does not require interpretation and that the issue for referral is not sufficiently clear.¹⁹ On the merits of the appeal, the Court rejected both arguments of the appellant on the ground that the Directive provides Member States with a wide margin of appreciation regarding the measures to be adopted in the field of ‘social policy’, provided the measures do not violate the principle of non-discrimination, citing the CJEU rulings in *Mangold*, *Palacios de la Villa* and *Age Concern England*. The Court concluded that the regulation of the issue of seniority by the Civil Service Law cannot be deemed as violating the principle of non-discrimination, since it does not place any particular civil servant or a group of civil servants in a disadvantageous position. The provision in the Civil Service Law is, according to the Court, a ‘fair and objective regulation’ of the issue of seniority, applied to all cases of employees in the same position and it does not result in discrimination against the appellant.

Internet source:

http://www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_3/2015/3-201504-12-10.htm&qstring=%E4%E9%E1%EA%F1%E9%F3*%20and%202015, accessed 16 July 2015.

Persons with intellectual or psychosocial disabilities are required to waive their legal capacity in order to claim welfare benefits

Disability

In 2014 Parliament adopted a new law, introducing a comprehensive reform to the welfare system by replacing the public benefits until then available to various vulnerable groups with a ‘minimum guaranteed income’.²⁰ One of the new conditions of eligibility required that persons with an intellectual disability were required to present a court order under the law on the administration of the property of ‘incapable’ persons,²¹ appointing a person as their legal representative for managing their property. Without such a court order, their applications for a minimum guaranteed income could not be examined. The Committee for the Protection of ‘Intellectually Retarded Persons’²² and several groups of relatives of persons with intellectual disabilities complained to the Equality Body that this requirement formed an obstacle to equal access to the minimum guaranteed income on the ground of disability, because obtaining such a court order required considerable cost and time, and was forcing persons with intellectual disability to renounce their legal capacity, thus abolishing their rights in a number of other fields. The Ministry of

17 Law on Equal Treatment in Employment and Occupation, No. 58(I)/2004.

18 Law on Public Service No. 1/1990, Article 49.

19 Supreme Court decision No. 1211 of 3 April 2015.

20 Law on minimum guaranteed income and generally on social provisions No. 109(I)/2014.

21 Law on the administration of the property of incompetent Persons of 1996 No. 23(I)/1996.

22 www.cpmmental.com.cy/epnka/page.php?pageID=186.

Labour, Welfare and Social Insurance, which is the competent ministry for the implementation of the 2014 law, informed the Equality Body that the purpose of this provision was to satisfy the concerns of banks who had raised an issue regarding the legality of depositing the welfare payments of persons with intellectual disability into the bank accounts of other parties (e.g. their parents) who were not legally authorized to manage these funds. The Ministry had sought the Attorney General's opinion as regards this practice, who confirmed that persons representing persons with intellectual disability in any activity, including the managing of their property, must be duly authorized to do so through a court order.

The Equality Body noted that the compatibility of the relevant provision of the new law with the non-discrimination laws and the Convention on the Rights of Persons with Disabilities had not been taken into consideration either by the Ministry or by the Attorney General.²³ The report also underlined the obligation of States Parties to the CRPD to provide support to persons with a disability to enable them to decide for themselves about issues affecting them, rather than resort to the unjustified deprivation of their legal capacity. The report added that the duty to provide support to persons with disability to exercise their legal capacity amounts to a duty to provide reasonable accommodation, a breach of which amounts to unlawful discrimination on the ground of disability. By contrast, the court order which the Ministry requires in order to examine an application for the minimum guaranteed income irrevocably abolishes the person's legal capacity and right to equality before the law. In practice, persons with intellectual and psychosocial disabilities are thereby forced to choose between the minimum guaranteed income, which has now replaced all other public benefits, and their legal capacity which is a prerequisite for their access to other fundamental rights and an important factor in their equal participation and social integration. The Equality Body found that this measure 'perpetuates obsolete stereotypes and prejudices' against persons with disabilities. In conclusion, the Equality Body requested the revision of the 2014 law and meanwhile for a practical solution to be found to ensure access of all adult persons with intellectual or psychosocial disabilities to the minimum guaranteed income without the adverse consequences of the 'incapacity' court order and invited all stakeholders to a consultation meeting.

Internet source:

[http://www.ombudsman.gov.cy/ombudsman/ombudsman.nsf/All/78F6368F0F1FEEB9C2257E7B0024E278/\\$file/2354.2014%CE%BA.%CE%B1-7415.doc?OpenElement](http://www.ombudsman.gov.cy/ombudsman/ombudsman.nsf/All/78F6368F0F1FEEB9C2257E7B0024E278/$file/2354.2014%CE%BA.%CE%B1-7415.doc?OpenElement), accessed 16 July 2015.

Czech Republic

CZ

CASE LAW

Supreme Court decision – no discrimination at the Charles University

The claimant was a female employee in the position of research assistant at the Charles University, employed since 1997. Her fixed-term contract was extended twice (a normal practice) until 2002, after which time the faculty started a selection procedure for her position. She participated in this procedure, but a male candidate was given the position. She brought a complaint before the Court claiming that she had been subjected to mobbing and sexual harassment, and also that the selection procedure had been initiated where contracts of her male colleagues in the same position were prolonged without any selection procedure. The selection procedure is regulated by Act No. 111/1998 Coll. on higher education institutions. Discrimination, including mobbing and sexual harassment, is prohibited by Act No. 198/2009 Coll., Anti-Discrimination Act. However, this latter Act was not mentioned in the procedure.

Gender

The claims were rejected by the District Court of Prague, and then also by the City Court of Prague.

23 Equality Body Position File No. A/P 2354/2014, A/P 162/2015, A/P 483/2015, 7 April 2015.

The Supreme Court confirmed the decisions of the lower courts and did not find discrimination on the ground of sex. The Court reasoned that the claimant participated voluntarily in the selection procedure, and did not claim that the decision of the jury was discriminatory. The claimant only asked to declare null the selection procedure, which, according to the Supreme Court (and also to lower courts), was not possible. The Court stated that starting selection procedures lies fully within the competence of the employer, and starting a selection procedure cannot of itself be considered discriminatory.

According to the Supreme Court, the claimant should have presented facts showing that the selection procedure as such was discriminatory.

This is not the only case where the Supreme Court has not found discrimination sufficient to shift the burden of proof to the defendant. Failing to do so, the courts almost never discuss the alleged discrimination, and tend to reject the case because of procedural failure.

The claimant has appealed against the decision and she has now brought a case before the Constitutional Court.

Internet source:

[http://www.nsoud.cz/Judikatura/judikatura_ns.nsf/\\$\\$WebSearch1?SearchView&Query=\[spzn1\]%20%3D%2021%20AND%20\[spzn2\]%3DCdo%20AND%20\[spzn3\]%3D1165%20AND%20\[spzn4\]%3D2013&SearchMax=1000&Start=1&Count=15&pohled=1](http://www.nsoud.cz/Judikatura/judikatura_ns.nsf/$$WebSearch1?SearchView&Query=[spzn1]%20%3D%2021%20AND%20[spzn2]%3DCdo%20AND%20[spzn3]%3D1165%20AND%20[spzn4]%3D2013&SearchMax=1000&Start=1&Count=15&pohled=1), accessed 22 July 2015.

School Law amendment promotes the right to equal access to education for Roma children

On 19 March 2015 the Senate adopted an amendment to the School Law regarding the wording which had been previously adopted by the Chamber of Deputies.

One of the aims of the new legislation is to promote equal access to mainstream education for Roma children and for children with disabilities in response to numerous decisions and reports by the Council of Europe and UN bodies and to the infringement proceedings initiated in 2014 by the European Commission against the Czech Republic.²⁴

The main changes introduced by this amendment include the following:

- A new definition of ‘pupils with special education needs’ (Section 16 Paragraph 1): ‘pupils who need to be provided with support measures to fulfil their educational opportunities or for the enjoyment or exercise of their rights on an equal basis with others.’ The integration into mainstream education of pupils with special education needs will be based on the supportive measures that these pupils need.
- A new definition and list of ‘supportive measures’ (Section 16 Paragraphs 1 and 2), including the provision that ‘Children, pupils and students with special education needs are entitled to free provision of supportive measures by schools’.
- Section 16 Paragraph 9 provides that only pupils with mental, physical, visual or hearing impairments, severe learning disabilities, severe development disorders, multiple disabilities or autism can be placed into special schools or classes. A written request by the child’s legal representatives, a recommendation by the school counselling facility and conformity with the interest of the child are necessary conditions for the placement. New special schools or classes can be founded only with the consent of the Ministry or the regional office.
- Review procedure: the representatives of the child, within 30 days of the receipt of the report by the school counselling facility, can ask for its revision by a legal entity authorised by the Ministry to carry

24 See for instance ECtHR, *D.H. and others v. Czech Republic* (Application No. 57325/00), judgment of 13 November 2007 and *European Equality Law Review*, Issue 1, p. vii.

out revisions. The review procedure may include a new examination of the pupil's educational needs, which may be done only with the consent of the pupil (or their legal representative).

- Preparatory classes at primary schools available for all pupils. Preparatory classes were previously available only for socially disadvantaged children and were mostly organised in the practical ('special') schools.

Previously it was possible to get extra funding for disadvantaged pupils, including pupils with a disability, only when the pupil had a diagnosis. In practice such funding was possible to obtain mainly for practical ('special') schools. Children who needed support but did not have a diagnosis were refused the funding. A school that accepted to enrol such a pupil would then have more work without receiving any additional funding. The most important change introduced by the 2015 amendment is therefore that extra funding to educate disadvantaged pupils will no longer be related to the diagnosis but to the pupil's specific needs. The new support will be divided into five levels and will be available for each school that educates disadvantaged pupils.

Internet source:

<http://www.psp.cz/sqw/text/tiskt.sqw?o=7&ct=288&ct1=0&v=PZ&pn=5&pt=1>, accessed 16 July 2015.

Denmark

DK

POLICY DEVELOPMENT

New Government and new Ministry for Gender Equality

The new Danish Government was formed on 28 June 2015. The Ministry of Gender Equality has been moved from the previous Ministry for Children, Gender Equality, Integration and Social Affairs to the Ministry for Children, Education and Gender Equality. The Prime Minister has published a document detailing the forthcoming work programme and objectives for the coming years in relation to government policy, work, and development in Denmark. However, gender equality is not mentioned in this programme.

Gender

In the former Government's work programme of 2011, gender equality was both mentioned and prioritised. The previous Government prioritised objectives to help achieve equality between women and men in the labour market, particularly in relation to salary and influence in company boards. This work programme also focused on issues such as maternity leave benefits for the self-employed, the promotion of single mothers' interests, and a number of other gender-oriented initiatives.

These gender equality policy proposals and political statements/objectives are missing in the 2015 work programme. This indicates that the new Government has not yet prioritised gender equality in its political objectives.

Internet sources:

New work programme 2015, available at: http://www.stm.dk/multimedia/Regeringsgrundlag_2016.pdf.

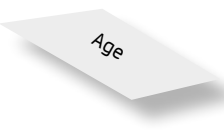
Prior work programme 2011, available at: http://www.stm.dk/publikationer/Et_Danmark_der_staar_sammen_11/index.htm.

Ministry homepage, available at: <http://www.uvm.dk/>.

All accessed 24 August 2015.

CASE LAW

Supreme Court judgment on age discrimination and unemployment benefit



The applicant was a member of an unemployment insurance fund until he reached the age of 65 and was therefore eligible for state pension. His membership was then automatically terminated in accordance with Section 43 of the Act on Unemployment Insurance. The applicant however did not wish to retire, and when he resigned from his previous employment he refused the state pension and requested unemployment benefits instead. The fund declined his request.

On behalf of the applicant, the association DaneAge brought an action against the Ministry of Employment claiming that Section 43 of the Act on Unemployment Insurance violated Article 2 of the Employment Equality Directive and the general EU principle on prohibition of age discrimination. The Ministry of Employment argued that unemployment benefits constitute a state social protection scheme which falls under the exception clause in Article 3(3) of the Directive, and are therefore not covered by the Directive.

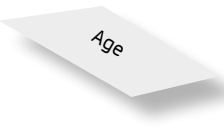
In its judgment of 10 October 2012, the Eastern High Court concluded that Section 43 of the Danish Act on Unemployment Insurance did not violate the Employment Equality Directive. DaneAge Association filed an appeal against the High Court judgment before the Supreme Court.

In its ruling of 19 January 2015, the Supreme Court referred to a number of rulings of the CJEU, including the combined cases of C-124/11, C-125/11 and C-143/11 (*Dittrich*).²⁵ The Court concluded that the Danish system of unemployment benefits should be regarded as a public scheme of social protection. The Court stressed the fact that the unemployment benefit scheme functions independently of employers and that the benefit cannot be compared to a salary. According to the Court, the payment of unemployment benefits was therefore covered by the exception clause in Article 3(3) of the Directive. The Court thus concluded that Section 43 of the Danish Act on Unemployment Insurance did not violate the Employment Equality Directive.

Internet source:

<http://www.hoejesteret.dk/hoejesteret/nyheder/Afgorelser/Pages/Aldersgraenseformedlemskabafafasse.aspx>, accessed 16 July 2015.

Eastern High Court judgment on age discrimination and dismissal



The applicants were dismissed together with three other colleagues from their positions in a government agency because of workforce reduction. The dismissed employees were all older than 50. The applicants claimed that they had been discriminated against because of their age.

In 2012 the Board of Equal Treatment issued its decisions in the case, stating that the percentage of older employees among those dismissed was disproportionately high. The complainants had thus established facts of possible discrimination and the employer could not prove that no discrimination had taken place. Thus the complainants were awarded compensation.²⁶

The government agency refused to follow the decision. Thus, the Board brought the case against the government agency to the civil courts.

In its ruling of 23 January 2015 the Eastern High Court emphasised that a number of other employees who were older than the two applicants were not dismissed during the workforce reduction. The Court also emphasised that the minutes from a manager meeting held just before the dismissals noted that

²⁵ Supreme Court judgment of 19 January 2015. Case 308/2012.

²⁶ Decisions by the Board of Equal Treatment Nos 401/ 2012 and No. 402/2012.

it would be unfair to look at the age disparity of the various departments when deciding on whom to dismiss.

Finally, the Court stated that the Board of Equal Treatment had not identified any circumstances beyond the age distribution of the dismissed employees to support the assumption that the government agency in whole or in part had attached importance to the age of the dismissed employees. Thus the Court concluded that the applicants had not established facts of possible discrimination and acquitted the government agency.²⁷

The judgment makes clear that documentation by statistics is not by itself sufficient to establish facts from which it may be presumed that discrimination has taken place. Previous decisions from the Board of Equal Treatment have presupposed that such statistics would be sufficient. However, according to this judgment more documentation is necessary for the burden of proof to be reversed and fall upon the employer to prove that discrimination has not taken place.

Internet source:

<http://www.domstol.dk/oestrelandsret/nyheder/domsresumeer/Pages/ALDERSDISKRIMINATION%E2%80%93FORSKELSBEHANDLING.aspx>, accessed 16 July 2015.

Estonia

EE

LEGISLATIVE DEVELOPMENT

Draft regulation on sex-disaggregated data collected by employers

In March 2015 the draft regulation 'Procedure of collection of sex-disaggregated statistical data about their workforce' was issued. The draft regulation requires employers to collect the following data:

1. the proportion of male and female employees at different levels of the organisation and professional groups;
2. in-house promotion and changes of positions;
3. participation in training;
4. the numbers of days of used vacation and leaves by different types of leave (annual holiday leave, paternity leave, parental leave, childcare leave, study leave);
5. hours of full-time and part-time work, the number of overtime hours, night time, and weekend hours worked, as well as the number of hours on an on-call basis;
6. the average salary or wages at different working regimes and hours;
7. the individual allowances, allowances, benefits and bonuses in relation to the level of the staff; and
8. the number and gender division of candidates and new hires in the previous financial year.

Gender

The Ministry of the Interior and the Ministry of Economic Affairs and Communications did not support the draft regulation. Some ministries made suggestions on the draft regulation, and only the Ministry of Culture accepted it without any comments. The regulation has been under public debate during the last couple of months. Unions have been supportive, but the Estonian Chamber of Commerce and Industry, the Estonian Employers' Confederation, and the Association of Estonian Cities opposed it. The main arguments against the regulation are connected with the increasing management costs for employers, and the fact that no impact analysis has been conducted. The regulation and Explanatory Memorandum was elaborated in the Ministry of Social Affairs. The Explanatory Memorandum refers to Article 11 of the GEA and to Article 21 of the GEA on social dialogues of Directive 2006/54 (recast). The coordination process continues.

²⁷ Eastern High Court judgment of 23 January 2015. Case B-2951-13.

The regulation is scheduled to enter into force in Estonia on 1 January 2016. The draft regulation is supported by unions and opposed by employers' organisations.

Internet sources:

Nael, M. (2015) 'Tööandjad ja ametiühingud on soopõhiste andmete kogumise osas eriarvamusel' (Employers and Unions have opposing opinions on collecting sex-disaggregated data) Estonian Public Broadcasting (ERR), 2 April 2015. Available in Estonian at: <http://uudised.err.ee/v/majandus/15b7bde1-71d1-4e44-987f-a6dd4e4b1cd6>, accessed 3 June 2015.


Estonia, Vabariigi Valitsuse määruse 'Soopõhiste tööalaste statistiliste andmete kogumise kord ja andmete loetelu' eelnõu seletuskiri (The Draft Explanatory Memorandum to the Government of Republic Regulation 'Procedure of collection of sex-disaggregated statistical data about their workforce'). Available in Estonian at: http://www.koda.ee/public/Andmete_kogumise_maaruse_eelnou_seletuskiri_03.2015_1.pdf, accessed 5 June 2015.

FI

Finland

LEGISLATIVE DEVELOPMENT

Parliament accepts ratification of CRPD




In April 2015 the Finnish Parliament adopted the Act on the Ratification of the Convention on the Rights of Persons with Disabilities and Optional Protocol (CRPD).²⁸ International conventions are generally not ratified by Finland until all necessary legislative changes to implement the convention in national law are adopted in Parliament. Three separate pieces of legislation have been identified as necessary for the ratification of the CRPD and its Optional Protocol: the Act on the Right of Patients and Clients to Self-Determination, the recently renewed Non-Discrimination Act (which came into force on 1 January 2015)²⁹ and the Act on the Ratification of the Convention on the Rights of Persons with Disabilities and Optional Protocol itself. The Act on the Right of Patients and Clients to Self-determination was presented to Parliament in the autumn of 2014 but was considered by the Constitutional Committee to be too restrictive with regard to the right to self-determination of people with learning difficulties. As the legislative session of Parliament was coming to an end mid-March 2015, the parliamentary groups decided to pass the Act on the Ratification and a resolution requesting the next Government to present a new Act on the Right of Patients and Clients to Self-determination and await its adoption before delivering the ratification documents. It is the first time that an international convention is ratified by an Act of Parliament while the delivery of official ratification documents is postponed.

Internet source:

<http://www.finlex.fi/fi/laki/alkup/2015/20150373>, accessed 17 July 2015.

CASE LAW

Supreme Court Penal Code precedent on employment discrimination



The claimant was hired as the editor-in-chief of a newspaper following a recruitment interview where she had not corrected the belief of the prospective employer, the CEO of a media company that she was living with a man. She had also given false information when stating that her spouse was not politically active. When the employer was informed that the applicant was living with a woman who was in fact

²⁸ Act No. 373/2015 of 10 April 2015.

²⁹ See *European Equality Law Review*, Issue 1, pp. 97-99.

politically active, he terminated the contract. The first instance court rejected the criminal charges as only part of the evidence showed that the termination of the contract was motivated by the claimant's sexual orientation.³⁰ The Court of Appeal however held that it was sufficient for a finding of discrimination that the employer's decision was partly based on the sexual orientation of the claimant. The employer was convicted on the basis of the Penal Code provisions prohibiting discrimination in the field of employment, and was issued a fine of EUR 9 000. The Court found that the termination of the contract constituted indirect discrimination on the ground of sexual orientation but found no discrimination on the basis of family relations. The Court took into account the fact that the claimant had lied as a mitigating circumstance when determining the sanction.³¹

In June 2015, however, the Supreme Court found direct discrimination on the basis of both sexual orientation and family relations.³² With regard to the ground of family relations the Supreme Court referred to CJEU case law in *Coleman*³³ and found that the prohibition of discrimination includes situations where a person is discriminated because of the political opinions of a spouse. The Supreme Court doubled the fine to the amount of EUR 18 000.

In March 2010, prior to the decision by the Supreme Court, the editor-in-chief had won the civil case against the employer and had been awarded EUR 80 500 for illegal termination of a work contract. This included EUR 5 000 as compensation for a breach of the prohibition of discrimination of the Non-Discrimination Act.

Internet source:

<http://korkeinoikeus.fi/fi/index/ennakkopaatokset/precedent/1433846010211.html>, accessed 23 July 2015.

France

FR

LEGISLATIVE DEVELOPMENTS

Parliamentary legislative proposal to repeal legislation imposing specific constraints and controls on Travellers

Law No. 69-3 of 3 January 1969 provides that Travellers must carry special identity papers ('circulation booklets') and have them stamped regularly, with failure to do so exposing them to penal sanctions, and control of compliance authorising the police to control them constantly.

Racial or
ethnic origin

In June 2015, the National Assembly adopted at first reading a parliamentary legislative proposal to repeal Law 69-3.³⁴ In addition, the bill intends to allow Travellers to benefit from the same rules regarding designation of administrative residence and registration on voting lists as any person without fixed domicile. It would also amend Law No. 2000-614 of 5 July 2000 regarding the parking and accommodation of Travellers in order to oblige local urban planning authorities to take into account the need to plan locations for long-term parking on family plots and massive reunions for ritual gatherings.

This legislative proposal follows a number of decisions of international and national bodies declaring Law 69-3 to be discriminatory and contrary to international human rights conventions.³⁵

30 Helsinki District Court, decision of 24 May 2011.

31 Helsinki Appeal Court, decision of 28 January 2013.

32 Supreme Court decision No. KKO 2015:41, of 10 June 2015.

33 CJEU Case C-303/06, *Coleman v. Attridge Law and Steve Law*, Grand Chamber judgment of 17 July 2008.

34 Parliamentary legislative proposal No. 1610, adopted by the National Assembly on 9 June 2015.

35 See for instance Conclusions of the UN Human Rights Committee adopted at its 110th session (10-28 March 2014), condemning France for violation of Article 12 of the International Covenant on Civil and Political Rights, concluding that

Internet source:

<http://www.assemblee-nationale.fr/14/ta/ta0526.asp>, accessed 17 July 2015.

Parliamentary legislative proposal to create class actions in matters of discrimination

In June 2015, the National Assembly adopted at first reading a parliamentary legislative proposal to create a class action procedure in matters of discrimination.³⁶ The class action would be reserved for trade unions as well as associations that have existed for at least five years and are registered to fight discrimination. Any other NGO could intervene in the action.

The action would be based on examples of individual claims presented by the association, and it would suspend time limitations on similar claims towards the defendant. The additional details regarding the procedure would be defined by decree.

The procedure would not separate judgment on the merits from the decision determining whether the situation is representative of a collective situation allowing for a class action. At the time of enforcement of the judgment and determination of damages, members of the group could give a mandate to the association to represent them. In cases where the victims are identified, the judge could order the defendant to indemnify them directly.

Following the adoption of this proposal, lawyers' associations, the Bar Association, the Defender of Rights and many representatives of discriminated groups have expressed concerns regarding the access to and efficiency of this proposed procedure, mainly considering that the exclusivity given to associations and the integration of the decision on the merits and the existence of a class into the same decision would alter the efficiency of the procedure.

This proposal was integrated in the reform of the justice system presented at the Council of Ministers by the Minister of Justice on 30 July 2015, called Justice of the XXIst century.

Internet sources:

<http://www.assemblee-nationale.fr/14/ta/ta0527.asp>.

Bill Justice of the XXIst Century <http://www.gouvernement.fr/action/la-justice-du-21e-siecle>.

Both accessed 17 July 2015.

Parliamentary legislative proposal to prohibit discrimination on the ground of social precariousness

In June 2015 the Senate adopted at first reading a parliamentary legislative proposal to prohibit discrimination on the ground of social precariousness (*précarité sociale*).³⁷

This new ground is to be added to the Penal Code, the Labour Code and Article 2 Paragraph 2 of the Law of 27 May 2008. It will therefore be applicable to public and private employment, to self-employment and occupation and to the penal prohibition of direct discrimination in employment and access to goods and services covered by Articles 225-1 *et seq.* of the Penal Code.

At the time of consultation, a number of Members of Parliament and academics as well as the Defender of Rights underlined the difficulties related to the actual scope of the situations targeted by this new ground, and the need to ensure legal effectiveness of the protection against discrimination.

Law 69-3 did not respect the principle of freedom of circulation. See also Supreme Administrative Court (*Conseil d'Etat*) decision No. 359223 of 19 November 2014.

³⁶ Parliamentary legislative proposal No. 1699, adopted by the National Assembly on 10 June 2015.

³⁷ Parliamentary legislative proposal No. 378 adopted by the National Assembly on 18 June 2015.

Internet source:

<http://www.senat.fr/petite-loi-ameli/2014-2015/508.html>, accessed 17 July 2015.

POLICY DEVELOPMENT

National Action Plan to fight racism and anti-Semitism

In April 2015 the Prime Minister announced the National Action Plan to fight racism and anti-Semitism, together with the Ministers of National Education, Justice, the Interior and Culture, state secretaries in charge of digital information, urban management policy and the Inter-Ministerial Delegate to the Fight against Racism and Anti-Semitism (DILCRA).

The plan foresees 40 measures and a budget of EUR 100 million over 3 years, to be implemented under the supervision of the DILCRA who will have to report annually to the National Consultative Human Rights Commission, the Economic and Social Council and European authorities competent on human rights.

Some EUR 25 million per year will be used for actions in the suburbs in the context of the national urban management policy against discrimination and racism.

The fight against racism and anti-Semitism is declared 'National Great Cause' for 2015, which will lead to a national communication campaign, financed initiatives by anti-racist NGOs, and mobilisation around the diffusion of counter discourse to fight hate speech on the Internet. Other measures will include a specific action plan to be implemented in the national education programme, and simplification and reform of offences related to hate speech, which will be transferred from the law of 1881 on the press which imposes a very strict procedural framework to the common legal regime of the Penal Code which is much more accessible to victims. Measures will also be taken to improve safety around places of worship and confessional schools. The repression of hate crime on the Internet will be reinforced, and internet hosts will be required to hold a legal representation in France.

Internet source:

<http://www.gouvernement.fr/planantiracisme-eveiller-les-consciences-agir-ne-plus-rien-laisser-passer>, accessed 19 August 2015.

CASE LAW

Supreme Court decision finding age discrimination in professional regulation

In 2012 the National Ski Instructors' Corporation adopted a regulation limiting ski instructors' activity after the age of 62 and favouring young recruits in the distribution of teaching classes.

Article L1133-2 of the Labour Code provides that maximum age limitations do not constitute discrimination when they are objectively and reasonably justified by a legitimate aim, in order to favour employment policies, the employment market and professional training.

The Supreme Court (*Cour de cassation*) decided that this regulation of the profession violates Law No. 2008-496 of 28 May 2008 as well as the Employment Equality Directive and does not meet the requirements of Article 6 Paragraph 1(A) because it favours the purely individual private interests that are specific to ski schools and their preoccupation to satisfy the requests of their clients, which therefore do not qualify as legitimate aims as provided by Article L1133-2 of the Labour Code.³⁸

³⁸ Supreme Court decision of 17 March 2015, in case No. 13-27.142.

France has not adopted legislative derogations to the prohibition of discrimination in employment but only reiterated possible derogations provided by the Directive. Many employers have attempted to interpret these possibilities as allowing private parties to unilaterally define what constitutes reasonable derogations, or in other cases, occupational requirements. The case law of the Supreme Court however imposes a strict legitimacy and proportionality test and systematically refuses arbitrary unilateral definitions of requirements based on prohibited grounds such as age or sex. This is the first case relating to a maximum age limitation.

Internet source:

<http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000030383142&fastReqId=964259005&fastPos=50>, accessed 17 July 2015.

Supreme Court referral to CJEU of 9 April 2015 (No. 13-19855)

The claimant was hired as a computer engineer, and was informed that whenever she would be in contact with clients she would be required not to wear her Islamic headscarf in order to remain neutral towards their opinions. However, an important client informed the employer that the claimant was wearing the headscarf on site and that this made the employees very uncomfortable. The client therefore requested that further services be performed by an employee who would not wear the Islamic veil. The claimant refused to remove her headscarf and was dismissed for this reason.

The claimant's claim for discriminatory dismissal on the ground of religion was dismissed by the Labour Court and by the Paris Court of Appeal. Before the Supreme Court (*Cour de cassation*), the claimant argued that restrictions to religious freedom must be justified by the nature of the work and be required as a determining occupational requirement, that wearing an Islamic veil when working in the private sector does not violate the rights or beliefs of others, and that the discomfort of persons toward the Islamic veil does not qualify as a non-discriminatory reason justifying a limitation on the claimant's religious freedom. Therefore, she argued that the Court of Appeal of Paris had violated Articles L. 1121-1, L. 1321-3 and L. 1132-1 of the Labour Code, Articles 9 and 14 of the European Convention of Human Rights and Article 18 of the International Covenant on Civil and Political Rights.

Given that the CJEU has not yet ruled on whether private clients' desire not to be served by persons wearing an Islamic headscarf qualifies as a genuine and determining occupational requirement related to the nature or the conditions of performance of the working contract, the Supreme Court referred the case to the CJEU for preliminary ruling.³⁹

Internet source:

https://www.courdecassation.fr/jurisprudence_2/chambre_sociale_576/630_9_31521.html, accessed 17 July 2015.

National court decision regarding the scope of the obligation of neutrality and applicability of the ban of the headscarf to mothers on public-school field trips

The claimant is a mother who volunteered to accompany children on a public-school field trip and enquired whether she could be allowed to wear her Islamic headscarf during the trip. The teacher replied in writing that the school was no longer authorised to accept mothers wearing the Islamic veil to accompany children on field trips and that the claimant therefore had to remove it in order to participate in the field trip. The claimant challenged this decision before the administrative tribunal.

The administrative tribunal of Nice held that parents participating in field trips, as the pupils, are users of a public service. Therefore, any restriction on their freedom to express their religion must be based

39 Supreme Court decision of 9 April 2015, in case No. 13-19.855.

on specific express legislation or on considerations related to public order or functional requirements of the organisation of the public service, which the State has the task of establishing.⁴⁰ In this specific case, the teacher's written refusal to allow the claimant to participate showed that the school did not base its decision on a legal requirement, an argument based on public order or requirements necessary for the proper management of the public service. Therefore the school's decision was based on an error in law and must be quashed.

In this decision, the Court followed an opinion of the Supreme Administrative Court (*Conseil d'Etat*) which was published in December 2013 and put an end to the controversy regarding the scope of the duty of neutrality of persons participating in the execution of a public service and its applicability to mothers accompanying public-school field trips.⁴¹

Internet source:

<http://nice.tribunal-administratif.fr/content/download/43508/377042/version/1/file/1305386.pdf>, accessed 19 August 2015.

Landmark decision on liability of the State for practices of racial profiling

The Code of Penal Procedure allows police forces to proceed to perform identity controls without cause either when there is a magistrate order allowing controls on a specific day in a designated area or in order to prevent a crime.⁴² These provisions are widely used to check the identity of illegal immigrants or persons living in insecure areas, giving rise to what is considered to be racial profiling. Unless the control leads to an arrest, there is no procedure to trace an individual police control, and there is no explicit provision for a remedy.

Racial or ethnic origin

The 13 claimants had all been subjected to identity controls and searches without being arrested. When requesting in writing for justification of the controls from the police they received no answer, and therefore brought an action of civil liability of the State for racial profiling. Such liability requires that intentional characteristic fault of the public agent is established.

In 2013 the 13 cases were dismissed by the first instance court on the basis that the actions of the police officers, who acted within the parameters of the law, could not give rise to liability of the State.⁴³ The Defender of Rights presented observations before the Court of Appeal arguing that the State had a positive obligation to take action to prevent police controls based on racial grounds and ensure effective access to justice in application of the Constitution and of the European Convention of Human Rights.

In June 2015 the Court of Appeal admitted the appeals in five of the 13 cases, following the observations of the Defender of Rights, despite the fact that all identity controls were performed under the authority of a magistrate order.⁴⁴

The Court held that police controls must be performed with due respect for fundamental rights and for the principle of equal treatment, which cannot allow police controls operated on the basis of racial criteria, physical appearance or origin. The State must not only refrain from discrimination but must take all necessary measures to prevent its occurrence.

40 Nice Administrative Tribunal decision No. 1305386 of 9 June 2015.

41 See *European Anti-Discrimination Law Review*, Issue 18, pp. 60-61.

42 Article 78 paragraphs 2 and 3 of the Code of Penal Procedure.

43 High Court of Paris, 2 October 2013, Nos RG 12/05876, RG 12/05884, et seq.

44 Court of Appeal of Paris, decision of 24 June 2015, case Nos 348 – 13/24286, 347, 13/24284, 346, 13/24277, 345, 13/24274, 344, 13/24269, 343, 13/24267, 342, 13/24265, 341, 13/24262, 340, 13/24261, 351, 13/24303, 350, 13/24300, 349, 13/24299 and 339, 13/24255.

The protection by courts must allow claimants to demonstrate the fault. In the absence of any mechanism to trace and report on the circumstances of the police controls, once the circumstances of the control are established by the claimant, the police authorities must be in a position to justify why the control of this person or this profile of population is justified. In the absence of such evidence, even in the absence of evidence that the police's behaviour was inadequate, police controls based on discriminatory grounds constitute an aggravated fault triggering the liability of the State.

The Court awarded EUR 1500 in damages to each of the five claimants whose actions in damages were admitted. However, the identity of the specific policemen was never confirmed by the State and the civil court has no power to order disciplinary sanctions.

In the eight cases where the actions were not admitted, the Court accepted as legitimate, justifications of the police that the controls were based on the search for a person of North African origin who had just committed a robbery, that the person controlled was in an insecure neighbourhood running and hiding his face, and that it took place in a location known for massive violence and drug dealing. These eight claimants will appeal the Court's decision to the Supreme Court (*Cour de Cassation*).

Internet source:

<http://www.defenseurdesdroits.fr/fr/actions/protection-des-droits-libertes/decision/decision-msp-mds-mld-2015-021-du-3-fevrier-2015>, accessed 19 August 2015.

MK

Former Yugoslav Republic of Macedonia

LEGISLATIVE DEVELOPMENTS

Obligatory social insurances for freelance contract workers

Gender

With the entry into force of the amendments to the Law on Obligatory Social Insurance, from 1 January 2015 every freelance contract in which the fees are higher than the national minimum wage (currently approximately EUR 150 per month) will incur the liability of the freelance contract worker to pay all the obligatory social insurances. These include retirement, invalidity, and health insurance, excluding insurance in case of unemployment. These freelance contracts are regulated by the Contract Law (Law on Obligations; 'Закон _за _облигации') and include paying tax on personal income.

This new requirement to pay all of the obligatory social insurances on freelance work contracts applies to all social areas (any kind of service, arts, culture, journalism, translation, small crafts, minor repairing, cleaning services etc.) and all working people, only excluding retired people. In addition, the obligation does not include any temporal clause; the duration of the working contract can be one hour, one month, or one year – the Law does not distinguish between durations of contracts. The only exceptions are payments that amount to more than six times the average national monthly wages (approximately EUR 2 500), which are free of any taxation or duties.

The Law provoked strong reactions from almost all groups in the civil sector. In reaction, the Government further amended the legislation with the Law on Amendments of 10 February 2015; effectively 40 days after the amendments to the Law on Obligatory Social Insurance entered into force. This Law is already in force. However, the changes made by the Law of 10 February 2015 did not result in radical or substantial compromises. It introduced a differentiation between unemployed employees who are also engaged as freelance contract workers, for whom the starting level of paying the social taxes is the minimum salary (approximately EUR 150), and employed employees who are also engaged as freelance contract workers, for whom the starting level is the average salary (approximately EUR 400). Also, those who were first

exempt from paying the additional taxation (retired persons and those with wages that amount to more than six average monthly wages) are no longer exempt after the amendments of 10 February 2015 – the exceptions were deleted.

According to the new legislation, freelance contract workers have the same obligations, but not the same rights, as employees (as their contracts fall under the Contract Law). Female freelance contract workers are now obligated to make all payments in the same way as employees. However, they will not be covered by the Law on Labour Relations, which addresses discrimination, pregnancy, maternity leave, working conditions related to motherhood, and trade union protection.

Internet sources:

Proposed and adopted amendments to the Law on Obligatory Social Insurance, available at:

<http://www.sobranie.mk/materialdetails.nsp?materialId=5475f8ed-1f57-43a9-b57f-ee76a31a1db5>.

Protests against the amendments:

<http://www.time.mk/c/686742d9c3/protest-protiv-predlog-zakonot-za-honorarci.html>.

Both accessed 20 July 2015.

Amendment to Labour Law extends paid maternity leave for more than one child

On 29 April 2015 both of the parliamentary bodies (the Commission on Labour and Social Policy and the Commission on Legislative and Legal Issues) and the plenary session of the Macedonian Parliament adopted the Amending Law of the Law on Labour Relations. With this amendment, the period of paid maternity leave in cases of the birth or adoption of more than one child is extended from 12 to 15 months. Only Article 165 is amended, and only with respect to the length of the leave.

Gender

The Parliamentary Commission on Gender Equality was not involved in this procedure.

Within one week of the Ministry of Labour and Social Policy's proposal (22 April 2015), the Governmental Cabinet provided its backing and on 29 April the proposal of the Amending Law was presented for discussion to the parliamentary Commissions on Labour and Social Policy, and on Legislative and Legal Issues. In the former, two MPs took the floor to express the view that the amendment was necessary; and in the latter there was no discussion at all. In the plenary session of Parliament, also on 29 April, there was also no discussion. All 63 MPs present voted in favour of the amendment.

Internet source:

Amendments to the Law on Labour Relations of 29 April 2015, available at:

<http://www.sobranie.mk/materialdetails.nsp?materialId=3b8dc4d5-39ce-43db-aa20-0f39b9d497c1>, accessed 20 July 2015. On 5 May 2015 the amendment was published in the Official Gazette of the Republic of Macedonia (72/2015).

POLICY DEVELOPMENTS

Publication of the Annual Reports of the two National Human Rights Institutions

The two national Human Rights Institutions with competences related to the protection against discrimination – the Commission for Protection against Discrimination (CPAD) and the Ombudsperson – published their annual reports for 2014.

All grounds

Only a small number of the complaints received by the Ombudsperson, who is responsible for cases asserting violations of all human rights, concerned discrimination (66 complaints, 1.55 % of the total number of complaints). The Ombudsperson did not publish detailed statistics as to grounds and fields

in relation to the complaints, but did mention that the trend of the largest number of cases being in employment and on grounds of ethnicity has continued.

The CPAD received 106 complaints in 2014, which is an increase compared to 2013 when it received 83 complaints. Although the complaints data show a relatively even spread of grounds and fields, most complaints concerned the ground of ethnicity (26) and the field of employment and labour relations (42). The CPAD reports that it fully processed 34 of the complaints received in 2014, and that it opened and/or processed 80 complaints from the backlog of previous years. In 2014 it found discrimination in seven cases only.

Internet sources:

Ombudsperson Annual Report 2014:

<http://ombudsman.mk/upload/Godisni%20izvestai/GI-2014/GI%202014.pdf>.

Commission for Protection against Discrimination Annual Report 2014:

<http://sobranie.mk/downloadaddocument.aspx?id=d5fc5a99-4941-4a6a-84f3-3776d9d1b67d&t=pdf>.

Both accessed 16 April 2015.

Annual Report of NGO Network highlights inefficiency of the national equality body

The Network against Discrimination, a network comprised of six civil society organisations working on equality and non-discrimination issues, published its annual report for 2014. Based mainly on data regarding the number of complaints submitted by the Network to the national equality body CPAD and the number of complaints resolved, the Network draws conclusions regarding the capacity and efficiency of the CPAD, finding for instance that the Ombudsperson seems to be a more efficient institution in dealing with complaints than the equality body. Important delays also seem to indicate, according to the Network, negligence in the work of the equality body with regard to some complaints.

Internet source:

http://www.mhc.org.mk/system/uploads/redactor_assets/documents/928/_____2014.pdf, accessed 29 May 2015.

CASE LAW

Court finds lack of reasonable accommodation to constitute discrimination

The claimant is the grandfather of a child with a psychosocial disability claiming that lack of adaptation of infrastructure creates an obstacle to free movement for his grandson who cannot leave the house by himself as there is no pavement and no aids for movement. He has requested and been promised the necessary adaptations by the municipality several times.

The claimant brought the case before the Commission for Protection against Discrimination (CPAD), which found discrimination on grounds of disability due to lack of reasonable accommodation – a form of discrimination under national legislation. In addition, the Ombudsman pointed out the violation to the municipality in a communication, but no improvement of the situation followed. So the claimant took the case to court.

The Court of First Instance in Delcevo established discrimination and requested that the municipality adjust the infrastructure in a way that will no longer pose obstacles for the child to leave his house, as requested by the claimant. It also awarded damages for fear and psychological pain suffered.⁴⁵

45 Case Judgment P-4, No. 14/2014, Court of First Instance Delcevo, of 20 March 2015. The decision is not publicly available, and the amount of damages is not disclosed in the version available to the Network.

This is the first court decision to find discrimination on grounds of disability and the first to find that lack of reasonable accommodation amounts to discrimination.

CPAD found no segregation of Roma children in education

In 2011, the Helsinki Committee of the FYR of Macedonia filed a complaint with the Commission for Protection against Discrimination (CPAD) asserting discrimination on grounds of ethnicity in primary education. The claimant argued that primary schools in the town Bitola segregate Roma children by enrolling all of them in the school which is the closest to the part of the town which is inhabited mainly by Roma, no matter where each child actually lives. As the CPAD did not respond to this complaint for over three years, the Network against Discrimination filed a case with the Ombudsperson against the CPAD for non-respect of the legal deadline (90 days) for responding to this and a number of other complaints. It was only after the Ombudsperson instructed the CPAD that it must submit a response, that the CPAD delivered its Opinion.⁴⁶

Racial or ethnic origin

The CPAD did not find discrimination or segregation on grounds of ethnicity, but held that the current situation is a result of the Roma parents' choice to register their children in that specific primary school. However the CPAD fails to specify the basis for its finding, and simply adds that it 'further supports this argument' with a report from a person from another state institution who claims that this process is one of 'natural segregation'.

Internet source:

<http://www.kzd.mk/mk/prestavki/2014/category/56-Етничка%20Припадност?download=209:07-80-05-09-2014-5>, accessed 29 May 2015.

Germany

DE

LEGISLATIVE DEVELOPMENTS

German legislator introduces a statutory 30 % gender quota for supervisory boards of all private companies that are listed and subject to full co-determination

The newly adopted Law on the equal participation of women and men in leading positions of private companies and in the civil service provides for a statutory 30 % gender quota for supervisory boards of all private companies that are listed and subject to full co-determination, entering into effect in 2016. In case of non-compliance, the election is void and the seat designated for a member of the under-represented gender remains vacant.

Gender

The Law includes binding published target quotas for executive and supervisory boards, as well as for the highest management level of listed or fully co-determined private companies. Each company determines its target quota, and although the Law does not specify a minimum quota, the target quota must not fall below the status quo as long as the women quota in leading positions of the company does not exceed 30 %.

The companies addressed must publish their first target quota by 30 September 2015, and reach their self-imposed goals by 30 June 2017. The subsequent time periods for realising self-imposed target quotas must not exceed five years.

⁴⁶ The Opinion is dated 5 September 2014, but was delivered to the initial claimant in December 2014 and reported in the Network against Discrimination's Annual Report in April 2015. The text of the Opinion is now also available on the website of the CPAD.

The Federal Minister for Justice compared the statutory gender quota with the introduction of women's right to vote and, agreeing with the Minister for Family, Senior Citizens, Women and Youth, declared the beginning of a cultural change. In December 2014, the Ministry for Family, Senior Citizens, Women and Youth published an expert study on women in leading positions (written in 2010). It recommended a minimum gender quota for supervisory boards, and target quotas and measures to effectively reconcile family and working life for operative management positions.

The German Women Lawyers' Association welcomed the introduction of the statutory gender quota but criticised its very narrow scope of application. The Association demands statutory gender quotas on executive boards and in higher management levels as well, and pointed out that no more than one hundred companies in Germany are listed and subject to full co-determination. Moreover, the Association suggested the introduction of effective sanctions, such as the invalidity of resolutions of the respective board and corporate tax disadvantages.

It is true that for the last fifteen years, soft law and self-regulatory instruments have not been sufficiently effective. Despite the chances of radical improvement in the 'super election year' 2013, in September 2014 females represented only 5.8 % of executive board members and 18.9 % of supervisory board members of the 160 listed companies. Furthermore, 31 of these companies have no female board members at all. The provisions of the law are lacking compared to those of previous drafts presented by the Greens and the Social Democratic Party.

Internet sources:

Legislative history with all relevant documents:

<http://dipbt.bundestag.de/extrakt/ba/WP18/643/64384.html>.

Criticism by the German Women Lawyers Association: <http://www.djb.de/Kom/K1/st14-17/>.

Women-on-Board-Index I of 30 September 2014: http://www.fidar.de/webmedia/documents/wob-index/140930_WoB-Index_I_Internet.pdf.

All accessed 23 August 2015.

German legislator improves the flexibility of parental leave and rewards the equal sharing of the leave between parents

On 1 January 2015, amendments of the Federal Statute on Parental Leave and Parental Allowances (*Bundeselterngeld- und Elternzeitgesetz, BEEG*) entered into force. The corresponding new regulations have been applicable since 1 July 2015.

Previously, the Law provided for parental leave for up to three years and for a parental allowance to parents for up to 14 months after birth, provided that the other parent takes at least two months. The amendments to the BEEG extend the duration of the entitlement to parental allowances of parents working part-time. They can receive their parental allowances in payments of halved amounts while the number of months paid is doubled. Parents working part-time simultaneously between 25 and 30 hours per week whilst also taking parental leave for 4 months are entitled to additional parental allowances for these months ('partnership bonus').

To increase the flexibility of parental leave, the amended BEEG grants every parent the right to take up to 24 months of the parental leave between the third and eighth birthday of the child, without requiring the consent of the employer, instead of up to 12 months with consent of the employer. The amendments are intended to encourage both parents to work part-time during parental leave and to share family responsibilities and childcare duties more equally.

The German Women Lawyers' Association welcomed the improvements for parents working part-time and sharing care responsibilities. However, the Association criticised the complications and restrictions of the 'partnership bonus'. It suggested to accept part-time work between 20 and 30 hours per week

and to secure the entitlements of single parents. It further suggested introducing the possibility to take parts of the parental leave between the third and fourteenth birthday of the child, to offer more flexible distributions of working time, and to strengthen the protection against dismissal after parental leave. The Association pointed out that the lack of a right to return to work after parental leave violates Directive 2010/18.

The amendments of the Federal Statute on Parental Leave and Parental Allowances encourage parents to work part-time during parental leave and to share family responsibilities and childcare duties more equally by introducing financial incentives and more flexible regulations on parental leave.

Internet sources:

Explanations of the amendments to the Federal Statute on Parental Leave and Parental Allowances and downloads: <http://www.bmfsfj.de/BMFSFJ/gesetze,did=93110.html>.

Criticism by the German Women Lawyers Association: <http://www.djb.de/Kom/K4/st14-10/>.

Both accessed 23 August 2015.

German legislator extends the entitlements to home-care leave and improves its financial support

On 1 January 2015, the Statute on the Better Reconciliation of Family, Home Care and Work entered into force. The Statute makes several amendments to the 2008 Law on Home Care Leave and the 2012 Law on Family Home Care Leave. From the reluctant use of the possibilities of both laws, it could be concluded that they did not meet the needs of caring employees.

Gender

The laws covered an emergency care leave for up to ten working days and part-time or full-time home-care leave for up to six months. Further, the laws provided for a reduction of working time to no less than fifteen hours per week in agreement with the employer for up to two years to care for a close relative in need of home care. The special measure was that this so-called family home-care leave was financed by an interest-free loan granted by the employer and secured by the respective authorities for up to two years. During the home-care leave, the employee's lower income was topped up by a payment of 50 % of his or her reduced income, and the interest-free loan was repaid by receiving this amount of income sometime after the home-care leave.

Under the Statute on the Better Reconciliation of Family, Home Care and Work, employees taking emergency care leave are now entitled to 'home care support benefit' as a means of earnings replacement benefits under Section 2 of the amended Law on Home Care Leave. The entitlement to part-time or full-time home-care leave is extended to care leave for a close relative under the age of eighteen for up to six months even when in need of care outside the home, and to end-of-life care of a close relative for up to three months. The entitlement to family home-care leave by reducing working time is extended to care leave for minor close relatives for up to 24 months.

The financial coverage of home-care leave and family home-care leave was thoroughly amended. Under Section 3(7) of the Law on Home Care Leave and Sections 3*et seq.* of the Law on Family Home Care Leave, employees taking one of the care leaves are entitled to an interest-free loan to be paid in monthly instalments granted by the Federal Agency for Family and Civil Society Tasks. Employers are therefore released from the administration of the loan. After the end of the respective care leave, employees are obliged to repay the loan but Section 3(7) of the Law on Home Care Leave and Sections 7 of the Law on Family Home Care Leave include hardship clauses. The Federal Agency for Family and Civil Society Tasks can award the extension, partial remission, or cancellation of the repayment.

Internet source:

More information available at: <http://www.wege-zur-pflege.de/neu-seit-112015.html>, accessed 23 August 2015.

POLICY DEVELOPMENT

Still waiting for a draft law to implement the Istanbul Convention concerning non-consensual sexual acts

Gender

The Council of Europe Convention on preventing and combating violence against women and domestic violence, which Germany has not yet ratified, obliges States Parties to criminalise, without further requirements, engaging in non-consensual sexual acts. In Germany, only 5-10 % of all sexual assaults are reported, attrition rates continue to rise and only 8 % of all investigation procedures lead to a conviction. Criminal law not only includes the requirement of lack of consent but additionally the requirement of force, serious threat, or an especially vulnerable situation of the victim. In the majority of cases in which the perpetrator is a person close to the victim and/or the victim does not fight back, state prosecutors and judges do not identify the sexual assault as falling within the scope of criminal law, or they do not believe the victim.

On 28 January 2015, the parliamentary Committee of Justice held a public hearing on the implementation of Article 36 of the Istanbul Convention. The majority of experts recommended amendments to the Criminal Code. Prior to the hearing, the Federal Association of Women's Advice Centres and the Women's Emergency Hotlines, the German Women Lawyers' Association, and the Greens had demanded amendments to the Criminal Code to implement the Council of Europe Convention and to combat and prosecute sexual violence effectively. The National Human Rights Institution had identified the need for some amendments from a human rights perspective. However, the Federal Ministry of Justice showed reluctance to fully implement the Convention.

A draft law on the implementation of European requirements for criminal law related to sexual assaults explicitly precluded sufficient implementation of Article 36 of the Istanbul Convention as subject of further investigation. In addition, the respective amendments of the Penal Code were adopted without a solution in January 2015. In the media, a chairman of judges at the Federal Court of Justice, Thomas Fischer, has actively campaigned *against* the prosecution of non-consensual sexual acts without further requirements.

In November 2014, the meeting of the ministries of justice of the *Länder* supported the identification of the need for amendments to the Criminal Code concerning the protection of sexual self-determination. In January 2015, criminal law professor Tatjana Hörnle presented an expert study on the implementation of Article 36 of the Istanbul Convention, including the proposal of a draft law to amend the Criminal Code. The Federal Minister for Justice announced the intention to present a draft law before the parliamentary summer recess, which started on 6 July 2015. However, this was not realised.

Catholic Church rules on duties of loyalty amended

Religion
or belief

Sexual
orientation

The Conference of German Bishops has amended its internal rules on duties of loyalty applicable to employees of the Catholic Church and its organisations. According to the new rules, re-marrying after divorce or concluding a Registered Partnership with another person of the same sex will be regarded as a severe breach of the duties of loyalty justifying dismissal only in exceptional circumstances, and only when the second marriage or the registered partnership causes significant upheaval in the community of employees or the professional environment and compromises the credibility of the Catholic Church. For employees with a specific religious mission the severity of the breach is assumed. These rules have to be adopted in the various dioceses to become effective.

The rules liberalise the treatment of re-marrying and same-sex couples. The amendment indicates a step toward a more differentiated treatment of breaches of loyalty as interpreted by the Catholic Church, not least regarding the kind of work performed. This has substantive consequences for the issue of the degree to which religious communities are entitled to treat employees disadvantageously because of

their sexual orientation. The new guidelines restrict the possibilities within the Catholic Church more narrowly than in the past.

Internet source:

<http://www.dbk.de/presse/details/?suchbegriff=grundordnung&presseid=2795&cHash=f7f556c89939c3780a06cee2ed56eb6c>, accessed 19 August 2015.

CASE LAW

Hospital which is part of a religious community imposes neutrality on employees

The claimant was a nurse in a hospital who was dismissed when she returned after maternity leave wearing an Islamic headscarf. The hospital was part of the Protestant Church, and the employment contract of the claimant included special provisions requiring employees to act in a manner reconcilable with the religious mission of the Church.

Religion
or belief

The Federal Labour Court (*Bundesarbeitsgericht*) decided that it is in principle permissible for an employer who is part of a religious community to require neutral behaviour during working hours.⁴⁷ This duty of neutrality can justify the prohibition to wear an Islamic headscarf. Referring to the specific provision of the employment contract, the Court held that the employee could not argue that the prohibition of wearing the headscarf was unreasonable. In addition, it was within the constitutionally protected autonomy of the Protestant Church to demand neutral behaviour of the employee, this autonomy being limited only by fundamental rights and the *ordre public* which the Court found not to have been violated. With regard to discrimination law, the Court argued that any unequal treatment would be justified under Article 9.2 of the General Equal Treatment Law which provides for special duties of loyalty with regard to employers with an ethos based on religion or belief, transposing Article 4(2) of the Employment Equality Directive.⁴⁸ As it was unclear whether the hospital in fact was part of the charitable organisations of the Protestant Church and could thus legitimately impose such a duty of neutrality and whether the claimant was in fact (due to health reasons) capable of working, the Court remanded the case to the lower instance for reconsideration.

The judgment of the Court confirmed the consistent case law of German courts including the Federal Constitutional Court on the autonomy of religious communities to define the duties of loyalty themselves within the limits of fundamental rights and the *ordre public*.

Internet source:

<http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=pm&Datum=2014&anz=47&pos=0&nr=17769&linked=urt>, accessed 19 August 2015.

Two Constitutional Court decisions on admissibility of visible religious symbols in schools

In the first case, the claimant is a Muslim woman who worked as a social worker in schools for several years wearing a headscarf without any conflicts. After a change of the law of the Land North Rhine-Westphalia regulating the professional duty of teachers to adopt religiously neutral behaviour (extended to social workers in schools), the school authorities prohibited the wearing of the headscarf. The claimant substituted the headscarf by a cap and a polo neck, but the school authorities held that even this kind of garment violated the duty to display neutral behaviour because an observer would interpret it – in this

Religion
or belief

⁴⁷ Federal Labour Court (*Bundesarbeitsgericht*), decision No. 5 AZR 611/12 of 24 September 2014.

⁴⁸ For an analysis of national law transposing Article 4(2) of the Employment Equality Directive in inter alia Germany, see Vickers, L. (2015), 'Religion and belief discrimination in employment under the Employment Equality Directive: A comparative analysis', in *European Equality Law Review*, Issue 1, pp. 25-37.

particular case – as a manifestation of Islamic faith. The decision of the school authority was upheld by the labour courts.

In the second case, the claimant had been teaching for several years with a headscarf without complaints. On the basis of the same legislative change as in the first case, the school authorities prohibited the wearing of the headscarf and the claimant was dismissed when she refused to comply with the new regulations. The labour courts upheld the dismissal.

In January 2015 the German Federal Constitutional Court decided on both cases together, finding that the prohibition to wear a headscarf as a teacher or a social worker in a public school violated the claimants' constitutional right to freedom of religion.⁴⁹ The aims pursued by the amended law were to protect the religious neutrality of the State and the peaceful operation of public schools without religious conflicts; to secure the educational duties of the State and to balance competing fundamental rights of pupils and their parents. The Court found that these aims are legitimate, but that the means to achieve them are disproportionate. In the view of the Court a general ban on visible religious symbols or clothing is not appropriate given the importance of the right to freedom of religion concerned. Neither the right of pupils not to be indoctrinated on religious grounds nor the right of parents to determine the education of their children is interfered with by such visible symbols if they are not accompanied with proselytising action. Finally, the Court held that the neutrality of the State is not violated because the symbol is attributed to the person wearing it, not the State.

The Court further noted that a prohibition to wear visible religious symbols is only proportionate if there are particular circumstances that create a concrete danger of substantial conflict because of the wearing of such symbols in schools. In these exceptional cases, prohibitions limited to these concrete cases are constitutional and not violating constitutional rights, rights under the ECHR or federal law like the General Equal Treatment Act. As a result, the Court interpreted the law restrictively, finding that a prohibition is only admissible if in fact there is such a concrete danger. As the law was open to such a narrow interpretation the Court found that it was not to be declared unconstitutional.

In addition, the Court struck down a specific provision which exempted Christian and Jewish symbols from the prohibition of behaviour that is not religiously neutral, finding that it violated Articles 3.3 and 33.3 of the German Basic Law that prohibit discrimination on the ground of religion. In doing so it rejected previous case law of other courts on this regulation that had interpreted this rule *contra legem* as applying to all religions alike. The Court regarded this case law as overstepping the possible limits of legal interpretation.

This decision overturns a prior decision of the German Federal Constitutional Court on the headscarf worn in schools, and will have general implications for the admissibility of religious symbols in employment.

Internet sources:

http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2015/01/rs20150127_1bvr047110.html, accessed 19 August 2015.

⁴⁹ German Federal Constitutional Court decision in case No. 1 BvR 471/10, of 27 January 2015.

Greece

EL

POLICY DEVELOPMENTS

ECRI report on racial discrimination in Greece

In February 2015 ECRI published its latest report on racial discrimination in Greece. In its previous fourth report of 2009, ECRI had welcomed the adoption of Law 3304/2005 as a positive step, but had also pointed out certain gaps which required amendment in order to provide wider protection against discrimination and reinforce the law. The new fifth report emphasised that no amendments have been made to reinforce Law 3304/2005 or broaden its scope, and therefore reiterates a number of recommendations already made in 2009. These include the adoption of amendments in line with ECRI's General Policy Recommendation No. 7, to include the grounds of colour, citizenship and language; extend the scope of Chapter III of the law (covering *inter alia* religious or other beliefs) to social protection, education and access to goods and services; include discrimination by association and by assumption; include a direct obligation on public authorities to prevent discrimination in carrying out their functions; and to enable NGOs to bring cases to court without representing a specific victim.

Racial or
ethnic origin

As far as Equality Bodies are concerned, ECRI also reiterates recommendations from its fourth report, notably to extend the Ombudsman's mandate to allow the body to initiate and participate in court cases, and to intervene in favour of claimants whose cases it has investigated.⁵⁰ The Ombudsman's mandate should also be extended to cover complaints in the private sector and not exclusively the public sector, or alternatively a separate body should be established with a mandate to receive complaints from the private sector. As regards the other two bodies tasked with monitoring compliance with the principle of equal treatment (the Equal Treatment Committee and the Labour Inspectorate), ECRI repeats that they are not independent bodies as they are integral parts of the relevant Ministries (Justice, Transparency and Human Rights, and Labour, Social Security and Welfare, respectively). ECRI recommends that these two bodies should be given a status similar to that of the Ombudsman.

Internet source:

<http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Greece/GRC-CbC-V-2015-001-ENG.pdf>, accessed 20 July 2015.

Ombudsman's special Annual Report on discrimination

In its 2014 special Annual Report on discrimination, which was published in April 2015, the Greek Ombudsman, as an Equality Body, presented a variety of cases regarding violation of the principle of equal treatment.

All
grounds

In the year 2014 the Ombudsman investigated 216 cases of alleged discrimination. 38 of the total number of cases were dismissed because they were found either to fall outside the Ombudsman's jurisdiction, to be unfounded or because no evidence was brought forward by the interested parties. Of the remaining 178 cases investigated, the Ombudsman found that discrimination had occurred in 167 cases and that no discrimination had occurred in 11 cases. At the time of reporting, the Ombudsman noted that the defendant administration only complied with the Ombudsman's recommendation in 25

⁵⁰ The Ombudsman can only refer a case to the competent prosecutor or administrative authority for investigation, without having the right to initiate and participate in court cases. Since 2010, the National Commission of Human Rights (NCHR) has been proposing to amend Law 3304/2005 to allow the Ombudsman to intervene in favour of a claimant in cases which the body has previously investigated and are subsequently heard by the courts. However, no such amendments have been made or are planned.

cases.⁵¹ It is noteworthy in this regard that the Ombudsman can only issue non-binding recommendations. There are still 53 long-pending cases mainly regarding the issue of housing for Roma. This backlog is due to the structural character of this type of discrimination and due to the decision of the Ombudsman to intervene actively in these cases at every development and until the final resolution of the issue.

Regarding the grounds and fields where complaints of discrimination were brought before the Ombudsman in 2014, 62 of the total of 216 concerned employment, 46 education and 108 supply of goods, services and housing. The highest number of complaints concerned race or ethnic origin (100 complaints, of which 75 were brought by Roma) followed by disability (50 complaints), age (33) and religion or belief (29). Only four complaints were brought in 2014 on the ground of sexual orientation.

The Ombudsman emphasised that education constitutes a field of vital importance regarding the elimination of the social exclusion of Roma. Education of Roma children does not seem to be given due consideration while planning solutions for the relocation of Roma settlements, nor does ensuring easy access to the education process seem to constitute a strategic goal. Moreover, the Ombudsman highlighted that in practice most of the relocation efforts concerning Roma seem to pursue the aim of removing the current Roma settlements from urban areas and installing them in isolated places which hardly ensures, on the one hand, decent living conditions and, on the other, good planning and connection of the specific settlements with easy access to education, health services, and employment. As the 2014 Special Report points out, this discrepancy, apart from the legal issues it raises, seems to accommodate the management of the actual or alleged local intolerance, rather than the achievement of the declared and binding goals of the National Strategy.

Internet source:

http://www.synigoros.gr/?i=kdet.el.ehtisies_ektheseis_documents.267014, accessed 20 July 2015.

CASE LAW

National court declares unconstitutional the reduction of the minimum wage for employees under the age of 25

The 6th Act of the Council of Ministers of 2012⁵² imposes an automatic reduction by 32 % of the minimum wage only for employees below the age of 25, irrespective of any collective agreements which may apply to them.

The claimant was a young employee who brought an action against his employer who had lowered his salary to the newly implemented minimum wage. In April 2015 the Justice of Peace of Thessaloniki, found the reduction of young employees' minimum wage to be unconstitutional and unlawful, for the following reasons:

1. The relevant provision of the 6th Act of the Council of Ministers of 2012 introducing discrimination on the ground of age violates the constitutionally protected rights of equality before the law (Article 4 Paragraph 1), equal pay and collective autonomy (Article 22 Paragraph 1) and protection of youth (Article 21 Paragraph 3).
2. Discrimination against young employees violates the principle of non-discrimination as it is stipulated in Article 8(c) of the Anti-Discrimination Law 3304/2005.
3. There was no public interest justification for imposing measures of salary and social insurance inequality, since there was no evidence of causation or logical relevance of the protection of national economy by the dramatic reduction of minimum wages.

⁵¹ In 20 cases the defendant administration declined to comply while in the remaining 122 cases the administration had not yet responded to the Ombudsman's recommendations.

⁵² Issued in application of Article 4 of Law 4046/2012 (OJ 28 A /14.02.2012). This law also reduced, to a lesser degree, the minimum wage for older employees.

4. The entire 6th Act of the Council of Ministers was adopted in violation of the Constitution (Article 26, Article 43 Paragraph 2) for procedural reasons.⁵³

Internet source:

<http://www.kepea.gr/article.php?id=1366>, accessed 20 July 2015.

Discrimination due to ‘mental disability’ in an advertisement for enrolment in vocational training

In 2014 the Greek Ombudsman received a number of reports from the National Association of Persons with Disabilities and individual claimants regarding an advertisement on the website of the national public employment organisation (OAED) calling for expressions of interest to enrol at the Vocational School for Persons with Disabilities for the year 2014-2015. Specifically, the advertisement, *inter alia*, mentions that: ‘Those with a disability caused by mental illness cannot participate in these programmes’.

Disability

In May 2015, the Greek Ombudsman issued a non-binding Opinion finding that the principle of equal treatment had been violated.⁵⁴ The Opinion noted that the advertisement violated Articles 12 (Equal recognition before the law), and 27 (Work and Employment) of the UN Convention on the Rights of Persons with Disabilities, which Greece ratified (together with the optional Protocol) through the adoption of Law 4074/2012, and, thus, has to implement nationally.

In addition, the Ombudsman noted that the exclusion of persons with mental disabilities from the call for expression of interest amounted to discrimination in violation of the Employment Equality Directive, incorporated into national legislation by Law 3304/2005.

OAED has responded positively to the Ombudsman’s opinion and committed, in writing, to cooperate with representatives of persons with a mental illness in order to find a solution so that subsequent calls of expression of interest may be inclusive and respect the principle of equality. The Ombudsman has declared that developments regarding this issue will be followed closely.

Internet source:

<http://www.synigoros.gr/resources/docs/synoyh-diamesolavhshs-diakritikh-metaxeirish-logw-yyxikhs-anaphrias-se-prokhry3h-toy-oad.pdf>, accessed 20 July 2015.

Discriminatory deletion of a person from public employment organisation’s records

The claimant is a long-term unemployed person of non-Greek origin and nationality who due to his temporary absence from the Greek territory had been removed from the register of the national public employment organisation (OAED). The absence was discovered when the claimant presented his passport as proof of his identity to register for a training programme for unemployed persons.

Racial or ethnic origin

The claimant submitted a report to the Greek Ombudsman, who published a non-binding Opinion⁵⁵ in May 2015. The Ombudsman noted that absences from the national territory will only be discovered as regards third-country nationals as EU citizens would have the possibility to travel within the Schengen area without the OAED discovering their absences. As a result, only unemployed third-country nationals suffer the consequences of ‘non-availability’ (due to absence from the Greek territory), such as the removal from the record of unemployed and the loss of other rights and benefits (e.g. tax exemptions, etc.). The Ombudsman emphasised therefore that this is not the most appropriate instrument for

⁵³ Justice of Peace of Thessaloniki, decision No. 34/2015 of 6 April 2015. The Justice of Peace is the lowest level of civil courts. Its competence concerns civil cases that arise from conflicts between private parties if their estimated financial value does not exceed EUR 20 000.

⁵⁴ Opinion of 4 May 2015.

⁵⁵ Opinion of 25 May 2015.

establishing the ‘availability’ of the unemployed and constitutes indirect discrimination against nationals of third countries which is, due to the specific circumstances, based on their ethnic/racial origin. In this regard, the Opinion notes that absence from the Greek territory is an objective criterion that could not be related ‘by definition’ to the nationality of a person, which shows that indirectly there is a hidden ground of discrimination.

For this reason, the Ombudsman asked the OAED to change the existing practice and apply appropriate detection measures of ‘non-availability’ of the unemployed, which would serve legitimate and lawful restrictions without placing unemployed nationals of third countries in a disadvantageous situation. OAED responded that it was implementing the existing legal framework and did not have the discretionary power not to apply the rules regarding registered unemployed persons’ obligation to declare absences from the Greek territory. Thus, legislative amendments would be necessary for the organisation to be able to amend its practice.

Internet source:

http://www.synigoros.gr/resources/docs/synoyh-diamesolavhshs-_oaed-diakriseis_.pdf, accessed 20 July 2015.

HU

Hungary

LEGISLATIVE DEVELOPMENT

Amendment to the Equality Act modifies the definition of ‘work relationship’

Article 3 of Act LXXIV of 2015 came into force on 19 June 2015, and modified the definition of ‘work relationship’ found in Article 3(1)(a) of Act CXXV of 2003 (Equality Act), which contains the definition of notions used in the Equality Act. These include the following: work relationship, other relationship for work, government support, public utilities, non-governmental organisations and trade unions, relatives, claimant, respondent, and violator.

Before the amendment, Article 3 of the Equality Act defined ‘work relationship’ as: ‘employment relationship, public service relationship, civil service relationship, judicial service relationship, judicial employees’ legal service relationship, prosecution service relationship, professional and contracted service relationship of soldiers, professional foster parent relationship’. The amendment added to the above listing: ‘the legal relationship between the temporary work agency and the employee that falls under the scope of the Labour Code’.

Under the new Paragraph 2, the organisation that hires a worker through a temporary work agency is also considered to be an employer.

The modification now explicitly declares that the legal relationships between the temporary work agency and the employee, and between the employee and the user enterprise, fall under the scope of the Equality Act.

This modification is technical and formal in nature. The lawful interpretation of the ‘employment relationship’ (which is part of the category of the work relationship) already covered this type of contract, prior to the amendment. According to Article 218 of the Labour Code, the relationship between the temporary work agency and the employee is considered an employment relationship. Furthermore, Article 219 of the Labour Code obliged both the temporary work agency and the user enterprise to meet the requirements of equal treatment; and the Article regulated the specificities of this obligation.

Gender

The modified notion of 'work relationship', which lists 'employment relationship' and 'the legal relationship between the temporary work agency and the employee that falls under the scope of the Labour Code' is repetitive and confusing in relation to the legal nature of the relationship between the agency and the employee. It implies that the relationship between the agency and the employee is not an employment relationship. If not, it would not be included into the listing as a separate entry.

Internet sources:

Modified text of Equality Act in Hungarian, providing the text of the Act which is in force, available at: http://njt.hu/cgi_bin/njt_doc.cgi?docid=76310.294675.

Text of Act LXXIV of 2015, available at: http://njt.hu/cgi_bin/njt_doc.cgi?docid=176171.294747.

Both Acts accessed 27 July 2015.

Only the Law in force at the time of the search is available from the public library.

CASE LAW

Supreme Court confirms burden falls on employer to prove having met rules on equal pay for equal work

Following maternity and parental leave, the claimant, an employee in a managerial position, was told by her employer that she could not continue working in the same position. She was instead offered a lower-level position, which she did not accept. The claimant was subsequently dismissed from employment.

The claimant brought a claim before the court of first instance, claiming that she had been discriminated against on the ground of sex, and that she was not provided with equal pay for equal work since her return from parental leave.

During the procedure, the employer did not fulfil the obligation to provide evidence: the evidence provided was misleading as it contained a calculation error, and some evidence was not filed because the employer claimed he had difficulties in gathering the requested data.

The court of first instance dismissed the case because the employee could not prove that she had been discriminated against during the dismissal; and that when the employer increased her salary following her return from parental leave, it was not equal to the salary of a male employee in the same position. The court of second instance partly upheld the claim in regard of the equal pay claim. The claimant then took the case to the Supreme Court (*Curia*).

The Supreme Court overturned the decision of the court of second instance, because the court did not correctly apply the rules on the burden of proof in discrimination cases. The Supreme Court pointed out that the employer must prove having met the rules on equal treatment and on equal pay for equal work. The Supreme Court also stated that in cases in which the employer fails to provide proper evidence, the claimant's claim must be upheld. The court of second instance was obliged to re-adjudicate the case on the basis of the guidance provided by the Supreme Court.

This case reveals how lower-level courts often do not apply the special rules on the burden of proof in equal treatment cases. It is hoped that the publication of this Supreme Court ruling will provide guidance to the lower-level courts in this regard.

Internet source:

Summary of the case available at: <http://www.lb.hu/hu/sajto/tajekoztato-kuria-mi-tanacsa-altal-targyalason-kivul-elbiralt-mfvi106302014-szamu-ugyrol>, accessed 23 July 2015.

The full decision has not yet been published.

Gender

Curia quashes local council's discriminative decree on housing

Racial or
ethnic origin

In May 2014, the Municipal Council of Miskolc amended its Decree on Social Housing, introducing a limitation on receiving financial compensation for the termination of social housing for tenants of 'low comfort' social housing. This amendment introduced differential treatment of low-comfort as compared to ordinary social-housing tenants, *de facto* allowing the authorities to 'expel' from the municipality tenants living in low-comfort social housing, which in practice are almost exclusively Roma.⁵⁶

The Government Office responsible for the supervision of the legality of municipal decrees requested the Municipal Council to amend the decree. When the Council refused to do so, the Government Office filed a motion with the *Curia* (Supreme Court) for the decree to be quashed.

The Supreme Court concluded that the relevant provision of the decree put tenants of low-comfort social housing in a disadvantaged situation compared to other social-housing tenants, and although differentiation may be justified if it pursues a legitimate aim, in this particular case no such aim was presented by the Municipal Council.⁵⁷ The Court therefore found discrimination on the grounds of financial situation and social status in violation of Article 26 of the Equality Act, which expressly bans discrimination in relation to housing subsidies, benefits provided by the State or a municipality, or in relation to the determination of conditions of sale or lease of state-owned or municipal housing and plots. The Court refuted all arguments presented by the Municipal Council and quashed the amended Article 23(3) of the Municipal Decree.

Although it is common knowledge that the majority of the tenants concerned are of Roma origin, the Court did not deal with the racial aspect of the issue, as under the Equal Treatment Act social and financial status are protected grounds in their own right, and in the absence of reliable official statistics, establishing the ethnic origin of the victims of the discriminatory decree would have been more complicated than referring to their indigence.

Internet source:

<http://magyarkozlony.hu/dokumentumok/62a153856fe4d348a532ffbf51ac3ea8e4a6330/megtekintes> (pp. 6007-6010), accessed 22 July 2015.

IS

Iceland

CASE LAW

Temporary appointment of two male inspectors violates the Gender Equality Act

Gender

The Gender Equality Complaints Committee issued a ruling on 28 April 2015 in Case No. 6/2014 brought against the Ministry of the Interior (head of the nine districts of the Office of the National Commissioner that administers police affairs). The claimant, a woman police officer, had applied for the position of police inspector alongside three male applicants.

There were 51 applications for the three vacant positions of police inspectors. An evaluation committee was appointed by the head of police of the metropolitan area to prepare the hiring process and assess the qualifications and capabilities of the applicants. Twenty-five applicants were interviewed, from whom ten were selected for a second interview. The claimant passed the first stage but not the second. Three men were temporarily appointed in May 2014, and the claimant requested feedback in July, which she

⁵⁶ See *European Equality Law Review*, Issue 1, pp. 115-116.

⁵⁷ *Curia* decision No. Köf.5003/2015/4, published in the Official Journal on 13 May 2015.

received the following day. The feedback from the chief of police stated that her rating was lower than that of those appointed. Following this she asked for more evidence documenting her experience, and claimed that the memos she received demonstrate that her managerial experience, including acting as a police inspector in the United Nations police force, had been ignored, whereas the job experiences of the male applicants had been examined in much more detail.

The Gender Equality Complaints Committee said that when assessing whether the provision prohibiting discrimination in work and engagement in employment has been violated, the educational qualifications, work experience, specialised knowledge, and other special talents must be taken into account. After examining the hiring process of the case the Committee concluded that the respondent had not evaluated the capabilities of the claimant on an objective basis. The Committee came to this conclusion as the method used by the district police to assess the qualities of the applicants was based on the number of police reports in the police's case collection. This was not considered a satisfactory paradigm; and the Committee furthermore assessed that the exam the applicants were required to take was neither an objective nor fair assessment of their capabilities.

The Committee held that her qualifications had been underrated and that the respondent had discriminated against the claimant without being able to demonstrate that grounds other than gender had been the determining factor for the difference in treatment.

The Committee held that there had been a violation of Article 26 of the Gender Equality Act No. 10/2008 (the GEA), which prohibits employers from discriminating between applicants for jobs on the ground of their gender. The same rule applies to promotions, and the claimant had demonstrated that the evaluation of applicants had not been objective.

Internet sources:

<http://www.urskurdir.is/Felagsmala/Kaerunefnd/Jafnrettismala/nr/7596>.

<http://www.visir.is/log-brotin--karlar-fengu-forgjof-thegar-radid-var-i-yfirmannsstofu-hja-logreglu/article/2015706229981>.

Both accessed 20 July 2015.

Man's wages decreased following a ruling from the Gender Equality Complaints Committee

The claimant, a woman with a university diploma, worked as a payment officer and her male colleague, also a payment officer, held a university Bachelor of Arts degree and a license to teach. Her male colleague received his wages according to the agreement of the Association of Academics, whereas the claimant's wages were calculated according to the agreement of the municipality's trade union. The man's wages were 7 % higher than the claimant's.

Gender

The Kopavogur municipality trade union brought a claim before the Committee on behalf of the female employee, complaining that she had been subject to wage discrimination that amounted to a breach of Article 19 of Gender Equality Act No. 10/2008 (GEA).

The municipality reasoned before the Gender Equality Complaints Committee that an evaluation of the jobs of claimant and her male colleague had been performed three times, and the evaluations had consistently led to the conclusion that the man's job was of more value. It also claimed that the job evaluation had been gender neutral. The municipality further maintained that there was objective basis for the wage difference between the claimant and her colleague, as the man had more educational qualifications. It claimed that the difference in education was widely accepted as constituting grounds for paying higher wages to someone with a university education.

The Committee referred to Article 25 of the GEA, which prohibits employers from discriminating between women and men in wages and other terms of employment on ground of their gender. If it is likely that

a woman and a man working for the same employer receive different wages for the same work or for work of equal value, then the employer must demonstrate that the difference is based on grounds other than gender. The Committee found that the jobs of the claimant and of the higher paid male colleague were of equal value, and that the difference in education did not justify the difference in wages. Since the employer was unable to prove that the difference in their wages could be explained on grounds other than gender, the municipality had violated the GEA.

Following its decision, the municipality decided to pay the man according to the same trade union agreement as the claimant, and his wages decreased accordingly.

The Committee's ruling will lead to an overhaul of the terms of the wage system applicable to the Kopavogur municipality's employees with university degrees. Job advertisements will also be revised, and care will be taken to avoid requesting educational requirements in advertisements that are not necessary for the job in question.

Internet sources:

<http://www.urskurdir.is/Felagsmala/KaerunefndJafnrettismala/nr/7185>.

http://www.mbl.is/frettir/innlent/2015/01/31/laun_karls_laekkudu_vegna_kaeru/.

Both accessed 20 July 2015.

IE

Ireland

CASE LAW

Gender discrimination in access to promotion

The claimant in this case was a well-qualified lecturer in the school of botany at the National University of Ireland in Galway (NUIG). She contended that she was discriminated against on the ground of gender in access to promotion to the position of senior lecturer, contrary to Section 8(1)(d) of the Employment Equality Acts 1998–2011 ('the Acts').

The claimant submitted that the application process to senior lecturer in NUIG is weighted against women. She became eligible to apply for promotion to senior lecturer when she reached the top point of the college lecturer scale. The claimant made numerous applications over the previous years, but she was either not shortlisted or she was shortlisted but failed to reach the panel. She submitted that she felt compelled to complain about the 2008/2009 selection process when only one woman was promoted. The claimant stated that this confirmed her suspicion that there was a gender bias regarding promotions in NUIG.

Promotions are assessed on three criteria: research and scholarly standing; teaching and examining; and contribution to the school, university, and community. The claimant was interviewed by seven interviewers, only one of whom was a woman, who according to the claimant remained passive and silent throughout the interview. The claimant stated that it was a 'bizarre affair'. The external reviewer gave evidence that some of the interviewers only arrived a minute before the interview and that there was no discussion of the claimant's application prior to the interview, or about what questions should be asked. The external reviewer also requested marking schemes and guidelines prior to interview, which is standard practice, but he received no such information. When he tried to argue in the post-interview discussion that the claimant was one of the leading plant ecologists in Ireland, he said that the other members talked over him. The Interviewing Committee also challenged his assessment mark, and reduced significantly the collective mark. The external reviewer also stated that he had sat on many interview panels and this

one fell far short of best practice. He felt an injustice was done in the claimant not being placed on the panel for promotion. The claimant appealed the decision, and the appeal was heard by the Registrar. Her appeal failed.

The Tribunal noted that there was no obligatory training for interviewers (in the Employment Equality Acts or otherwise), and there was no pre-meeting to discuss each candidate, nor were questions agreed beforehand. Furthermore, only the rapporteur retained the notes from the interview.

The Tribunal noted that there was one male candidate who was promoted, even though he was not eligible for the promotion, yet all female applicants shortlisted met the service requirements. The Tribunal also noted that the Registrar was on the claimant's interview board and yet also involved in hearing her appeal. Obviously it would have been preferable if somebody independent of the interview process had heard the appeal. The Tribunal was also critical of the respondent's statistical evidence. The Tribunal pointed out that despite men being in the minority in the college lecturer grade, this statistic is almost inverted when it comes to the next promotional grade. Male applicants had a one in two chance of being promoted to senior lecturer, while female applicants have less than a one in three chance of the same promotion. The Tribunal was satisfied that the claimant had established a *prima facie* case of direct discrimination, and the respondent had failed to rebut it.

The Tribunal decided that the claimant was also indirectly discriminated against due to the existence of an apparently neutral requirement on the application form that puts women at a particular disadvantage. The application form for the position of senior lecturer required applicants to specify what dates they were on maternity leave or other unpaid leave, so that it could be discounted. Male applicants left this blank. The claimant referred to caring responsibilities for her mother in the 1990s, and other female candidates had also taken leave. The Tribunal could not escape the conclusion that in drawing attention to their caring responsibilities outside the workplace, the majority of female applicants became disadvantaged against male applicants. Therefore, the means chosen was neither appropriate nor necessary, and so could not be objectively justified.

The Tribunal found that the respondent had discriminated against the claimant on the grounds of gender regarding the claimant's access to promotion. In considering redress, the Equality Officer of the Tribunal said she was guided by Article 25 of the Recast Directive (2006/54) which states that penalties must be effective, proportionate, and dissuasive.

This is a significant case as it highlighted the lack of promotion of women in the third-level education sector. The Higher Education Authority has initiated a gender equality review as a means of enhancing women's representation in the third-level sector.⁵⁸ The decision is also significant in respect of the apparently neutral requirement on the application form that requested details of unpaid leave so that such leave could be discounted, which put women at a significant disadvantage. There is to be a review of the policies and procedures in the respondent university and a report on progress is to be sent to the Irish Human Rights and Equality Commission.

Internet sources:

<http://www.workplacerelations.ie/en/Cases/2014/November/DEC-E2014-078.html>.

<http://www.irishtimes.com/life-and-style/people/micheline-sheehy-skeffington-i-m-from-a-family-of-feminists-i-took-this-case-to-honour-them-1.2027451>.

Both accessed 4 July 2015.

⁵⁸ Reported in the Irish Examiner on 9 June 2015. See <http://www.irishexaminer.com/ireland/hea-begins-third-level-gender-equality-review-333482.html>, accessed 10 July 2015.

Two cases from the Equality Tribunal concerning sex discrimination and access to goods and services

The claimant in the first case, *Carroll v. Gruaig Barbers*,⁵⁹ maintained that she was discriminated against on the ground of gender when she was refused a haircut because she is a woman. The claimant asked the female barber for an ‘undercut’ (i.e. to shave the side of her hair). The female barber stated that she could not perform the required action as the client was female. The claimant stated that she had previously had her hair cut at that particular barber shop. The claimant also stated that the female barber said that she could not do it as she would be on camera and would get into trouble. The claimant stated that the owner of the barber shop had said that they are not qualified to cut women’s hair and that they could not cut it for insurance reasons.

The respondent party, the owner of the barber shop, maintained that as it is a barber shop it provides a service to male customers, and is therefore insured specifically for cutting the hair of male customers. The respondent party backed this by stating that the lease with the shopping centre is as a barber shop. The respondent relied on Section 5 of the Equal Status Act 2000, which provides that:

- (1) A person shall not discriminate in disposing of goods to the public generally or a section of the public or in providing a service, whether the disposal or provision is for consideration or otherwise and whether the service provided can be availed of only by a section of the public.
- (2) subsection (1) does not apply in respect of—.....
- (c) differences in the treatment of persons on the gender ground in relation to services of an aesthetic, cosmetic or similar nature, where the services require physical contact between the service provider and the recipient...

The respondent argued that the barber shop provides services of ‘an aesthetic, cosmetic or similar nature’ and that therefore the service can be provided exclusively to the male gender, i.e. boy’s or men’s haircuts. The equality officer considered that the claimant had a prima facie case of discrimination. The respondent said that to their knowledge no woman had her hair cut on the premises and that the claimant has never had her hair cut in the respondent barber shop. All the staff are trained as barbers and are not trained to cut women’s hair. The respondent also said that under the terms of the lease of the shop, which is in a shopping centre, they are not permitted to have a ladies’ hair salon as there is a well-known women’s hairdressers in another premises in the shopping centre and so the barber shop is not permitted to provide the same services. It refers any women seeking services to the women’s hairdressers.

The second case (*Carroll v. Short Cuts*),⁶⁰ brought by the same claimant, had similar facts as the respondent barber had a similar lease in a shopping centre which contained a women’s hairdresser. The respondent stated that it would be profitable for him to provide women’s hairdressing services, but if he did so he would be in breach of his lease and that he could lose his shop. The respondent advised the hearing that under the terms of his lease, the premises is not ‘[t]o be used for any other purpose other than the business of cutting men’s hair with no ancillary services offered’.

The Equality Officer of the Tribunal decided in both cases that the claimants were not discriminated against. The respondents were entitled to rely on the exemption in Section 5(2) of the Equal Status Act.

There was no reference to Directive 2004/113/EC in the two decisions. Article 4.4 of that Directive provides that instruction to direct or indirect discrimination on the ground of sex shall be considered discrimination within the meaning of the Directive. In addition in the decisions, there is no reference to Section 13(1) of the Equal Status Act of 2000 which provides that ‘[A] person shall not procure or

⁵⁹ Case No. DEC-S2015-005.

⁶⁰ Case No. DEC-S2015-007.

attempt to procure another person to engage in prohibited conduct', nor to Section 6 of the Act that in summary provides that a person shall not discriminate in the 'disposing of any estate or interest in premises...'. In the view of the expert, it should be questioned why this Section was not raised in the second case in relation to the granting of the lease for a barber shop that only provides barber services to males. Arguably the reliance on Section 5(2) in respect of privacy is tenuous.

Internet sources:

<http://www.workplacerelations.ie/en/Cases/2015/April/DEC-S2015-005.html>.

<http://www.workplacerelations.ie/en/Cases/2015/May/DEC-S2015-007.html>.

Equal Status Acts 2000-2012 – consolidated and updated text as prepared by the Law Reform Commission available at:

http://www.lawreform.ie/_fileupload/RevisedActs/WithAnnotations/HTML/EN_ACT_2000_0008.HTM.

All accessed 20 July 2015.

Italy

IT

LEGISLATIVE DEVELOPMENT

The re-organisation of equality bodies and equality advisors

On 11 June 2015, the Council of Ministers examined one of the draft decrees implementing Delegation Act No. 183/2014 (providing for a wide reform of the labour market). This draft decree also includes a part that amends the Code for Equal Opportunities with regard to the equality bodies under the competence of the Minister of Labour. The draft decree is also aimed at the revision of the territorial competence of the provincial equality advisors; under Act No. 56 of 7 July 2015, provinces are substituted by metropolitan cities and local government bodies of large areas (*enti locali di area vasta*).

All grounds

Following the amendments, each local body (region, or the bodies mentioned above) that appoints an equality advisor will allocate the resources for the equality advisor's functioning, and will have to decide (within its spending power) the possible remuneration for time off work, to which the equality advisor is entitled. Local bodies will also pay a monthly allowance to which local equality advisors could be entitled. It is not fully clear whether the fund for the activities of equality advisors (provided by the amended Article 18 of Decree No. 198/2006) would cover these costs if local bodies were not able to cope with them. On the contrary, the activity of the National Equality Advisor and the allowance for which he/she can ask for the entire mandated period are covered by the fund, and ruled by a Decree of the Minister of Labour. This also establishes the amount to be awarded, including expenses.

In 2015, the allocations mentioned above (limited to EUR 140 000) will be paid by the fund for conciliation measures between working and family life, provided by Article 25 of Decree No. 80 of 15 June 2015.

The appointment procedure, facilitated by a comparative evaluation, has been simplified and the mandate of both national and local equality advisors lasts three years, renewable only once. They are also excluded from the so-called 'spoil system' provided by Article 6(1) of Act No. 145 of 15 July 2002, which means that they cannot be removed from office exclusively on the ground of a change in Government.

The competences of equality advisors in relation to the substance of their work have been slightly modified. Matters that concern more general issues (such as the promotion of the coherence of the policies of territorial development with the EU, and national and regional policies on equal opportunities) have been given to the National Committee (see below). Also, under the re-organisation the collaboration of equality advisors with the Labour Inspectorate has been strengthened.

The National Committee, which operates within the Ministry of Labour and promotes equal opportunities, has also been reformed: the number of its members, who are mainly representatives of social parties, associations working in the field, and the Ministry of Labour, has been cut. In addition, its functioning has been simplified. In terms of the role of the Committee in matters concerning positive action, the National Committee keeps a more political role in fixing the objectives of projects to be financed. The Committee's more technical role, which includes responsibilities such as the evaluation of projects and their respective results, will be facilitated through the participation of some National Committee members in a specific commission. A decree from the Minister of Labour is expected to mandate this. Other technical bodies that had previously been set up to support the National Committee will be abolished.

The Net of the Equality Advisors, in which all local equality advisors participate and which is coordinated by the National Equality Advisor, has been replaced by the Conference of Equality Advisors. The Conference of Equality Advisors has the same composition and functions: predominantly strengthening the activities of equality advisors, and exchanging information and good practices. The Office of the Prime Minister and the Ministry of Labour will promote initiatives aimed at ensuring the effectiveness of the promotion of equal opportunities, one of the competences of equality advisors. However, the Conference will not be supported by the technical bodies, as they have been abolished. In addition, it is likely that the Conference will no longer be able to use experts, no specific allocations for its functioning have been provided, and the existence of the Conference must not give rise to further costs.

The draft decree simplifies the composition and organisation of equality bodies at national level, and allocates more political functions to the National Committee. It also improves the appointment procedures for equality advisors, amending them so that they conform to EU requirements on the independence of such bodies. This intervention was particularly necessary, as evidenced by State Council judgment No. 5031 of 29 July 2010 (confirming the Administrative Tribunal decision of 19 July 2009). This stated that the National Equality Adviser can be removed under the spoil system if she or he is not 'tuned in' with the Government's policies, as the National Equality Adviser is not an independent body (despite her/his wide autonomy over internal organisation).

The main problem is the financing. In fact, although a more rational distribution of the expenses between the local and the national level is commendable, the new text does not expressly guarantee the remuneration of either time off or of a monthly allowance for local equality advisors. A lack of funding could weaken their role in fighting discrimination and promoting equal opportunities.

Internet source:

Draft Decree of 11 June 2015 on the Reorganisation and simplification of procedures for citizens and enterprises, and other provisions on labour and equal opportunities: <http://www.jobsact.lavoro.gov.it/documentazione/Documents/Semplificazione.pdf>, accessed 24 August 2015.

The protection of motherhood and fatherhood

Decree No. 80 of 15 June 2015 on the protection and conciliation of working, care and family life is one of the decrees implementing Delegation Act No. 183/2014, which provides for a wide reform of the labour market.

The content of the draft Decree approved on 20 February 2015 has been fully confirmed, except for some minor changes and some issues concerning its financing.

Article 24 (on the introduction of some measures aimed at supporting the victims of gender violence) has been slightly modified. The period of paid leave of three months, which is awarded to working women who are victims of gender-based violence and are under a protection programme certified by local authorities, is not available to domestic workers. The allowance has been regulated in a similar way as the maternity allowance. It is paid by INPS (the National Social Welfare Institute), and is calculated

based on the amount of the beneficiary's last month of remuneration. Whether this leave is used daily or hourly will be regulated by either law or by a collective agreement, which shall be signed by the most representative trade unions at national level. The temporary conversion of the working relationship to which women are entitled is conditional upon the availability of such positions.

Another change regards the regulation of the hourly or daily use of the parental leave provided by the Decree, which applies in case collective agreements do not address this issue. Under the changes, the Decree is not enforceable to the workers of the defence department, the fire brigade, or the public rescue service.

An amendment has also been approved (new Article 22), which applies a criminal sanction to an employer if he or she infringes the right of an adoptive or foster mother employee to refrain from performing night work. This right is also afforded (in the place of the mother) to the father living with the mother, until the third year after the child entered the family on the condition that the child is not older than twelve.

Under Article 25, 10 % of the fund allocated to incentivise collective agreements at the enterprise level will be used for the promotion of conciliation measures in the period 2016-2018. The incentive and coordination of these measures will be managed by a selection of representatives of different Ministers who will have to guarantee their functioning by the resources previously available.

Article 25 on the promotion of measures of conciliation between family and working life will be enforceable after 2015. So will a number of other provisions, such as:

- the right to not perform night work; and
- for parents working as professionals: the right for the father to assume the mother's right to maternity allowance if she dies, falls seriously ill, or if the father is given official and exclusive custody of the child and the adoptive and foster mother's right to the maternity allowance.

The final text of the Decree confirms that a significant number of the other measures, for instance the extension of the period within which parents can benefit from parental leave, or the right to a period of leave for gender violence victims, will only be enforceable in 2015 as a trial. After the trials, it is expected that a number of further decrees will be issued to allocate appropriate funding.

A safeguard clause is also provided in Article 27 on Decree no. 80, which states that the financial effects of the Decree must be constantly monitored. If the cost starts to significantly exceed the amount mentioned above, a Decree of the Minister of Finance will be issued to recalculate the benefits provided by the Decree, following consultation with the Minister of Labour. The recalculation will apply especially with regard to Articles 7 to 10, which mainly concern the extension of the period within which parents can benefit from parental leave.

The recent amendments change neither the framework nor the content of the draft Decree approved on 20 February 2015. However, the introduced safeguard clause may reduce the advantages of the new Decree even in 2015.

This is the main problem of the Decree, as on the whole it represents a positive step forward with regard to the strengthening of the protection of motherhood and fatherhood, most of all in the self-employment sector, and the promotion of conciliation measures.

Internet source:

Decree No. 80 of 15 June 2015 on the Protection of motherhood and fatherhood, promotion of reconciliation measures, and protection against gender violence, Official Journal No. 144 of 24 June 2015, o.s. No. 34:

http://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2015-06-24&atto.codiceRedazionale=15G00094&elenco30giorni=true.

Accessed 25 August 2015.

CASE LAW

Non-pecuniary damages for discrimination and harassment of a pupil with disability

Disability

A student with a disability was victim of several acts of discrimination and harassment by his support teacher and by the director of the school.⁶¹ According to the claimant the support teacher had in several circumstances excluded the student from collective activities or had locked him in a room alone as a remedy to his allegedly violent behaviour. Moreover both the support teacher and the director had expressed their view about the difficulties raised by the disability of the student in front of him, his parents and the other students, without taking into account his feelings. The support teacher resigned before the end of the school year and was replaced.

The Tribunal of Livorno expressly ruled out the relevance of discriminatory intent of the perpetrators, and found that the school and the Education Office were liable for several acts of direct discrimination and harassment. The claimant was awarded EUR 10 000 in compensation for non-pecuniary damages, to be paid by the school and the Education Office. The amount of the award was calculated to take into account the seriousness, number and duration of the offences, as well as the emotional stress caused. The fact that the acts had ended and the support teacher had been replaced did not reduce the importance of the damage suffered by the claimant.

The action was brought against the school and the Education Office and the issue of the personal liability of the support teacher and/or the school director was not raised.

Internet source:

http://www.personaedanno.it/attachments/article/48309/9003182_livorno.pdf, accessed 29 July 2015.

The municipality of Rome convicted for discriminatory housing policy of a Roma camp

Racial or ethnic origin

Two NGOs, ASGI and *Articolo 21*, filed an action against the municipality of Rome claiming that the policy of placing Roma in a large settlement on the remote outskirts of Rome and thereby hindering their effective inclusion in society, was discriminatory.⁶² In August 2012 interim measures were issued based on *prima facie* discrimination but were later quashed on appeal.⁶³

In May 2015 the Tribunal of Rome delivered its judgment on the merits of the case, and convicted the municipality of Rome for indirect discrimination on the ground of racial or ethnic origin in violation of Article 2 of Legislative Decree 215/2003 implementing the Racial Equality Directive. The municipality was ordered to stop the assignation of housing in the camp and to annul the consequences of the previous assignations already in force, to publish the judgment in a national newspaper, and to pay half of the legal costs incurred by the two claimants.

Internet source:

<http://www.asgi.it/wp-content/uploads/2015/06/Ordinanza-La-Barbuta.pdf>, accessed 22 July 2015.

National court decision regarding victimisation and sanctions

Four private citizens and an association dealing with discrimination on the grounds of race and ethnic origin had challenged the Varallo municipality for the dissemination of racist posters around the city against foreign hawkers without license and women wearing the Burqa.⁶⁴ The Court of Turin rejected the

⁶¹ Tribunal of Livorno, 14 June 2015.

⁶² Tribunal of Rome, 30 May 2015.

⁶³ Tribunal of Rome, 4 December 2014.

⁶⁴ Tribunal of Vercelli, 4 December 2014.

action since the municipality had removed the posters before the judgment. However, other posters were later disseminated around the city by the municipality, mentioning the names of the citizens who had brought the case to Court and ridiculing them because they had diverted economic resources (necessary for paying legal costs) away from the community. The claimants brought a new action against the municipality for victimisation.

Racial or ethnic origin

Religion or belief

In December 2014, the Tribunal of Vercelli convicted the municipality of Varallo, its Mayor and its assessor for victimisation in violation of Article 4-bis of Legislative Decree 215/2003 implementing the Racial Equality Directive. In this regard, the Tribunal held that protection against victimisation extends to anyone who acts against discrimination notwithstanding the result of that action. The respondents were convicted to pay EUR 6 000 and 5 500 respectively to the victims as compensation for non-pecuniary damages, to publish the judgment in a local newspaper, on the Facebook page of one of the respondents and on the website of the Varallo Municipality, and to pay the legal fees. The Tribunal expressly referred to Article 15 of the Directive which requires that sanctions must be effective, proportionate and dissuasive, and calculated the damages in part as compensation and in part as a sanction ('punitive damages').

Internet source:

http://www.asgi.it/wp-content/uploads/2014/12/2014_tribunale_Vercelli_rg-1241-del-2014-ord-04-12-2014_Varallo-BOTTA-BUONANNO-trib-vercelli.pdf, accessed 22 July 2015.

Liechtenstein

LI

LEGISLATIVE DEVELOPMENTS

Amendment of the Gender Equality Act

Law No. 33/2015, Official Gazette, concerning the applicable law in conciliatory proceedings, changed Article 11(3) of the Gender Equality Act (GLG).

According to Article 11(3) of the GLG, conciliatory proceedings are still free of charge and are now governed by Articles 227 *et seq.* of the Civil Procedure Code. An independent procedure has to be initiated in order to avoid a claim before the court, pursuant to the GLG. During conciliatory proceedings an offer of compromise will be made; if it fails, the parties are free to bring a claim before court. However, the amendment will come into force simultaneously with the Act abolishing the conciliatory offices.

Gender

The amendment only concerns the application of the Civil Procedure Code, rather than the repealed law regarding the conciliatory offices. There is therefore no significant difference between the formerly applicable law and the currently applicable law, so the amendment has only a formal rather than a substantive impact on the GLG.

Internet source:

Liechtenstein legislation available at: <https://www.gesetze.li/chrono/0/pdfs/2015033000>, accessed 20 July 2015.

Amendment to Criminal Code concerning abortion entered into force

Gender

The amendments to the Criminal Code concerning abortion (issued on 4 March 2015 in State Gazette No. 111/2015⁶⁵) entered into force on 1 July 2015.

According to Article 96(4) of the Criminal Code, the law decriminalises abortion under certain circumstances, e.g. there is a danger for the life or health of the pregnant woman, the pregnant woman is not older than 14, or the pregnant woman was the victim of a rape. In all of these examples the procedure must be performed by a doctor.

Pursuant to Article 64(1) of the Criminal Code, the abolition of the criminalisation of abortion by Liechtensteinian residents abroad is also regulated. These measures shall be in line with the constitutional norms.

Internet source:

The amendment is available in German at: <https://www.gesetze.li/chrono/0/pdfs/2015111000>, accessed 16 July 2015.

LT

Lithuania

LEGISLATIVE DEVELOPMENT

New draft laws to modernise labour law introduce women quotas on company boards, but other provisions are controversial

Gender

The Ministry of Social Security and Labour announced the draft labour legislation, which forms part of the so-called 'social model'.⁶⁶ This refers to the EU-funded project 'Legal-administrative model of labour relations and social security', which was initiated by the Ministry to increase the competitiveness and effectiveness of the labour market and address the current problems of statutory social insurance. Amongst many novelties to increase the flexibility and security of workers, there is also a proposal to amend the Law on Companies to introduce women quotas on company boards. However, some changes may be considered setbacks for workers with family responsibilities.

The Ministry of Social Security and Labour entrusted a group of scholars with the task of preparing the new codification of labour legislation with the aim to address these problems. The draft Labour Code was published officially on 15 March 2015 and is now under debate in the Tripartite Council.

The draft Labour Code aims to transpose the labour law directives, but there are also measures that intend to indirectly or directly increase equality between women and men:

- 1) the right to unpaid time off for family needs;
- 2) the right to request distance work, part-time work, and job sharing for employees with children;
- 3) the right to a flexible or individual working-time schedule;
- 4) the obligation on employers with more than 50 employees to approve remuneration schemes and equality strategies and make them publicly available;
- 5) the obligation to reserve 1/4 of places on management boards for women in state and municipal enterprises and joint stock companies;
- 6) other improvements on the fight against discrimination.

⁶⁵ See European Equality Law Review, Issue 1, p. 128.

⁶⁶ It is now open for discussion, before it is submitted to the Government and then to Parliament.

The proposed legislation contains a set of measures to ensure greater protection against discrimination based on sex, and to promote equal opportunities at the workplace: the right to request flexible working-time arrangements, transparency in remuneration and the duty to establish equality strategies, quotas for women on management boards, etc. However, some proposals that affect employees raising children may actually restrict rights, because of the diminished level of protection against dismissal.

Internet source:

The draft legislation is available in Lithuanian at: http://www.socmodelis.lt/wp-content/uploads/Darbo_kodekso-projektas.pdf, accessed 20 July 2015.

POLICY DEVELOPMENT

Parliament appoints the new Equal Opportunities Ombudsperson more than two years after the mandate of the previous one expired

On 18 June 2015 the *Seimas* (Parliament) appointed a new Equal Opportunities Ombudsperson, after the post had remained vacant since November 2013, when the former head of the institution passed away and the Board of Parliament appointed the Ombudsman of the Rights of the Child as a temporary substitute. In the meantime two candidacies for the post had been rejected by Parliament, although both had relevant legal backgrounds and experience in human rights and non-discrimination law.⁶⁷ The new Ombudsperson was previously vice-minister for Culture and has no specific human rights or anti-discrimination experience.

All grounds

Internet source:

Stenograph of Parliament plenary sitting of 18 June 2015:

http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=1043561&p_query=loba%E8evskyt%EB&p_tr2=2, accessed 19 August 2015.

Malta

MT

LEGISLATIVE DEVELOPMENTS

Parliament adopts the Gender Identity, Gender Expression and Sex Characteristics Act, Act XI of 2015

In September 2006, Joanne Cassar, a transsexual woman, was denied the right to marry her partner. In 2007 a judge in Malta ordered government officials to issue her with the appropriate documentation. The Director of Public Registry successfully contested that ruling in May 2008. Cassar filed a constitutional application at the First Hall of the Civil Court alleging a violation of her fundamental human rights. She won that case initially, but lost on appeal in 2011. In April 2013, she reached a settlement with the Government, which included financial compensation in addition to promised statutory changes. Transgender persons in Malta who have undergone irreversible gender reassignment surgery may change the sex recorded in official documentation such as identity cards, birth certificates and passports. In April 2014, Malta became the first European state to add the recognition of gender identity to its Constitution as a protected category. Parliament has now adopted, on 1 April 2015, the Gender Identity, Gender Expression and Sex Characteristics Act (GIGESC) (Act XI) of 2015.

Gender

⁶⁷ See *European Equality Law Review*, Issue 1, p. 130.

Article 3 of the GIGESC Act recognises the right of each person to their gender identity and the free development thereof. The NGO 'Transgender Europe' (TGEU) declares that the envisioned legal gender recognition procedure fulfils the Council of Europe standards of 'quick, transparent and accessible' gender recognition procedures, based on self-determination.

Under Article 5, the procedure introduced before a notary requires a simple declaration based on a person's self-determination and prohibits requests for medical information. The entire process lasts a maximum of 30 days. According to the TGEU this quickly enables the individual to pursue his or her life without further interference.

According to Article 7, an application by a legal minor is regulated by analogy through a court procedure. Parents or legal guardians of an underage person can therefore apply. The best interests of the child and the views of the minor have to be given due consideration.

The Act foresees that parents or guardians may decide to postpone the inclusion of a gender marker on the birth certificate until the child's gender identity is determined. This has to be welcomed as it allows for time for the child to make an informed decision thereon.

It also regulates health care provision, the prohibition of normalising genital surgery on intersex infants, and a reform of public data collection. Moreover, measures are foreseen in areas of health, non-discrimination and criminal justice to create supportive and inclusive environments for trans and intersex persons.

Internet sources:

<http://justiceservices.gov.mt/LegalPublications.aspx?pageid=31&year=2014&type=2&p=2>.

<http://tgeu.org/gender-identity-gender-expression-sex-characteristics-act-malta-2015/>.

<http://tgeu.org/malta-adopts-ground-breaking-trans-intersex-law/>.

<http://www.hrw.org/news/2015/04/01/dispatches-malta-s-inspiring-gender-recognition-law>.

http://socialdialogue.gov.mt/en/Public_Consultations/MSDC/Pages/Consultations/GIGESC.aspx.

<http://www.maltagayrights.org/localcampaignsselected.php?title=Proposed%20Gender%20Identity%20Act%20For%20Malta>.

All accessed 9 June 2015.

Quota of persons with disabilities within Maltese public entities

On 3 March 2015 the Maltese Parliament adopted legislation imposing a quota of persons with disabilities within a number of public entities/authorities listed in the Act, including the national equality body.⁶⁸ The Act affects the composition of the boards of the following entities, increasing their number by one and obliging that at least one member must be a person with a disability or a person representing such persons:

- The Housing Authority,
- The National Commission for Further and Higher Education,
- The Employment and Training Corporation,
- The Broadcasting Authority,
- The Refugee Appeals Board,
- The Malta Statistics Authority,
- The National Commission for the Promotion of Equality for Men and Women,
- The Commission on Domestic Violence,
- The Council for the Voluntary Sector,
- The Authority for Transport in Malta.

68 Act No. VII of 2015 'Various Laws (Persons with Disability) (Membership in Various Entities) Act', adopted on 3 March 2015, entered into force on 10 March 2015.

The relevant Minister whose Ministry governs each specific entity is responsible for the implementation of the new provisions. If one of the concerned entities does not fulfil the new requirement it will not be considered as legally constituted in accordance with Maltese law. The new Act complements the existing employment quota which imposes a minimum of 2 % of employees with a disability on employers with at least 20 employees.

Internet source:

<http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=26717&l=1>, last accessed 22 July 2015.

POLICY DEVELOPMENTS

Government announces the creation of a new maternity leave fund

The Government has announced a new system for the funding of maternity leave in the private sector. Private employers had long argued that the statutory obligation upon small enterprises to pay 14 weeks full pay during maternity leave was an impossible burden to bear in combination with the cost of replacing the pregnant worker for the duration of the leave.

Gender

Under this new scheme, all private employers will pay a sum of 30 cents in every EUR 100 of pay for each employee, male or female, into a central fund. Maternity leave pay for the first 14 weeks for all private sector employees will be paid out of this fund. The Government will continue to pay a flat rate payment to all employees on maternity leave for the remaining four weeks of the maternity leave (the total maternity leave amounts to 18 weeks).

It is common knowledge that small private businesses prefer to engage staff who are unlikely to become pregnant and select new employees accordingly. This is rarely the subject matter of court or industrial tribunal proceedings due to difficulties in proving such a situation, even though it amounts to direct discrimination on the ground of sex. This new scheme attacks this discrimination at its roots.

Internet sources:

Equality for Men and Women Act 2003 as amended, (Chapter 456 of the Laws of Malta), available at: <http://justiceservices.gov.mt/LegalServicesSearch.aspx?type=lp&pageid=75>.

Government of Malta press release (L-GVERN INIEDI L-FOND GHALL-LEAVE TAL-MATERNITÀ KIF IMHABBAR FL-AHHAR BAĠIT), Reference No. PR151696, 21 July 2015, available (in Maltese only) at:

<https://www.gov.mt/en/Government/Press%20Releases/Pages/2015/July/21/pr151696.aspx>.

Kurt Sansone, *Maternity Leave Fund aims for Equality*, Times of Malta, 22 July 2015, available at:

<http://www.timesofmalta.com/articles/view/20150721/local/new-maternity-leave-trust-fund-launched-in-bid-to-end-gender.577551>.

All last accessed 22 July 2015.

The Netherlands

NL

LEGISLATIVE DEVELOPMENTS

Amendments to Acts relating to employment and care

On 1 January 2015 a number of changes to the Employment and Care Act (*Wet arbeid en zorg*) and the Working Hours (Adjustment) Act (*Wet aanpassing arbeidsduur*) came into effect. The changes aim to facilitate the reconciliation of work and care.

Gender

The most important changes are:

In the Employment and Care Act

- The introduction of a right to parental leave (unpaid) of three days for fathers following the birth of a child, in addition to the pre-existing two days of paid father's leave (Article 6:5 § 4);
- The abolition of the requirement of a minimum of one year's employment before requesting parental leave (Article 6:6);
- The introduction of the possibility to spread the leave for foster care or adoption instead of being required to take four weeks consecutively (Article 3:2 § 4);
- A widening of the period during which the leave for foster care or adoption can be taken, from 18 to 26 weeks (Article 3:2 § 2);
- An extension of the possibility to take care leave. As of 1 July 2015 this leave need not only be used for children, parents and partners; but also to take care of brothers, sisters, grandparents, grandchildren, roommates and other relations who are dependent upon the help of the employee (Article 5:1);
- An extension of maternity leave by a maximum of 10 weeks in situations where children must remain in hospital for a long time (after birth) (Article 3:1 § 5);
- The transfer of any untaken maternity leave to the partner of the mother in the event of her death; the partner being the one the mother is married to or has a civil partnership with or the one who has acknowledged the child (Article 3:1a);
- The introduction of the possibility to spread the maternity leave that remains after six weeks over a maximum period of 30 weeks (part-time maternity leave) (Article 3:1 § 6); and
- Increased pregnancy leave in cases of multiple births (the date of entry into force of this article is still unknown).

In the Working Hours (Adjustment) Act:

- A shortening of the term for requesting an adjustment to working hours, from once every two years to once every year (Article 2 § 3); and
- The introduction of the possibility to request an adjustment to working hours in cases of force majeure (Article 2 § 1).

The legislative changes aim to improve the reconciliation of work and care, and to prevent employees from resigning, becoming overworked, or becoming ill. However, the changes are relatively minor; the parental leave and care leave are often unpaid and employers are not always happy when employees exercise their rights to leave. It is therefore doubtful whether the changes will have any substantive effect on the reconciliation of work and care.

Internet sources:

Employment and Care Act:

http://wetten.overheid.nl/BWBR0013008/geldigheidsdatum_23-02-2015.

Working Hours (Adjustment) Act:

http://wetten.overheid.nl/BWBR0011173/geldigheidsdatum_23-02-2015.

Both last accessed 20 July 2015.

Adoption of the Act on Flexible Working

On 14 April 2015 Parliament adopted the Act on Flexible Working (*Wet flexible werken*).⁶⁹ This Act will replace the Working Hours (Adjustment) Act.⁷⁰ The date of its entry into force is 1 January 2016.

⁶⁹ As the Act has not yet entered into force, there is no official document available.

⁷⁰ See: http://wetten.overheid.nl/BWBR0011173/geldigheidsdatum_10-06-2015, accessed 20 July 2015.

The Act on Flexible Working will introduce a number of changes to the Working Hours (Adjustment) Act. These changes aim to facilitate the combination of employment and private life and to encourage a more flexible way of working in which employees have more control over both their working hours and place of work. The most important change is that the employee will acquire the right not only to request an adjustment to his or her working hours – to which the employee is already entitled on the basis of the existing law – but also the right to request an adjustment to her/his working schedule (working pattern) and her/his place of work.

An employer may only refuse a request for an adjustment to the employee's working hours, whether this is a reduction or an increase in hours, on the ground of compelling (business) reasons (Article 2). This is similar to the present situation.

Similarly, a request for an adjustment to the working schedule/pattern may also only be refused for compelling (business) reasons. This regulation is introduced for the first time by the new Act (Article 2). However, the employer may unilaterally change the working schedule if the interest of the employer outweighs the interest of the employee. The employer must balance the interests of both parties. The right to request an adjustment to the working schedule (i.e. to work the same number of hours but at different times) is therefore less strong than the right to request an adjustment (a reduction or an increase) to the working hours.

The new Act will also give the employee the right to request an adjustment to the place of work, e.g. to work remotely or from home (Article 2). However, the employer is not legally obliged to grant the request for a change to the place of work. It is sufficient if the employer seriously considers the request (Article 2 (6)).

Under the Act the employee will have the right to make these three types of requests once she/he has been employed for 26 weeks (Article 2 (1)). This is half of the term required by the present Working Hours (Adjustment) Act (one year).

The employer must inform the employee when a decision on the request has been made. If the employer does not do this at least one month before the desired starting date of the adjustment, the adjustment will proceed in conformity with the request of the employee (Article 2 (12)).

The Act on Flexible Working applies only to employers with 10 or more employees (Article 2 (16)). Employers with fewer than 10 employees must create their own arrangements for the adjustment of employees' working hours, working schedule and/or place of work. If this is not done, the District Court may rule that the regime of the Act on Flexible Working applies.

The legislative changes aim to improve the combination of employment and private life and to encourage a more flexible way of working, in which employees have more control over both their working hours and place of work. This aligns with the phenomenon of the so-called 'new way of working', in which employees no longer have fixed working hours or a fixed place of work. However, since the employer has a rather wide margin to refuse a specific distribution of the working hours over the week, or a change of the place of work, it is not likely that the new Act will substantially improve the reconciliation of work and private life.

Internet source:

Act on Flexible Working, available at:

https://www.eerstekamer.nl/behandeling/20141016/gewijzigd_voorstel_van_wet_8/document3/f=/vjo7otwrnlzv.pdf, last accessed 20 July 2015.

The ‘sole ground construction’ is abolished

All
grounds

The ‘sole ground construction’ (enkelefeitconstructie), which can be found in Article 5(2)(c) of the Dutch General Equal Treatment Act (GETA), was aimed at eliminating the possibility that a distinction is exclusively made on the ground of political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status, under the guise of existing justifications which are permitted by law. The sole ground construction played an important role with regard to the question whether Christian schools may lawfully refuse to hire cohabitating homosexual teachers, and has been hotly contested.

Following the initiation of infringement proceedings against the Netherlands in 2006 regarding, inter alia, the compatibility of the ‘sole ground construction’ with Article 4(2) of the Employment Equality Directive, the Dutch Government announced that the provision would be rephrased. Several legislative proposals and discussions with concerned parties such as NGOs and the national equality body followed, before the Lower House of Parliament adopted a bill abolishing the construction in May 2014. One year later, in March 2015, the Senate has now also passed the bill, definitely abolishing the contested provision.

The wording of the amended Article 5(2) GETA corresponds more closely to the wording of the exception in the Directive, and reads as follows:

- ‘2. Article 5(1) shall not prejudice that:
- a. an organisation the ethos of which is based on religion or belief,
 - b. an organisation offering private education, or
 - c. an organisation the ethos of which is based on a political conviction, may, as regards individuals working for them, make a difference in treatment based on religion, belief or political conviction, insofar as these features, by reason of the nature of the specific occupational activities concerned or of the context in which they are carried out, constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation’s ethos.

Such a difference in treatment should not go beyond what is appropriate, having regard to the attitude of good faith and loyalty to the organisation’s ethos that may be required of individuals working for them, and should not justify discrimination on another ground mentioned in Article 1, without prejudice to Article 2(1).’

The adopted bill was introduced by several Members of Parliament, as the Government did not show any inclination to take the initiative. Religiously affiliated political parties and commentators remain adamantly opposed to this amendment, which they consider to be discriminatory on the ground of religion.

Internet source:

https://zoek.officielebekendmakingen.nl/zoeken/parlementaire_documenten.

Last accessed 16 March 2015.

CASE LAW

Clinic’s refusal to carry out gestational surrogacy treatment not discriminatory against male gay couple

Sexual
orientation

Gender

The applicants were a male same-sex couple who desired to have a child through the implantation of one woman’s egg cell in the uterus of another woman (‘gestational surrogacy treatment’). The child’s parenthood would, after its birth, be transferred to the male couple. The couple requested a clinic to carry out this treatment, but the clinic refused. The couple brought a case to the Netherlands Institute for Human Rights (NIHR), arguing that the clinic had made a forbidden distinction, firstly on the ground of sexual orientation, because the clinic requires, for IVF treatment, that the sperm and egg cell derive

from the intended parents, which by definition excludes gay couples. Secondly, the couple argued that the clinic had also discriminated on the ground of sex, as under certain circumstances it does agree to provide such treatment to female same-sex couples.

The clinic argued that egg cells are not included under the scope of goods and services as meant in the Dutch General Equal Treatment Act (GETA). The NIHR rejected this line of reasoning, confirming its predecessor's standing case law that IVF treatment constitutes a service within the scope of the GETA.

The NIHR then found that the clinic does not offer the service requested by the applicants to heterosexual couples either, as it only provides IVF treatment using the genetic material of the parents, on the basis of ethical considerations. Thus, no unlawful distinction was made on the ground of sexual orientation. Exceptionally, the clinic does provide the requested service to female gay couples, but only where the egg donor and the surrogacy mother will become the legal parents of the child. By contrast, the treatment requested by the applicants would require the surrogacy mother to give up her child after birth, which would require the clinic to offer prolonged and intense psychological counselling, which it does not.

Under these circumstances the NIHR found that, in order to offer the treatment requested by the applicants, the clinic would have to expand its services considerably. The equality body thus concluded that equal treatment legislation only concerns access to goods and services, not their nature or content. The clinic is therefore not obliged to extend its services to offering (psychological) guidance to a surrogacy mother who gives up her child, and has therefore not made a distinction on the ground of sex.

Internet sources:

<http://www.mensenrechten.nl/publicaties/oordelen/2015-6/detail>.

<http://www.mensenrechten.nl/publicaties/oordelen/2015-7/detail>.

Both last accessed 19 August 2015.

Dutch Public Prosecution Service imposes fines for racist remarks on social media

In November 2014, a member of the Dutch national football team posted a picture of himself together with eight other coloured players of the national team on social media, which caused numerous negative reactions and comments. Several comments compared the players to apes or slaves, as well as to 'Zwarte Piet' (Black Pete), the hotly-debated central figure of the Dutch Saint Nicholas festivities.⁷¹ The racist comments drew a lot of media attention and caused indignant reactions from players as well as the Dutch Football Association.

Racial or
ethnic origin

The Public Prosecution Service rapidly initiated an investigation and announced in March 2015 that three comments were found to be punishable under criminal law. The Service did not announce the legal basis for the prosecution, but it may be presumed that the remarks constitute discriminatory speech (as forbidden under Article 137c of the Criminal Code). The suspects have been offered the possibility to settle their case by paying a EUR 360 fine each. If they refuse this 'transaction', they have to appear before a court of justice. The Public Prosecution Service did not announce which comments exactly were being prosecuted, but it is clear that many comments have gone unpunished as only three persons are prosecuted.

The provisions of the Dutch Criminal Code that criminalise discriminatory speech and insulting groups because of their race, religion/belief or sexual orientation are rarely applied. Consequently, the available sanctions such as fines are hardly ever imposed.

Internet source:

<https://www.om.nl/actueel/nieuwsberichten/@88544/reacties/>, last accessed 11 March 2015.

71 See *European Equality Law Review*, Issue 1, p. 133.

National equality body decision on a discriminatory ban on the donation of blood by gay and bisexual men

Sexual
orientation

The Court of Justice of the European Union ruled in April 2015 that permanent bans on the donation of blood by gay or bisexual men may be justified by the need to ensure health protection.⁷² One week earlier, the same issue had been brought before the equality body Netherlands Institute of Human Rights (NIHR), which reversed its standing case law and came to a different conclusion to that of the CJEU.

The previous case law of the NIHR's predecessor, the Equal Treatment Commission (ETC), established that the ban on donation by gay and bisexual blood donors was justified by the need to ensure health protection.⁷³

In April 2015 the NIHR largely followed the ETC's established reasoning that the possibility to donate blood has to be regarded as rendering a service in the sense of the Dutch General Equal Treatment Act, and that the policy is directly discriminatory on the ground of sexual orientation. The NIHR has however abandoned its established case law when finding that the protection of public health cannot justify the discriminatory measure.

The main reason for this reversal is a report published by the University of Maastricht and which was sent to the Dutch Second Chamber by the Minister of Health, which finds that security risks involved with allowing gay and bisexual men to donate blood are smaller than previously thought, mainly because the percentage that does not admit to unprotected sexual activity is lower than previously established.

The Dutch organisation responsible for a safe and efficient blood supply announced that it would study the NIHR's decision, in conjunction with the report published by the University of Maastricht.⁷⁴

Internet source:

<https://mensenrechten.nl/publicaties/oordelen/2015-46>, last accessed 29 July 2015.

Clothing size as an occupational requirement found to be indirectly discriminatory on grounds of chronic disease, but objectively justified

Disability

This case dealt with a woman who sent an application for a job as a junior promotion employee at a marketing company. The job would entail working at various locations, as well as wearing clothing according to different dress codes (depending on the client) which are only available in two size (M and L). In the questionnaire provided by the potential employer size needed to be filled in and the applicant answered that she was XL, the reason why the employer refused to hire her.

The applicant then filed a complaint with the Anti-Discrimination Centre to which the employer answered offering a higher-ranked post instead since it argued that changing the sizes of the clothing to accommodate her needs would entail an excessive burden due to the dimensions of the business. The applicant had to refuse the offer since the job required someone with a driving licence which she did not have, and instead decided to take the case to the Netherlands Institute for Human Rights (NIHR).

The NIHR, following the CJEU rulings in this area,⁷⁵ found that obesity in itself (determined by a Body Mass Index Score) did not fall per se in the definition of disability. However, the NIHR (in line with the judgment of the CJEU in *FAO/Kommunernes Lansforening*), found that if the obesity entails a limitation

72 CJEU, Case C-528/13 *Léger*, judgment of 29 April 2015, ECLI:EU:C:2015:288. See also this publication, p. 58.

73 Equal Treatment Commission, decision Nos 2006-20 and ETC 2007-85.

74 NIHR decision 2015-46 of 24 April 2015.

75 Cases C-335/11 and C-337/11 *Skoube Werge and Ring*. See Waddington, L. (2013), 'HK Danmark (Ring and Skouboe Werge): Interpreting EU Equality Law in Light of the UN Convention on the Rights of Persons with Disabilities', *European Anti-Discrimination Law Review*, Issue 17, pp. 11-21.

that may hinder the full and effective participation of that person in professional life on an equal basis, it can be covered by the concept of 'disability'.⁷⁶

Based on this case law, the NIHR found that the Law on Equal Treatment on the Ground of Disability or Chronic Illness, which transposed Directive 2000/78, applies in the case at hand, as the *de facto* requirement of size M/L causes the obesity of the applicant (which was based on her Body Mass Index score) to entail a limitation that may hinder full and effective participation in professional life on an equal basis, thus giving rise to indirect discrimination on the ground of chronic disease (obesity).

The NIHR decided that, in balancing the interests of the defendant (to preserve low costs and an efficient business model, necessary in a market that is distinguished by a high level of competition) against the interests of the applicant to be hired, the interests of the defendant in this case were more important, especially since the applicant had been offered a job as a *senior* promotion employee instead. Thus, the NIHR found the indirectly discriminatory requirement to be objectively justified, and ruled that the employer did not make a forbidden distinction on the ground of chronic disease.⁷⁷

Internet source:

<http://mensenrechten.nl/publicaties/oordelen/2015-18/detail>, last accessed 23 April 2015.

Discriminatory remarks led to dismissal

Recently, two different courts have decided on cases concerning dismissal because of discriminatory remarks.

The first case concerned a shop manager who, as a reaction to several instances of theft, put up a short note in the staffroom, which called upon all employees to be more attentive, and which amongst the characteristics of possible thieves mentioned 'Antilleans/gold teeth'. The employer, following complaints by other employees, decided to use the most far-reaching measure possible, and summarily dismissed the employee (with immediate effect). Such a dismissal (on the ground of Article 7:677 in conjunction with Article 7:678 Dutch Civil Code) requires an urgent cause, which must be such that an employer cannot be expected to continue the contract. The District Court of Rotterdam did not find such an urgent cause since the note had not raised any concerns among the management team until other members of the staff started to complain which was weeks after. The Court decided that the employee was entitled to receive her salary from the date of the improper termination, and that the employer should allow her to start working again.

Racial or
ethnic origin

In the second case, a security employee working for a casino had posted remarks on Facebook that were strongly discriminatory, for example referring to Muslims as an 'enormous cancer tumour'. This was against the official company policy as regards to discrimination, which was laid down in its employment regulations. The employee, moreover, had a long history of conflicts with his employer, and had received official warnings before. Contrary to the first case, the employee was not dismissed with immediate effect, but the employer did decide to go to court, requesting the court to dissolve the employment contract on the basis of an urgent reason or, alternatively, on the basis of a substantial change of circumstances (Article 7:685(2) in conjunction with Article 7:678 Dutch Civil Code).

The District Court of Limburg found that the circumstances of the case did not justify dismissal for an urgent reason. However, the Court did grant the alternative request to dissolve the labour agreement on the basis of a substantial change of circumstances. In the Court's decision, the previous conflicts between the employee and the employer, as well as the former's refusal to follow an anti-aggression course, were

⁷⁶ CJEU, Case C-354/13 FOA/Kommunernes Landsforening, judgment of 18 December 2014, ECLI:EU:C:2014:2463. See also the analysis in *European Equality Law Review*, 2015, Issue 1, pp. 63-64.

⁷⁷ NIHR Decision 2015-18 of 26 February 2015.

considered to constitute important circumstances. The employment contract was therefore terminated, and the employee was not granted any compensation.

Internet sources:

District Court of Rotterdam, 24 February 2015, ECLI:NL:RBROT:2015:2848:
<http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBROT:2015:2848>.
 District Court of Limburg, 31 March 2015, ECLI:NL:RBLIM:2015:2660:
<http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBLIM:2015:2660>.
 Both last accessed 19 August 2015.

Employer made a forbidden distinction by rejecting an applicant with a foreign-sounding name, while subsequently inviting a (similar) applicant with a Dutch-sounding name

The Dutch equality body, the Netherlands Institute for Human Rights (NIHR), has recently rendered an interesting decision in a case concerning a job applicant who held that he was refused for a job because of his foreign-sounding name. After this person had applied for a job as a dishwasher, he received the reply that all positions were filled. One day later, a friend with similar work experience and a Dutch-sounding name applied at the same restaurant, and he received a reply inviting him for an interview. The rejected applicant issued a complaint of discrimination at the local Anti-discrimination Centre, and this bureau subsequently sent a letter to the employer informing him of the complaint. The employer's outright denial that a discriminatory distinction on the ground of race or ethnic origin had been made led the Anti-discrimination Centre to bring the case before the NIHR.

The NIHR established that the employer had a dual obligation. Firstly, as regards the *negative* obligation, the employer cannot make a distinction based on race or ethnic origin and that employer bears a heavy burden in proving that no such distinction was made. In this case the employer argued, on the one hand, that it had been a matter of luck as the man with a Dutch-sounding name had called just when the opening was notified to the employer and, on the other, that a quarter of his employees had a foreign-sounding name. The NIHR rejected these arguments as it was proven that the employer had been notified two weeks in advance, plus he had to prove that there had been no discrimination in that individual case.

Secondly, the case reaffirms that the *positive* obligation on employers to take measures ensuring compliance with the equal treatment legislation also includes the duty to properly investigate complaints alleging discrimination.

Internet source:

NIHR decision 2015-44 may be retrieved via:
<https://mensenrechten.nl/publicaties/oordelen/2015-44/detail>, last accessed 19 August 2015.

POLICY DEVELOPMENT

Statistics on discrimination published, only a fraction of discrimination cases taken up by the Public Prosecution Service

The two equality bodies of the Netherlands, the Netherlands Institute for Human Rights (NIHR)⁷⁸ and the Anti-Discrimination Bureaus ('anti-discriminatievoorzieningen', ADVs)⁷⁹ plus the National Expertise

⁷⁸ A quasi-judicial body that has been assigned with the tasks of hearing complaints about unequal treatment (which result in a non-binding Opinion), drafting reports, giving advice to the government and investigating possible instances of structural discrimination.

⁷⁹ It has its legal basis in the Act on Local Anti-Discrimination Bureaus. All 393 municipalities are obliged to establish and subsidise an ADV. The ADVs work together in the National Association of Anti-Discrimination Bureaus ('Landelijke Vereniging ADB's') and are supported by the expert institution called 'Art.1'.

Discrimination Centre which forms part of the Public Prosecution Service, published reports regarding statistics on discrimination cases and complains.

Art. 1 issued a press release pointing to a large increase in complaints about discrimination to ADVs in 2014 (from 6 186 complaints in 2013 to 9 714 in 2014). However, taking into account that over 4 500 of these complaints concerned *one* incident, namely the MP Wilders' remarks on fewer Moroccans, then actually there has been a substantial decrease in the number of complaints lodged at the ADVs. Most complaints concern discrimination on the ground of race/ethnic origin.

The NIHR, in its annual report on 2014 as compared to 2013, received fewer questions about equal treatment as well as fewer requests for opinions but registered a relative increase in race/ethnic origin complains. The NIHR emphasises that in 83 % of cases, measures were taken by the defendant as a result of the Opinion, as compared to 70 % in 2013.

Finally, an internal report by the National Expertise Discrimination Centre stated that out of 1 600 cases of discrimination reported to the police in 2013, only 83 were taken up by the Public Prosecutor – the lowest number since registration began in 1998, while there is no reason to assume that the actual prevalence of discrimination is lower than before – most cases concern race/ethnic origin.

Internet source:

Art. 1's press release on the overview of complaints as compiled by the National Association of Anti-Discrimination Centres (Landelijke Brancheorganisatie van ADBs):

http://www.art1.nl/artikel/10777-Forse_stijging_aantal_discriminatieklachten.

The NIHR's annual report is available (in Dutch) at: <https://mensenrechten.nl/publicaties/detail/35410>.

NRC on the handling of discrimination cases by the Public Prosecution Service:

<http://www.nrc.nl/nieuws/2015/03/29/aangifte-van-discriminatie-belandt-vaak-niet-bij-om/>.

The Minister's letter to Parliament may be accessed here:

<http://cmsawt.ncrv.nl/data/files/data/files/images/Van%20der%20Steur.pdf>.

All last accessed 22 April 2015.

Norway

NO

LEGISLATIVE DEVELOPMENT

Revised age limits in the Working Environment Act

The Working Environment Act § 15-13a has raised the age limit for terminating employment to 72 years, as opposed to the previous 70, and it entered into force as of 1 July 2015.⁸⁰ Additionally, as of 1 July 2015 the mandatory imposed age limits set by employers cannot be lower than 70 years. Exceptionally, a lower age limit than 70 years may be set if necessary due to health or security issues.

Age

The legislation provides an extension for the introduction of the higher age limit until 1 July 2016 for all, if the limit has been established before the implementation of the amended legislation, or when the existing collective agreement expires.

This will require a number of large Norwegian firms to increase the age limit set for employees from 67 years to 70 years. Most of these age limits are found in internal regulations that now need to be amended and adjusted to the higher age limit.

80 Law No. 21 of 24 April 2015.

It is important to note that this new legislation does not change the state-imposed mandatory retirement age of 70 years for state workers according to the Act on Age Limits for Public Officials of 21 December 1956 no. 1 section 2, nor the similar age limit set by counties and municipalities. Furthermore, exceptions set by legislation, such as for the armed forces and other sectors with a lower mandatory retirement age remain valid.⁸¹

Internet source:

<https://lovdata.no/dokument/NL/lov/2015-04-24-21>, last accessed 19 August 2015.

POLICY DEVELOPMENT

National report on the situation of Roma as a national minority from 1850 until today

The Government White Paper: *NOU 2015: 7: Assimilation and resistance – Norwegian policies related to Gypsies/Roma from 1850 until today (Assimilering og motstand – Norsk politikk overfor taterne/romanifolket fra 1850 til i dag)* was presented to the Minister of Local Government and Modernisation on 1 June 2015. This is the result of a national committee appointed by the government in 2011 to examine and describe the development of the Norwegian authorities', institutions', organisations' and other businesses' policies and measures aimed at Roma from 1850 until today.

The committee has examined the implementation of policies towards Roma, and the subsequent treatment of these groups. The policy of the national and local governments towards the Roma during the 20th century helped to undermine these people's traditional way of life and culture. The committee has looked at what has happened in the past, in order to describe the situation of these groups today. The Committee has made a number of recommendations to promote reconciliation and justice between the majority of the population and the minority group, of which several are linked to issues of non-discrimination. These include targeting prejudice and negative opinions towards the group as a whole, as well as increasing general knowledge in society about the culture and history of this group by including these aspects in the materials used in primary education.

The work of the committee has led to a public apology by the Minister of Local Government and Modernisation to the members of this minority group upon the presentation of the report.

Internet sources:

<https://www.regjeringen.no/nb/dokumenter/nou-2015-7/id2414316/?docId=NOU201520150007000DDDEPIS&ch=1&q>.

<http://www.jus.uio.no/smr/om/tater-romaniutvalget/index.html>.

Both last accessed 19 August 2015.

Report assesses how Scandinavian countries treat Roma migrants from Romania

On 16 June 2015 the Norwegian research institution FAFO published the report 'When poverty meets affluence. Migrants from Romania on the streets of the Scandinavian capitals' about the situation of Romanian Roma beggars in the Scandinavian capitals. This is the first large-scale quantitative mapping of this population. Some 1 296 migrants were interviewed about their coping strategies on the streets, their living conditions in Romania, their reasons for migrating and their expectations for the future. The report found that the Romanian street workers are less subject to discrimination than expected, but are

81 Background documentation:

Prop 48 L (2014-2015) Endringer i arbeidsmiljøloven og allmenngjøringsloven (arbeidstid, aldersgrenser, straff mv).

<https://www.regjeringen.no/no/dokumenter/Prop-48-L-20142015/id2345625/>.

<https://www.stortinget.no/no/Saker-og-publikasjoner/Publikasjoner/Innstillinger/Stortinget/2014-2015/inns-201415-207/>.

vulnerable to harassment and a lack of protection. The report concludes that a number of the myths associated with the Romanian street workers are not true: although they are poor, they are not organised by traffickers, the money is sorely needed and spent on necessities and criminal activities are not closely associated with begging.

There are few Roma living in Norway although in the past there has been a large influx of street workers from Romania, most of them being of Roma origin. Given the Norwegian immigration policies, a large number of these do not have residence permits, but travel in and out of Norway on a tourist visa. The report demonstrates the consequences of the different policies chosen to meet the Roma migrants in the different Scandinavian countries. It also demonstrates that while the EU framework encourages the free movement of labour, there is little regulation in place to address the free movement of poverty. The knowledge base of the report may spur the debate on political responses to transnational poverty.

Internet source:

<http://fafo.no/images/pub/2015/954-innmat-trykk.pdf>, accessed 19 August 2015.

Portugal

PT

LEGISLATIVE DEVELOPMENTS

New legislation regarding gender equality in access to and the supply of goods and services which implements the decision in *Test-Achats*

Law No. 9/2015 of 11 February 2015 has been published, implementing the CJEU judgment in the *Test-Achats* case at the national level. It amends Law No. 14/2008 of 12 March 2008 regarding gender equality in access to and the supply of goods and services.

Gender

Despite the general principle of non-discrimination on the grounds of sex in insurance and financial services contracts established in Article 6 No. 1 of Law No. 14/2008, Article 6 No. 2 explicitly allowed for different prices and benefits in insurance contracts and other contracts providing for financial services, based on sex as an actuarial factor. This was subject to the condition that such differences were proportional and based on relevant and rigorous actuarial and statistic data. In the original version, the Law indicated that actuarial data for this purpose were only to be considered proportional, rigorous and relevant if calculated in accordance with the Guidelines established by the Portuguese Insurance Institute for that purpose (Article 6 No. 3). Finally, Article 6 No. 4 established the obligation to assess and review the derogations applied under Article 6 No. 2 during a period of five years.

The amendment of this Law, now introduced by Law No. 9/2015, consists basically of the following:

- the general principle establishing that when taking into account the consideration of sex as an actuarial factor for the calculation of prices and benefits in insurance and financial services contracts, the fact that this cannot result in different prices and benefits was retained (Article 6 No. 1);
- this general principle is now applicable not only to private insurance contracts but also to voluntary and private pension schemes not related to employment contracts (New Article 6 No. 5); and
- the derogations from the general principle established in Article 6 No. 1, by way of making use of sex as an actuarial factor in these contracts (as established in Article 6 No. 2 of Law No. 14/2008, in its original version) have been eliminated; and as a result Articles 6 No. 3 and 4 were also eliminated.

However, the Law has retained different treatment in the areas of health and life insurance where those practices are allowed by the European Commission in the Communication of 22 December 2011, and gives the Portuguese Insurance Institute the competence to divulge those practices (the new Article 6 No. 6).

The changes to Article 6 have been given retroactive effect from 21 December 2012 (Article 5 of Law No. 9/2015), thus avoiding an infringement of EU Law due to the late implementation of the *Test-Achats* judgment.

Nonetheless, a clear distinction is established in the Law between insurance and financial services contracts concluded up to 20 December 2012, and those concluded after that date. For the previous contracts, the old provision that allowed for derogations (Article 6 Nos 2 and 3) is still admissible, while for new contracts the new rules apply. As for contracts concluded between 21 December 2014 and Law No. 9/2015, a period of 90 days to adapt them to the new provisions is indicated (Article 3 of Law No. 9/2015).

Internet source:

All Portuguese legislation available via: www.dre.pt, last accessed 20 July 2015.

Changes to the Labour Code include ‘gender identity’ within the grounds of discrimination

The Labour Code, approved by Law No. 7/2009 of 12 February 2009, was recently amended by Law No. 28/2015 of 14 April 2015. The amendment concerns Article 24 No. 1 of the Labour Code, which prohibits discriminatory practices against both workers and job applicants for a position of employment on several grounds indicated by the law. This provision has been changed in order to add ‘gender identity’ (a term which is undefined in Portuguese legislation) as an autonomous ground of discrimination among the other grounds already indicated in the provision.

This change is intended to prohibit, and qualify as discriminatory, practices against workers based on gender reassignment and transsexualism. These discriminatory practices are now made more visible.

Internet source:

All Portuguese legislation available via: www.dre.pt, last accessed 20 July 2015.

RO

Romania

LEGISLATIVE DEVELOPMENTS

Proposed amendments on ‘disposition to discriminate’, indirect discrimination, multiple discrimination, discrimination by association, psychological harassment, justifications accepted in discriminatory treatment and the status of magistrates for members of the Steering Board of the NCCD

Nine deputies and senators submitted a draft bill amending the Anti-discrimination Law. The text is currently under review in the chambers of Parliament and has never been publicly discussed with the NCCD or with NGOs working on anti-discrimination issues.

Amendments are proposed regarding the list of protected grounds covered by the prohibition of a ‘disposition to discriminate’ (an altered form of the prohibition on an instigation to discrimination), indirect discrimination, multiple discrimination and genuine occupational requirements. However, an analysis of

the text shows that the list of grounds is the same as the current one and there is actually no change. The supporting documents and the opinion of the Legislative Council do not provide any information regarding the need for or the purpose of mentioning an extended list of grounds which in practice are already covered. The text mentions the 'disposition to discriminate' which is currently not fully compliant with the definition of an instruction to discriminate.

On a positive note, the draft introduces a prohibition on discrimination by association which is currently lacking in Romanian legislation, although the NCCD's and the courts' jurisprudence have sanctioned discrimination by association as direct discrimination. Also a new concept to be introduced in the law is that of psychological harassment which is defined as 'actions by a person who repeatedly engages in intimidating conduct which affects the emotional state of a person and triggers a state of fear.' It is unclear how this new concept adds to the already existing definition of harassment.

The draft also aims to change the process of selecting the members of the Steering Board with the final decision being taken not by the plenary of Parliament as currently provided by the Law in Article 23, but by the joined Permanent Bureaus of Parliament. The draft proposes that the period spent as a member of the Steering Board of the NCCD for graduates of Law Schools is to be considered as experience as magistrates while for graduates of other faculties the period of the mandate is to be considered as experience in their specialty.

Internet source:

http://www.parlament.ro/pls/proiecte/upl_pck.proiect?idp=14626, last accessed 19 August 2015.

Measures to secure accessibility to communication services by persons with disabilities⁸²

The National Authority for Administering and Regulating Communications (*Autoritatea Națională pentru Administrare și Reglementare în Comunicații*, ANCOM) issued a decision establishing measures targeting persons with disabilities as the end users of electronic communications which entered into force on 1st of March 2015. Decision 160/2015 aims to ensure 'access to and possibilities for final users with disabilities to use electronic communications for the public, adapted to their needs and subject to similar conditions as those provided for other end users.' The decision establishes minimum standards so that any user with disabilities can exercise the right to enjoy electronic communications for the public (phone landlines, mobile phones, internet services except public hotspots). The providers of communication services have a duty to establish an accessible webpage with all the relevant information for users with disabilities and to provide such information in writing upon request. Additional facilities are also mentioned such as the possibility to file a request or a petition through a representative, priority access in requests regarding installation or malfunctioning, the use of adapted means of communications when interacting with other users with disabilities, and providing all contractual information free of charge through electronic mail in a format which is compatible with the needs of the users. The maximum transfer speed and the maximum transfer costs are also established for internet and telephone. In order to have access to these benefits, persons with disabilities or their representatives have to show their certificate establishing the type and degree of disability. ANCOM will revisit the conditions established in the decision in 12 months. No sanction is provided in the decision for a failure to comply. Theoretically, ANCOM could impose sanctions based on the general legislation but clear express provisions in these secondary norms would have had more impact.

Disability

This is a novelty in terms of ensuring the accessibility of public services to persons with disabilities.

The lack of specific sanctions and of a monitoring mechanism give rise to the question whether ANCOM will be willing and able to use its general mandate in order to ensure enforceability.

⁸² Decision 160/2015 of the National Authority for Administering and Regulating Communications.

This decision comes as an isolated initiative not linked with any other public policy. The national equality body is currently preparing a national equality strategy and the Ministry of Labour is currently discussing a draft strategy on the rights of persons with disabilities, but neither had been involved in this effort.

Internet source:

<http://lege5.ro/Gratuit/gu3tinjsa/decizia-nr-160-2015-privind-stabilirea-unor-masuri-adresate-utilizatorilor-finali-cu-dizabilitati>, last accessed 19 August 2015.

POLICY DEVELOPMENTS

Parliament appoints six new members for the national equality body amid controversies

As the mandates for six out of the nine members of the Steering Board of the national equality body (NCCD) had expired, on 1 April the Romanian Parliament appointed six new members amid controversies and criticism. The appointment procedure was deeply problematic and is contested by NGOs in the Anti-discrimination Coalition, by independent candidates and by the opposition parties.

The flawed procedures raise serious concerns regarding the politicisation of the NCCD and the gradual erosion of the institution and indicates threats to its independence. The opposition parties and the NGOs are protesting against the entire process, independent candidates threaten to file complaints for being discriminated against and some NGOs are threatening to sue Parliament for not observing the legal requirements for the appointments. The lack of transparency in the process, backdoor arrangements leading to solely political appointments and a misinterpretation of the legal requirements give rise to serious questions regarding the actual independence of the NCCD.

Internet source:

<http://www.hotnews.ro/stiri-esential-19806707-parlamentul-validat-noua-componenta-colegiului-director-cncd-cine-lupta-impotriva-discriminarii-romania.htm>, last accessed 19 August 2015.

Report on access to justice for Roma and other vulnerable groups published by the Superior Council of Magistracy

The Superior Council of Magistracy (Consiliul Superior al Magistraturii) has published the feasibility study 'Access to justice for vulnerable groups in Romania – 2014' as part of the project entitled 'Improving access to justice. An integrated approach with a focus on Roma and other vulnerable groups' developed in collaboration with the Norwegian Courts Administration and the Council of Europe and carried out within the Norwegian Financial Mechanism 2009-2014 Program RO 24 'Judicial capacity building and cooperation'.

The feasibility study aimed to assess the state of access to justice in general and in particular for Roma and other vulnerable groups of the population, as well as their needs and obstacles in this regard. Some of the key conclusions of the study are that the 'progressive legal framework lacks impact assessment concerning vulnerable groups', the 'legal aid provisions do not counterbalance the views that Court fees are not affordable for vulnerable groups', 'information related to the judiciary does exist but it is not adaptable and easily accessible for vulnerable groups.' Notably, the study finds that 'gender and ethnicity does not play a role in impacting access to justice for vulnerable groups but prejudice does,' 'a lack of trust in the judiciary among Roma is at high level and impacts their access to justice,' 'the judiciary does not acknowledge discrimination faced by vulnerable groups particularly the Roma' and 'the judiciary does not seem to grasp the landscape of vulnerable groups in Romania.'

While being a first and encouraging study in this regard, due to the methodological limitations the authors recognize that the study cannot claim that it introduces representative data. In spite of the

All
grounds

Racial or
ethnic origin

shortcomings, the limited statistical data assessing the perception and attitudes of the courts, partner institutions, NGOs and vulnerable categories regarding different aspects of access to justice (including statistical data on the level of trust or affordability and availability of information relevant for vulnerable groups) could be a good baseline for developing future interventions meant to increase the effectiveness of vulnerable groups' access to justice – particularly Roma.

Internet source:

http://www.csm1909.ro/csm/linkuri/26_01_2015__72130_ro.pdf, last accessed 19 August 2015.

Government adopts a new Strategy for the Inclusion of Romanian Citizens of Roma Ethnicity for 2015-2020⁸³

On 14 January the Romanian Government adopted the Strategy for the Inclusion of Romanian Citizens of Roma Ethnicity for 2015-2020, a document which entered into force on 21 January 2015. The Strategy is an update of the Roma Strategy 2012-2012 adopted in 2011 as Governmental Decision 1221/2011. The updated document claims to include all European recommendations for Roma inclusion and to be in harmony with the prior Strategies approved in this field.

Racial or
ethnic origin

The declared goal of the Strategy is to ensure the socio-economic inclusion of Romanian citizens of Roma origin on a similar level to that of the general population and to ensure equal opportunities by initiating and implementing policies and public programmes in areas such as: education, professional training and employment, health, housing and infrastructure, culture, social services, and preventing and combating discrimination.

The main areas of intervention are: access to education, employment, health and housing. The Strategy also includes plans of action for each area of intervention and targeted results, sources of funding and a monitoring and revision system. The overall estimated budget for implementing the Strategy in the period 2015-2016 is RON 430 502 million (approx. EUR 10 000 million).

In the area of education, the Strategy aims to reduce the gap between Roma and non-Roma children regarding school participation, school performance and socio-economic conditions and to reduce the number of discrimination cases in schools. In the area of employment the major objective of the Strategy is to increase participation in the labour market. In the area of health the Strategy aims to improve the access of Roma to basic, preventive and curative health services, reducing health risks and preventing discrimination against Roma accessing health services. In the area of infrastructure and housing the Strategy aims to ensure decent living conditions and public services and infrastructure. The Strategy also mentions areas of interest and includes specific objectives and directions of action for culture, infrastructure and social services including child protection, justice and public order, administration and community development. Discrimination is not an area which is discussed in a separate section but combating discrimination in access to education, employment and services is mentioned under these headings.

For each area of intervention the Strategy provides actions, indicators, results for 2016 and 2020 with a varying degree of specificity. A list of responsible actors and the next steps with a timeline are also included. Also a mechanism for the monitoring and evaluation of the Strategy is mentioned – prior strategies being criticized for their rather rhetorical, declaratory content and the lack of responsibilities, and clear mechanisms for implementation. However, no further steps have been adopted in establishing and organizing the various committees mentioned as focus points for the monitoring and evaluation,

⁸³ *Strategia de incluziune a cetătenilor români aparținând minorității rome pentru perioada 2015-2020* issued by the Romanian Government on 11 January 2015, in force from 21 January 2015 updating the Roma Strategy 2012-2012 adopted in 2011 as Governmental Decision 1221/2011.

thus raising the concern that the mechanism will be merely formal just to respond to prior criticisms. Likewise, the lack of coordination with other relevant national strategies may generate difficulties.

As a positive development, different from the prior Strategy, this one includes a more elaborated mechanism of monitoring and evaluation and the results and indicators are somewhat more specific.

The relevant sections on equality and non-discrimination in the new Roma Strategy seem to be less developed than in previous Strategies. It seems that the attempt to mainstream equality concerns in all areas of intervention lead to an actual dilution of the equality and non-discrimination concerns, actions or relevant indicators and results.

Some key concerns are absent from the strategy such as: the need to re-evaluate and clarify Romanian legislation on housing, particularly social housing and on evictions or tackling police abuse in Roma communities. Also a notable failure is that it does not respond to the need to collect ethnic data anonymously and to generate relevant data needed for public policies or special measures.

Internet source:

<http://lege5.ro/en/Gratuit/guytsnzwgm/strategia-guvernului-romaniei-de-incluziune-a-cetatenilor-romani-apartinand-minoritatii-rome-pentru-perioada-2015-2020-din-14012015>.

Last accessed 19 August 2015.

CASE LAW

Denial of access to fitness facilities for homoparental or monoparental families⁸⁴

After using the fitness facilities of the respondent club for 11 years, the claimant and his partner started using the facilities three years ago together with their children. However, in March 2014 the staff and management of the club failed to react to homophobic harassment targeting the gay fathers and their children occurring in the locker rooms. Furthermore, the club introduced a new rule meant to limit the access of the claimants to the already paid services by prohibiting parents to have access to locker rooms with children of the opposite gender, regardless of the age and level of dependence of the children. The alternative solution offered by the wellness club to homoparental or monoparental families with children of the opposite sex was the use of a public toilet where the children could change.

The claimant, supported by the NGO ACCEPT, filed a petition before the National Council for Combating Discrimination (NCCD) (*Consiliul Național pentru Combaterea Discriminării*) in June 2014 requesting the NCCD to find discrimination on grounds of sexual orientation, gender and family status, given the failure to react to homophobic incidents in the locker rooms and the adoption of a rule de facto denying access to the premises for homoparental families with children of the opposite sex. This is the first decision of the NCCD on discrimination in access to services on grounds of sexual orientation (homoparental families).

NCCD decision 680/ 12.11.2014 communicated on 21 January 2015 found that no evidence had been provided regarding the harassment of the claimant by other clients and the failure of the club to take measures against the aggressors or to disclose the identity of the aggressors so that the claimant could file a complaint with the police. As for the new rule introduced in the internal regulation of the club adopted shortly after the homophobic incident the NCCD took into consideration the opinion issued by the National Authority for the Protection of the Rights of Children which emphasized the need to ensure the security, comfort and privacy of the child. It also noted that when such clubs or sports facilities do not have family locker rooms and the child is not of an age to decide for him or herself or the ability to

84 National equality body decision 680/ 12.11.2014 communicated on 21 January 2015, Jerome Goupil and *ACCEPT v. World Class Romania*.

independently take care of him or herself, it should be the decision of the parent to bring the child into a locker room for the opposite sex as the parent is in the best position to assess the impact of such a situation on the child.

The NCCD also assessed the neutrality of the rule as if the rule was indeed objectively justified by a legitimate aim as alleged by the club. The club (World Class), justified the rule mentioning the best interest of the child and the right to privacy of the members of the club. The NCCD underlined that the members' right to privacy cannot trump the child's right to dignity. The NCCD concluded that while the purpose of the decision is legitimate and the justification is objective, the methods chosen to attain this purpose are not adequate and necessary. Thus, the apparently neutral rule generated a disadvantage for parents with children of the opposite sex.

The NCCD found that the measure was not adequate and sanctioned the defendants for discrimination on grounds of sexual orientation and against monoparental and homoparental families with children of the opposite sex according to Articles 2(3) and 10 of the GO 137/2000. The sanction was a warning with no financial penalties. The sanction of an administrative warning was criticized, including in the separate opinion filed by two of the members of the NCCD, given the gravity of the actions as well as the negative impact on the development of the two children exposed to the discriminatory treatment of their father and the trauma of the little girl sent to a public toilet in order to change. The NCCD decision was not challenged before the Court of Appeal and it is therefore final.

This is the first decision on denial of access to services on grounds of sexual orientation and of homoparental status in Romania. The media coverage of the event, the partnerships forged by World Class with notoriously homophobic groups in condemning the petition and the NCCD decision generated a great deal of public discussion which is hopefully beneficial in dispelling homophobic biases.

The individual claimant and the NGO have the possibility to bring an action before the court and to seek damages. This option had not been used at the time of writing the flash report, and the ACCEPT leadership mentioned informal negotiations with World Class asking the club to arrange equality and diversity training for its personnel.

Internet source:

Decision of the NCCD in Romanian available on request. A presentation of the case in Romanian is available at:

<http://www.acceptromania.ro/blog/2014/11/19/cncd-regula-impusa-de-world-class-ce-restrictioneaza-accesul-parintilor-in-vestiar-alaturi-de-copii-de-sex-opus-este-discriminatorie/>.

Last accessed 19 August 2015.

National equality body rejecting discrimination complaint filed by disabilities NGO attacked in the media, defining the campaign as free speech

The case originated with a complaint filed with the National Council for Combating Discrimination by a Romanian NGO, the European Centre for the Rights of Children with Disabilities (*Centrul European pentru Drepturile Copiilor cu Dizabilități*, CEDCD). Following a two-year campaign by the CEDCD in support of a proposed bill on special education seeking to advocate a CRPD-compliant reform of the system of education for children with disabilities, an aggressive media campaign attacking the NGO and its President, Mrs. Mădălina Turza, started in 2014.

The CEDCD filed a complaint with the NCCD against a journalist, the leader of a trade union of teachers and two teachers at special schools for their statements made in a series of articles published in a

Disability

regional newspaper, *Evenimentul Regional al Moldovei*.⁸⁵ These statements included personal attacks against the NGO President including the disclosure of personal medical information from the file of her daughter and an infringement of her right to privacy as well as the obligation not to disclose personal data with the potential of triggering discrimination or statements discriminating Roma children as well: 'And all this, because this lady, Mădălina Turza, has an NGO and a child whom she wanted to integrate within mass education and she had not been allowed access thereto as it is not the case that a child with down's syndrome and elements of autism, with a low IQ level, can be enrolled in a normal school [...] and the tendency of this law is for these children to extensively go without classes of mass education, and benefiting from those rights can be five to six times more expensive than they are at present (in special schools)...' 'Too few children of Romanian ethnicity come to us, because of those of Roma ethnicity. Many parents remove their children from here, because of the Roma. A mixed class of Romanian and Roma children is a disaster. They complain that the others (Roma children) are dirty, have head lice, and smell badly.'

The CEDCD also filed a submission under the early warning and urgent action procedures of the CRPD Committee which in January 2015 sent a letter from the Chairperson of the Committee on the Rights of Persons with Disabilities to the Romanian authorities in which it 'requests the State party to investigate seriously and expeditiously the allegations of threats against organizations of persons with disabilities which have promoted the draft law.'⁸⁶

The NCCD found that these statements do not amount to a breach of the GO 137/2000 (discrimination and an infringement of the right to dignity) as they pertain to 'a public debate which aims to lead to a progress of human relations...'⁸⁷ The NCCD argued that the criticisms of the draft law published by the author of the article and his three expert guests 'cannot be thought of as a differentiation, restriction, exclusion, preference having as a purpose restricting or impeding the recognition, use or exercise of human rights and fundamental freedoms equally as prohibited by Art. 2 of the GO 137/2000.' In deciding that there was no breach of the non-discrimination provision and no violation of the right to dignity, the NCCD invoked the ECHR jurisprudence on Article 10 mentioning the essential role of the media in a democratic society and the need to protect even the expression of information and ideas which are shocking, offensive or insulting as part of the pluralism defining a democratic society. The NCCD accepted as free speech and part of a 'public debate aimed to lead to progress of human relations' statements against the claimant provided by the teachers from special schools, the trade union leader and the journalist, instead of arguments regarding the measures proposed by the CEDCD to establish early intervention systems, desegregation and an improvement in the accessibility of mainstream education. The decision has been challenged before the Court of Appeal.

Internet source:

Text of the decision available in Romanian upon request.

85 The texts are available in Romanian at: 1. '*Mercenarii copiilor cu dizabilități*' ['The mercenaries of children with disabilities'], published on April 25, 2014, available at: <http://www.ziarulevenimentul.ro/stiri/moldova/mercenarii-copiilor-cu-dizabilitati--140919.html>. 2. '*Abandonați între două puteri oarbe*' ['Abandoned between two blind powers'], published on May 4, 2014, available at: <http://www.ziarulevenimentul.ro/stiri/moldova/abandonati-intre-doua-puteri-oarbe--142233.html>. 3. '*Cobaii unui experiment distructiv*' ['Guinea pigs for a destructive experiment'], published on April 17, 2014, available at: <http://www.ziarulevenimentul.ro/stiri/moldova/cobaii-unui-experiment-distructiv--144106.html>.

86 Office of the High Commissioner for Human Rights, Letter of the Chairperson of the Committee on the Rights of Persons with Disabilities in reply to *Note Verbale* No. 1937 of the Permanent Mission, CRPD/SP, 19 January 2015.

87 National equality body decision 14 from 14 January 2015.

Serbia

RS

POLICY DEVELOPMENTS

2014 Annual Report of the national equality body

The Commissioner for the Protection of Equality (CPT) in her report for 2014 underlines that some positive improvements in the area of anti-discrimination in Serbia have been made, but that discrimination is still widespread in all areas of social life and that some additional measures are necessary in order to develop a stable, open, inclusive and tolerant society.



All grounds

Overall, the CPT concludes that Serbia has established a satisfactory legal and strategic framework for combating discrimination and achieving equality. However, she also identifies room for further improving the situation, and proposes several recommendations to public authorities and other social actors in order to efficiently combat discrimination.

In 2014, 666 complaints were submitted to the CPT, who worked on 884 cases. Most of these referred to discrimination based on ethnic origin, followed by complaints based on disability, health, age, and gender. Also a majority of the complaints concerned discrimination in recruitment and in the workplace, discrimination in proceedings before the public authorities, the provision of public services and the use of facilities and public spaces, as well as in the area of education and training. Discrimination against Roma is still widespread in the area of education, employment, health protection and housing. Persons with disabilities are mostly discriminated against in the area of employment, education, access to facilities and services and in the area of housing. Persons with HIV/AIDs do not receive equal treatment in health institutions; they are frequently stigmatized by those around them and their family members, and are often discriminated against in education and employment. It has been found that gender equality has still not been achieved, and that discrimination against women is very much present in the business sector, while domestic violence, sexual violence and other gender-based violence are everyday occurrences in Serbia. Discrimination against the elderly in 2014 was more visible, especially in the area of health services and employment. The LGBTI population are among the most discriminated groups in Serbia, often exposed to threats, violence and hate speech. Finally, refugees, internally displaced people, migrants and asylum seekers are in a very vulnerable position and are exposed to discrimination in the area of employment, housing, access to justice, and the issuing of personal documents.

In acting upon complaints, the CPT issued 109 opinions and 198 recommendations to undertake measures for improving equality and more effective protection against discrimination. Furthermore, the CPT issued 20 public warnings regarding frequent and severe cases of discrimination, and instigated six criminal charges, made three proposals to assess constitutionality and legality, initiated two strategic litigations for protection against discrimination and worked on six previously initiated strategic litigations, submitted one notice for initiating misdemeanour proceedings, and issued two expert opinions on draft laws and regulations.

In this report special attention is given to the issue of access to justice and the provision of free legal aid, bearing in mind that Serbia has unsuccessfully tried to adopt the Law on Free Legal Aid since 2004. In order to make the CPT's service more accessible to citizens, the first regional office in Novi Pazar was opened, while three additional offices are being planned for 2015.

The CPT also stressed the role of the media in covering her findings and recommendations.

Room for further improvement was nevertheless identified and recommendations were proposed for public authorities and social actors, such as:

- adopting new strategic anti-discrimination documents to replace those that will expire in 2015;⁸⁸
- prescribing mandatory gender mainstreaming in all decisions and politics on the national and local level;
- intensifying work on the implementation of measures prescribed in national and local strategic documents and action plans;
- continuously working on the training of judges, public prosecutors, police officers and public servants;
- educating journalists and increasing their capacities to inform the public about recent cases of discrimination;
- creating and realizing educational programmes for teachers and professors, as well as for medical and social workers in order to train them to recognize and prevent discrimination;
- ensuring equal opportunities for the youth of vulnerable groups to enter higher education and to secure access to institutions and assistive technology;
- adopting the Law on Free Legal Aid that will secure access to justice for vulnerable groups;
- repealing from current legislation all inadequate and stigmatizing terms, reforming regulations on the deprivation of legal capacity and recognizing registered/civil partnerships.

As the five-year term of the first CPT expired in May 2015, the report underlines that recent years have been marked by intensive work on building and strengthening the technical capacity and human rights expertise of the institution. However, the limiting factor in strengthening this capacity continues to be the lack of adequate premises for the work of the CPT and the lack of human resources.⁸⁹ However, the number of complaints and activities is increasing on a daily basis and this problem must be urgently solved.

Internet source:

http://www.ravnopravnost.gov.rs/images/files/Redovan_godisnji_izvestaj_2014_sajt_FINAL.doc

Last accessed 19 August 2015.

CASE LAW

NGO E v. The Army of the Republic of Serbia and the Minister of Defence

The claimant, M.V., was a major in the Serbian Armed Forces with 22 years of military service. The military police arrested M.V. in 2001 when M.V. was biologically male, because she was wearing women's clothing. For seven months M.V. was deprived of her rank and service, until the Supreme Court ordered that she be returned to work.

In September 2014, M.V. informed doctors at the military hospital that she wanted to undergo sex-reassignment surgery. M.V. started to use hormonal treatments in preparation for reassignment. Doctors at the Department of Psychiatry of the Military Academy subjected her to psychiatric examinations, and on the basis of these made a diagnosis of 'F64' (trans-sexualism); however, they found M.V. to be mentally capable of continuing professional military service. Despite this evaluation, the Chief of the Headquarters of the Serbian Armed Forces suggested on 3 October 2014 that M.V. should terminate military services and retire.

The Department of Human Resources of the Armed Forces sent a letter to the Ministry of Defence asking for the termination of M.V.'s professional military service. It was argued that M.V. had 22 years

88 Those strategic documents are: the National Strategy for the Improvement of Women's Position and the Enhancement of Gender Equality (2009-2015); the National Plan of Action for Children (2004-2015); the National Strategy for Improving the Position of Roma, and the Implementation of the Roma Decade (2005-2015); the National Strategy on Ageing (2006-2015); the Action Plan for Implementing the Strategy for Improving the Position of Persons with Disabilities (2013-2015); the Strategy on the Development and Promotion of Socially Responsible Business (2010-2015).

89 Decision on the approval of the Rulebook published in the Official Gazette of RS, no. 111/12.

and 5 months of military service (20 years are required for a pension), that M.V. was in a low ranking position, and that there was no prospect of promotion as M.V. did not have an appropriate specialisation. Finally, it was underlined that M.V. had an 'established psychiatric diagnosis which can cause adverse consequences for the reputation of the Serbian Army.' Acting on this suggestion, on 22 October 2014 the Minister of Defence issued an order to terminate M.V.'s professional military service, and on 13 November 2014 the Chief of Staff issued a decision to dismiss M.V. from the professional army. M.V. agreed to terminate military service and to receive her pension.

Although M.V. agreed to receive her pension, she considered that the words used in the decision to dismiss her were offensive (that she had an 'established psychiatric diagnosis which can cause adverse consequences for the reputation of the Serbian Army'). In January 2015, the NGO Egal, an organisation that protects the rights of transgender persons in Serbia, brought a complaint on behalf of M.V., arguing that she was exposed to a severe form of discrimination.

The Commissioner for the Protection of Equality (CPE) stated that examining whether or not the procedure for terminating M.V.'s professional military service was legal was outside the scope of her mandate. However, her task was to examine and assess whether the reasoning used in the letter (a psychiatric diagnosis that can cause adverse consequences for the reputation of the Serbian Army) can be considered to be discrimination based on gender identity.

The CPE did not accept that this reasoning could be considered a 'technical administrative error', and found this expression (an 'established psychiatric diagnosis') to be unacceptable as it is based on negative stereotypes and prejudices about the gender identity of M.V., and expresses a negative value judgment. The CPE also found that the wording is especially significant, as the sentence is written in documents of the Serbian Armed Forces and the Serbian Ministry of Defence, whose constitutional and legal duty is to strictly respect the prohibition of discrimination and the principle of equality for all citizens.

The CPE therefore found that the reasoning used in the letter violated Article 12 of the Law on the Prohibition of Discrimination, which prohibits harassment and degrading treatment, as the actions insulted and offended the dignity of M.V. The CPE recommended the Chief of Staff and the Ministry of Defence to issue a written apology to M.V., and to take all appropriate measures to diminish transphobia, increase tolerance, and prevent discrimination against transgender persons who are employed in the Armed Forces and at the Ministry of Defence.

The CPE relied on domestic law: Article 21 of the Serbian Constitution,⁹⁰ which prohibits discrimination; Article 12 of the Law on the Prohibition of Discrimination;⁹¹ and Article 13(3) of the Law on the Serbian Armed Forces. The latter Law stipulates that it is forbidden to favour or deprive a member of the Serbian Armed Forces of his/her rights and duties on the grounds of his/her race, religion, gender, nationality, background, or another personal feature.⁹²

The CPE also relied on international norms to substantiate her opinion, including: the prohibition of discrimination stipulated in Article 14 of the European Convention on Human Rights, Principle No. 3 of the Yogyakarta Principles on the right to recognition before the law, and the Recommendation of the Committee of Ministers of the Council of Europe CM/Rec (2010) on measures to combat discrimination on grounds of sexual orientation or gender.

90 The Constitution of the Republic of Serbia, *Official Gazette of the Republic of Serbia*, No. 98/2006.

91 The Law on the Prohibition of Discrimination.

92 It also relied on the Code of Honour of members of the Serbian Armed Forces, which as one of the most important rules stipulates that a member of the Armed Forces must respect each person and diversity. See *The Code of Honour of members of the Serbian Armed Forces*, November 2010, available at http://www.vs.rs/content/attachments/Kodeks_casti_pripadnika_Vojske_Srbije.pdf. Accessed 24 July 2015.

It is very important that the CPE found that in this case the harm suffered by the claimant was caused by existing stereotypes and prejudices towards transgender persons. The CPE also found that this behaviour contributes to the maintenance of widespread transphobia, stigma, and intolerance of transgender persons; and pointed out their poor social status, and the ignorance and serious and specific problems they face in Serbian society.

Internet source:

Opinion of the CPE in *NGO E. v. The Army of the Republic of Serbia and the Minister of Defence* in Serbian, at: <http://www.ravnopravnost.gov.rs/rs/друга-лична-својства/притужба-уг-е-против-врс-и-министра-одбране-због-дискриминације-по-основу-родног-идентитета-у-области-рада>.


Last accessed 22 July 2015.

SK

Slovakia

POLICY DEVELOPMENT

Government Adopts the National Strategy for the Protection and Promotion of Human Rights in the Slovak Republic



On 18 February 2015, the Slovak government adopted the National Strategy for the Protection and Promotion of Human Rights in the Slovak Republic ('the Strategy'). The document is the first strategic policy document in the field of human rights in general which has been adopted during the era of the independent existence of the Slovak Republic. The process of adoption was lengthy (it took three years) and involved not only the Council of the Government of the Slovak Republic for Human Rights, National Minorities and Gender Equality but also the very active participation of civil society, including NGOs. The process of adopting the strategy was very turbulent and was met with a great deal of resistance from some segments of society, mainly conservative NGOs and politicians.

The first implementation period for the Strategy is scheduled to last until 2020 when it should undergo a complex evaluation and an update from a long-term perspective. The monitoring and evaluation of its implementation with continuous updating should be carried out every two years, although at the time of the adoption of the Strategy it is not clear who will be responsible for its coordination.

The Strategy describes the main human rights legislative and implementation frameworks which exist in the Slovak Republic, and states that this document is an 'umbrella' for the existing partial programmes (i.e. existing policy documents dealing with some particular human rights issues) and will be made more specific on the basis of the currently existing, as well as the newly-prepared programmes. The last section of the Strategy sets out a few framework priorities and tasks for the coming period.

The Strategy sets out, as a separate priority, the adoption of systemic and complex measures against all forms of intolerance. It also specifically focuses on education, training and research in the field of human rights, and on the field of remedies and the enforcement of human rights, including by the courts where it is essential to provide systemic human rights education for judges. Besides, the strategy also establishes 'systemic measures for the prevention and removal of barriers to achieving real equality and life in dignity for all groups of the population' as one of its priorities.

The adoption of the Strategy *per se* is a good thing since it is indeed the first document of its kind to have been adopted in Slovakia and since it contains rather strong and principled human rights language. However, the priorities and tasks are very briefly and broadly formulated without, in many cases, any

concrete bearers of responsibility and accountability. This makes the Strategy basically toothless and means that it has rather weak prospects for effective implementation in the future.

The Strategy places a great deal of emphasis on the Slovak National Centre for Human Rights (the national equality body and a general human rights institution pursuant to the Paris principles). It notes that making the activities of the Centre more effective is a 'pressing need'; that the body's mandate, independence and pluralism should be strengthened; and that its financial and human resources insufficiencies should be substantially resolved.⁹³

The Strategy reminds the public of legislative changes regarding the Centre that are allegedly still in preparation since 2014. The Strategy also deals with inadequacies as regards the funding and personal capacities of the Ombudsperson (also having some powers falling under the material scope of the Directives), and with the need for systemic legislative, institutional and financial support for NGOs.

The Strategy also calls for a complex analysis of the observance of human rights in Slovakia (including the functioning of institutional mechanisms) which has not yet been carried out and which would also set the methodological basis for data collection in the field of human rights.

Internet source:

<http://www.rokovania.sk/Rokovanie.aspx/BodRokovaniaDetail?idMaterial=24253>

Last accessed 19 August 2015.

Slovak Ombudswoman presents her annual report to Parliament

On 24 March 2015 the Slovak Ombudswoman presented her 2014 annual report to the National Council of the Slovak Republic (the Slovakian Parliament).⁹⁴ The Ombudsperson is not an equality body but a public body established to contribute to the protection of fundamental rights and freedoms in the exercise of activities by public administration bodies.

All grounds

In her 2014 annual report, the Ombudswoman reported on a survey carried out by her office in 2014 on the exercise of the right to education by children 'coming from a socially disadvantaged background, with language, cultural and social barriers, most frequently of Roma origin and also from marginalised environments'.⁹⁵ The 2014 survey was a continuation of a survey carried out in 2013 which revealed systemic violations of the right to education of children with special educational needs by the existing system of so-called 'special schools'. In her 2014 annual report, the Ombudswoman emphasised that concerning Roma children coming from socially disadvantaged and marginalised environments, the majority are placed in special schools, and that re-diagnostics in these schools is rare. She also pointed to the fact that such a high occurrence of 'mental disability'⁹⁶ among Roma children is not statistically possible, and emphasised the paradox of children with a 'mental disability' speaking two languages (since in special schools education is the state language only, which the Roma children often cannot speak).

The Ombudswoman concluded that the system of diagnostics and re-diagnostics – which 'does not take into consideration the incomparable situation of a child coming from a different cultural, social and language environment of a national minority coming from a socially excluded community, often with a language barrier' – is discriminatory. In her 2014 annual report, the Ombudswoman reminded Parliament that, in 2013, she had called upon the Ministry of Education to carry out various measures including the

93 It should be noted that a bill had already been submitted in October 2012, and the first draft came in December 2013; in spite of some meetings and discussions with NGOs thereon, the bill has not yet been adopted.

94 *Správa o činnosti verejného ochrancu práv za obdobie kalendárneho roka 2014* (Report on the Activities of the Public Defender of Rights for the Period 2014), available at <http://www.vop.gov.sk/files/sprava.pdf> (accessed 8 June 2015).

95 See pp. 51-54 of the report on the description of the survey and its outcomes.

96 The Ombudswoman's 2013 survey confirmed that in order for a child to be placed in a special school, it has to be diagnosed with a 'mental disability'.

abolition of the ‘special schools of variant A’ where children with a ‘light mental disability’ are placed (and she addressed the same recommendation to Parliament in her 2014 annual report⁹⁷), and to provide for adequate diagnostics and re-diagnostics that would accommodate the ‘abilities of children coming from the socially disadvantaged environment of marginalised Roma communities.’⁹⁸

The Ombudswoman also devoted a significant part of her 2014 annual report to the issue of the rights of the elderly, including their right to access the social services.⁹⁹ Following a survey carried out in 2014, the Ombudswoman focused on the access of elderly people to facilities that provide 24-hour facility-based care and concluded that there are serious barriers to this access¹⁰⁰ which include: a high level of disability threshold enabling an elderly person to get to the facility providing care for a state-subsidised fee, a non-sustainable system of state subsidisation of the services, the unavailability of the services in sufficient amounts and unaffordable services for many elderly people.

Finally, the Ombudswoman also reiterated her long-term concerns connected to the lack of resources provided by the government to the Ombudsperson’s office, which, according to the Ombudswoman, leads to constant understaffing at the office and the office lacking a regional outreach, which challenges the ability of the office to perform its statutory tasks, while there were also concerns with regard to its independence from the government. The Ombudswoman recommended that Parliament should provide for a legislative amendment that would provide the Office of the Ombudsperson with a special chapter in the state budget.¹⁰¹

Internet link source:

<http://www.vop.gov.sk/files/sprava.pdf>, last accessed 19 August 2015.

SI

Slovenia

LEGISLATIVE DEVELOPMENT

Parliament adopts amendments to the Marriage and Family Relations Act enabling same-sex spouses to have access to additional employment-related rights

On 3 March 2015 the National Assembly passed the Act Amending the Marriage and Family Relations Act. The main change that the Act has introduced is the legalisation of marriage for same-sex partners, aiming at eliminating the systemic discrimination of same-sex couples, in line with the non-discrimination provision of Article 14 of the Slovenian Constitution.

The amendments provide additional employment-related rights to same-sex couples (married and cohabiting) and address discrimination on the grounds of sexual orientation in the field of employment: the right to paid sick leave from work to care for a sick partner, the right to additional days of leave from work for a wedding, and the right of a cohabiting same-sex partner to obtain a survivor’s pension that is based on contributions paid during the employment of the deceased partner (for married/registered same-sex partners a survivor’s pension is already provided for in the law).

97 See p. 103 of the report, point 2.1.1.

98 See p. 54 of the report.

99 See pp. 64-82 of the report.

100 This included a high level of disability threshold enabling an elderly person to get to the facility providing care for a state-subsidised fee, a non-sustainable system of state subsidisation of the services, the unavailability of the services in sufficient amounts and unaffordable services for many elderly people.

101 See pp. 104-105 of the report for more details.

The law has not yet entered into force. On the day that the new law enters into force the previous law regulating the status of same-sex partners – the Registration of a Same-Sex Civil Partnership Act – will no longer be valid.

The conservative civil society coalition called 'It's about children!' (*Za otroke gre!*) immediately announced that they would request a legislative referendum and started collecting the necessary 40 000 signatures as required by Article 12 of the Popular Initiative and Referendum Act. On 26 March 2015 the National Assembly rejected the claim for a referendum and terminated the collection of signatures based on Article 90 (2) of the Constitution that prohibits referendums on laws that eliminate unconstitutionality in the field of human rights and fundamental freedoms or other forms of unconstitutionality.

The proponents of the referendum lodged an appeal against the decision to reject the referendum before the Constitutional Court, that will have to assess the following questions:

- whether the current legislation that existed before the amendments to the Marriage and Family Relations Act were passed is in accordance with Article 14 of the Constitution which prohibits discrimination;
- whether the newly proposed legislation is in accordance with the Constitution; and
- to what extent do the amendments eliminate the possible unconstitutionality of the current legislation.

It is worth noting that a similar situation occurred when the Family Code was amended in order to allow same-sex couples to adopt and, on that occasion, the Constitutional Court decided to hold the referendum. It took place on 25 March 2012 with a resulting 45 % in favour and 55 % against, which prevented the Family Code from entering into force.

In the meantime, the Constitution was amended and Article 90 (2) was added in order to reinforce the conditions for referendums. On the one hand, referendums on laws that eliminate unconstitutionality in the field of human rights and fundamental freedoms are now prohibited. In addition, there is a new double condition in the Constitution: the law which is subject to a referendum will be repealed if the majority of those who voted have voted 'No', provided that the absolute number of those who voted No is at least 20 % of all eligible voters.

Internet source:

<http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO7083>, last accessed 19 August 2015.

CASE LAW

Accessibility of buildings for people with disabilities

The Human Rights Ombudsman (an independent state body which is competent to examine complaints alleging human rights violations and to issue non-binding recommendations) received a complaint concerning discrimination on the grounds of disability at the local labour office. The complainant complained about the fact that the labour office's premises were not accessible for people with disabilities. She claimed that she was treated in a degrading and offensive way, as her interview was held in the public and open hallway of the office instead of in a private office where clients are usually interviewed.

Based on the complaint the Ombudsman recommended that the Employment Service should respond. The Ombudsman emphasised Articles 6 and 9 of the Equal Opportunities for People with Disabilities Act, which relate to the prohibition of discrimination in proceedings before state authorities and the requirement to ensure the accessibility of public buildings for persons with disabilities. The Ombudsman held that holding an interview in the hallway violated these provisions and recommended the Employment Service to find appropriate premises for the reception of people with disabilities in order to avoid potential future violations of the prohibition on discrimination on the ground of disabilities.

Disability

Even though the decisions and recommendations issued by the Human Rights Ombudsman are not binding, the Employment Service took these recommendations into account and arranged for the possibility to use the facilities at the Administrative Unit and Health Insurance Institute of Slovenia which are appropriate for receiving people with disabilities.

However, there are still several public buildings, especially older ones, which remain inaccessible to people with disabilities, despite the adopted laws and regulations.

Internet source:

<http://www.varuh-rs.si/medijsko-sredisce/aktualni-primeri/novice/detajl/dostopnost-urada-za-delo-za-in-valide/?cHash=f0b9efadb2e70577d02dee3802a3ed59>, accessed 19 August 2015.

Roma demanding access to basic public infrastructure

A Roma community living in an unregulated settlement in the municipality of Ribnica had no access to basic public infrastructure (water, sanitation, electricity). Despite the lack of a regulated legal status for the settlement, enabling access to public infrastructure falls within the competence of the municipality. According to paragraph 2 of Article 6 of the Roma Community Act, the municipality should have solved this issue by adopting a detailed programme and measures to plan a strategy for legalising the Roma settlement and other positive measures for the implementation of special rights for the Roma community (in the fields of education, employment, social protection). As the municipality had still not adopted such a programme and had not ensured that the Roma community could live in a village with access to basic infrastructure, a representative of this Roma community filed a complaint with the Human Rights Ombudsman.

After examining the case, the Ombudsman recommended that the mayor of the municipality should ensure that the Roma community have access to basic infrastructure, especially water and sanitation, should invite representatives of Roma for a meeting and present them with options for permanent solutions, and should adopt a detailed programme and measures in accordance with Article 6 of the Roma Community Act.

The municipality did not respect these recommendations and replied that it does not see any legal grounds for the legalisation of the settlement. The Ombudsman informed the Office for National Minorities concerning this situation and suggested that the Government adopts the necessary measures if the municipality continues to ignore this issue, which it is authorized to do according to the Roma Community Act.

The Ombudsman emphasised that the problem of the lack of access to water in the settlement is also highlighted in the 2014 ECRI report in which the Slovenian authorities are urged to ensure access to water for all Roma. The Office for National Minorities responded that access to water lies within the domain of municipalities and that the government will not intervene. The Ombudsman sent another letter to the Office for National Minorities, as well as to the Government, emphasising that in cases when the human rights of Roma are violated and it is clear that the municipality will not address these violations, the government is obliged to ensure the realization of human rights. However, the Ombudsman's recommendations are not legally binding or enforceable.

Internet source:

<http://www.varuh-rs.si/medijsko-sredisce/aktualni-primeri/novice/detajl/ureditev-bivalnih-razmer-prebivalcev-romskega-naselja-gorica-vas/?cHash=0be04a77d3c2ee1595bd87839642747f>.

Last accessed 19 August 2015.

Racial or
ethnic origin

Spain

ES

LEGISLATIVE DEVELOPMENT

The Government approves the granting of a special social security benefit for self-employed workers with family responsibilities

Article 9 of Royal Decree 1/2015 of 27 February 2015 adds an Article (the new Article 30) to Law 20/2007 of 11 July 2015 on the Statute for the Self-Employed (*Estatuto del Trabajador Autónomo*). The new Article 30 establishes a reduction in the amount of monthly contributions that self-employed persons make and this is applicable to those who care for a child younger than seven years of age or those who have a close dependent relative with duly accredited dependency. The benefit consists of a 100 % temporary reduction in the part of the monthly contribution of a self-employed person that is devoted to common contingencies. The common contingencies contribution is the highest of the self-employed monthly contributions to social security. This amendment ensures that during the maximum twelve-month duration of the new benefit, self-employed persons will only be required to pay for the other minor monthly contributions.

Gender

Internet source:

Royal Decree 1/2015, of 27 February 2015, on a second opportunity mechanism, a reduction of financial charges and other measures of a social character, available at:
<http://www.boe.es/boe/dias/2015/02/28/pdfs/BOE-A-2015-2109.pdf>, last accessed 20 July 2015.

POLICY DEVELOPMENT

The Government approves the Comprehensive Family Support Plan 2015-2017, which includes a commitment to increase pensions for mothers

On 14 May 2015, the Council of Ministers approved the Comprehensive Family Support Plan 2015-2017. The Plan has an annual budget of EUR 5.5 million to fund welfare measures, measures to encourage a work-family balance, maternity incentives, and tax deductions for single-parent and large families.

Gender

However, most of the measures that the Plan contains are already in force. In fact the only novelty in the Plan is the announcement of an increase in pensions for mothers.

From 2016 onwards, and provided the measure has been finally approved, the Plan will give working mothers who retire an additional 5 % on top of their pension if they have had two children, 10 % if they have had three, and 15 % if they have had more than three. However, this measure is simply a commitment by the current ruling party.

In order to enter into force it will have to be presented as a bill and approved after the appropriate legal procedure. However, the forthcoming general elections in Spain may disrupt this legal process.¹⁰²

Internet sources:

Official webpage of the Government providing information concerning the Plan:

<http://www.lamoncloa.gob.es/consejodeministros/Paginas/enlaces/140515enlacefamilia.aspx>.

Press commentary in English: http://elpais.com/elpais/2015/05/14/inenglish/1431612096_240747.html.

Both last accessed 3 June 2015.

¹⁰² It is expected that these elections will be held at some time between September and November 2015.

CASE LAW

The Supreme Court reinforces the burden of proof for employers in non-discrimination cases in a case of collective dismissals affecting pregnant workers and workers on parental leave

Gender

The claimant, a pregnant woman who was also on parental leave, was dismissed along with 47 other workers since the company was experiencing economic difficulties. The company had fulfilled the administrative requirements for a collective dismissal and the Labour Authority had established that the company had the right to abolish 48 working positions.

When the company dismissed the claimant, she claimed that her dismissal was null and void as it contravened the rights established in Article 55.5 of the Worker's Statute. Article 55.5 of the Worker's Statute stipulates that a dismissal is null and void if it is without cause and affects a worker who is pregnant or is on parental leave. However, in this case the employer had established a just cause for the dismissal (economic difficulties) and, furthermore, none of the other 47 workers challenged the dismissal before the courts.

In its judgment, the Supreme Court ruled that in the event of a collective dismissal due to economic reasons, the employer must justify the specific reason for including a person protected by Article 55.5 of the Worker's Statute in the group of persons to be dismissed. As the employer had failed to do so, the dismissal of the claimant was declared null and void.

Although in this case the claimant was both pregnant and on parental leave in order to care for another child at the time of the dismissal, the Supreme Court confirmed that the same solution would apply if the claimant satisfied only one of the two conditions (pregnancy or parental leave). This is because the protection afforded by the Spanish legislation (the dismissal to be declared null and void) is the same for both cases.

In Spanish legislation the employer does not have to explain the reason why he/she chooses to dismiss a worker when there are economic reasons to do so. However, the Supreme Court has clarified in this ruling that the employer must provide a concrete justification of his/her choice when the dismissal affects workers who are pregnant or on maternity or any of the forms of parental leave listed in Article 55.5 of the Worker's Statute.

Internet sources:

Judgment of the Supreme Court of 14 January 2015, Appeal No. 104/2014, available at: <http://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=TS&reference=7324092&links=&optimize=20150313&publicinterface=true>.

Article 55.5 of the Worker's Statute, Royal Legislative Decree 1/1994, of 24 March 1995, available at: http://noticias.juridicas.com/base_datos/Laboral/rdleg1-1995.t1.html#a55.

Both last accessed 20 July 2015.

High Court of Catalonia annuls the burka ban in the town of Reus (Catalonia)

Religion
or belief

The Ordinance of Civic Behaviour of the city of Reus,¹⁰³ approved on 21 July 2014, establishes that 'It is not allowed to access municipal buses or municipal facilities, equipment or premises wearing the full veil, burka, niqab, balaclava, integral veil (...) or other clothing or accessories that prevent or hinder identification (...)' (Article 10.4). Article 44 considers these actions to be minor offences. A group of

103 The *Ordenança de Civisme de la ciutat de Reus* (Province of Tarragona, Catalonia) is available at <https://serveis.reus.cat/ordenances.php>.

associations (especially Islamic cultural associations) requested the suspension of these articles because they violate their right to religious freedom and discriminate against them.

The High Court of Catalonia has decided to suspend those two articles (10.4 and 44) of the Ordinance of Civic Behaviour of the city of Reus,¹⁰⁴ following the Supreme Court's ruling in a similar case in Lleida that cancelled the Lleida City Council Ordinance banning the wearing of full-face veils in public city spaces.¹⁰⁵

The fundamental argument contained in the judgment was that the use of the veil by some women is part of their religious freedom which is a fundamental right recognized in the Spanish Constitution (Art. 16) that can only be further regulated by a law passed in Parliament. Therefore, the judgment nullified the City Council Ordinance because the City Council did not have the authority to limit freedom of religion. The Supreme Court Judgment argues (and the High Court of Catalonia repeated this) that the use of the integral veil is part of religious freedom, which is a fundamental right; but another part of the public (political and legal) opinion argues that the integral veil is an imposition of the most fundamentalist of Islam and symbolizes the oppression of women.

The High Court of Catalonia noted that the Ordinance of Civic Behaviour of Reus is equal to the Ordinance of Lleida City Council. The Court noted that there has been no change in the legislation and it therefore applied the reasoning of the Supreme Court and suspended the application of the two articles of the Ordinance of Reus.

The burka ban by the Lleida City Council was followed by twelve other municipalities in Spain, most of them in Catalonia, including the city of Reus, now annulled by the High Court of Catalonia. All municipal ordinances prohibiting the wearing of the burka in public spaces are thus deemed to be unconstitutional.

Internet source:

<http://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=AN&reference=7281991&links=reus%20ayuntamiento&optimize=20150210&publicinterface=true>.

Last accessed 19 August 2015.

Sweden

SE

POLICY DEVELOPMENT

11 Roma persons request civil damages in connection with the police registration scandal

In September 2013 it was revealed that the police had been registering more than 4 000 Roma persons or persons having a relationship with a Roma person.¹⁰⁶ Several governmental authorities dealt with the case, namely the Swedish Commission on Security and Integrity Protection, the Public Prosecutor, the Parliamentary Ombudsman, the Chancellor of Justice and the Equality Ombudsman.

Religion
or belief

The task of the Swedish Commission on Security and Integrity Protection was to investigate the registration practice according to the Data Protection Act. Its first statement in November 2013¹⁰⁷ described seven main errors of the registration system. In December 2014 the Commission closed the case with a public statement that the police had addressed all seven problems and that the police's current use of the new

¹⁰⁴ ATSJ CAT 1/2015, 29 January 2015

¹⁰⁵ See *European Anti-Discrimination Law Review*, Issue 17, November 2013, p. 81.

¹⁰⁶ See *European Anti-Discrimination Law Review*, Issue 18, July 2014, p. 83.

¹⁰⁷ <http://www.sakint.se/dokument/rapporter-och-uttalanden/Uttalande-2013-Kringresande.pdf>. Last accessed 18 August 2015.

register is legal.¹⁰⁸ The new register is reviewed once a year and it is clearly marked if persons in it are not suspected of any crime. A copy of the old register is kept in order to answer the public's questions, but it is planned to be destroyed.

The main task of the Public Prosecutor was to decide whether or not charges should be brought against the two individual police officers in Lund involved in the daily operation of the register. In December 2013 the Public Prosecutor dropped the charges against the two officers.¹⁰⁹ The decision of the Prosecutor stated that it could not be proved that the basic culprits were these two individuals rather than systematic errors within the whole national police organisation, i.e. the seven main errors described by the Commission on Security and Integrity Protection.

The task of the Parliamentary Ombudsman was to look at all levels of the national police organisation and to decide whether or not there are one or more persons who are responsible for the systematic errors to such a degree that a crime has occurred. The Ombudsman adopted its decision on 17 March 2015.¹¹⁰ Although very critical of the situation, the main conclusion of the Parliamentary Ombudsman is the same as those of the other authorities. The critical comment against certain individuals does not amount to criminal offences and the police are allowed to keep the register if they reform it as they have done.

The fourth authority dealing with the case was the Chancellor of Justice who is responsible, among other responsibilities, for representing the state when somebody claims damages against it. So far 2 751 persons have been awarded SEK 5 000 (EURO 550 each) by the Chancellor of Justice as compensation for the police violation of Section 48 of the Data Protection Act. It concerns persons who ought to have been completely removed from the register or whose information in the register ought to have been supplemented with a mention that they were not under suspicion of having committed any crime. In Sweden a violation that is regarded as less severe results in normal damages of SEK 3 000 SEK. The information in the register was not divulged to persons other than the police and no person suffered any loss due to that information, therefore the violation was considered to be marginally more than 'less severe' so that an amount of SEK 5000 was considered to be appropriate.¹¹¹

The Equality Ombudsman has also investigated this matter. Throughout this process the police statement that they have never embarked on any ethnic registration has been accepted by all the authorities involved. Sometimes the wording has been carefully chosen like the Parliamentary Ombudsman saying that the wrongdoing affected a vulnerable ethnic group or the Equality Ombudsman stating that ethnic discrimination could not be ruled out.¹¹² Thus all of them – although with reservations – have viewed it as a violation of the Data Protection Act, but nothing more. It started with three Roma families being investigated for breaking into homes, and in this investigation their relatives and friends were registered. The police could not have known if their friends were Roma or not. Three 'ethnically Swedish' families could have been registered in the same way if they were involved in the same criminal activity. The 2 751 people who were awarded SEK 5000 received the same amount as an 'ethnically Swedish' person would have received for the same violation of the Data Protection Act.

A human rights group called Civil Rights Defenders have decided to assist 11 Roma persons in going to court and seeking SEK 30 000 (EURO 3 300).¹¹³ They consider that this was not merely a case of bad

108 <http://www.sakint.se/dokument/rapporter-och-uttalanden/Uttalande-PM-Skaane-Uppfoeljning-Kringresande.pdf>. Last accessed 18 August 2015.

109 <http://www.aklagare.se/Upload/Media/Nyheter/131220%20Beslut%20AM%20139971%2013.pdf>. Last accessed 18 August 2015.

110 <http://www.jo.se/PageFiles/6353/5205-2013.pdf>. Last accessed 18 August 2015.

111 <http://www.jk.se/sv-SE/Beslut/Skadestandsarenden/1441-14-47.aspx>. Last accessed 18 August 2015.

112 <http://www.do.se/globalassets/stallningstaganden/stallningstagande-beslut-med-rekommendationer-till-polismyndigheten-gra-2013617.pdf#page=1&zoom=auto,0,848>. Last accessed 18 August 2015.

113 <http://www.civilrightsdefenders.org/sv/featured/we-sue-the-swedish-state-for-the-police-register-of-roma/>. Last accessed 18 August 2015.

practice with regard to registers that happened to violate the rights of a large number of Roma persons and their friends. Here the investigation started with three Roma families and resulted in the police using registered information in a way they would not have done had the investigation concerned three 'ethnically Swedish' families involved in the same criminal activities. However, the burden of proof lies on the human rights group. The Swedish Discrimination Act does not apply to police work. It is rules in the ECHR and the Swedish Constitution that will provide the basis for increasing the damages if the Civil Rights Defenders win. This is a separate legal process. However, if the Civil Rights Defenders are granted a higher award for the 11 persons in question, the Chancellor of Justice is likely to make a new decision and to give all other affected persons the same amount.

Turkey

TR

LEGISLATIVE DEVELOPMENT

Draft Law amends a number of laws and statutory decrees with the aim of protecting families and a dynamic demographic structure

A Draft Law amending a number of laws and statutory decrees with the aim of protecting families and a dynamic demographic structure was submitted to Parliament on 26 January 2015. If successful, the new measures to increase the employment rate of women and to facilitate the reconciliation of work, private and family life are the following:

- *Incentives for child-care institutions:* Tax incentives for a period of five years will be provided for child-care institutions (Article 1). Also, the establishment of child care institutions will be a legal obligation for municipality administrations (Article 23).
- *Promotions are to continue for female civil servants during unpaid maternity leave:* A civil servant is entitled to an 'upgrade (one degree)' (also meaning an increase in salary) following each year of service (a horizontal upgrade, '*kademe ilerlemesi*') and following three years' of service (a vertical upgrade, '*derece ilerlemesi*'). A civil servant on unpaid maternity leave (two years) will also have these entitlements (Article 2).
- *Part-time work as an option for female civil servants:* A female civil servant may opt for part-time work (half of the statutory working time, which is 40 hours per week) following the end of fully paid maternity leave. This will be an amount of two months for the first child, four months for the second child, and six months for the third child. She will receive a full salary from the public employer as if she has worked full time (Article 3). She may commence her two-year unpaid maternity leave after the paid maternity leave, or start after the expiry of the 2/4/6-month period of part-time work (Article 4). The duration of part-time work will be longer in the case of multiple births (the specified periods plus one month) or if the child is disabled (12 months). The periods are the same for adoptive parent(s).
- *Part-time work as an option for a civil servant mother and/or father:* A civil female servant who has given birth and/or her civil servant husband has the option of working part time until the first day of the month following the compulsory age for the child to start school (Article 5). Compulsory schooling age starts at the end of September when the child is aged five years. A civil servant who opts for a time reduction of 50 % will be paid half the regular salary.
- *Leave for adoptive civil servant parent(s):* This is if a child is adopted when he or she is less than three years old. There will be eight weeks' paid leave (the same as post-natal leave) for adoptive civil servant parent(s). Upon request, adoptive civil servant parent(s) will be granted unpaid leave for 24 months.
- *The death of a female worker during giving birth or maternity leave:* If a female worker dies during giving birth or during maternity leave, the unused period of post-natal leave will be granted to the worker father (Article 13). This was previously only available for civil servant fathers, and now it is also granted to all worker fathers.

Gender

- *Leave for adoptive worker parent(s)*: This is if a child is adopted when he or she is less than three years old. There will be eight weeks of paid leave (the same with post-natal leave) for the adoptive worker parent(s) (Article 13).
- *Part-time work as an option for a female worker*: A female worker may opt for part-time work (half of the statutory working time, which is 45 hours per week) following the end of paid maternity leave. This will be an amount of 60 days for the first child, 120 days for the second child, and 180 days for the third child. The duration of part-time work will be longer in multiple births (the specified period plus 30 days) or if the child is disabled (360 days). The periods are the same for adoptive parent(s). If she opts for a time reduction of 50 %, she will receive half of her regular wage from her employer. For the remaining period she will be paid from the Unemployment Fund. The daily amount of this payment (allowance) will be 80 % of the daily gross minimum wage.
- *Part-time work as an option for a female worker and/or her husband*: A female worker who has given birth and/or her (worker) husband has the option of working part time until the first day of the month following the compulsory schooling age of the child (Article 12). She/he will be paid half of her/his regular wage if she/he opts for a time reduction of 50 %. A request for this option will not constitute a valid reason for an employer to terminate her/his contract (Article 12).
- *Birth allowance*: Whether working or not, there will be a birth allowance of EUR 177 (TL 300 TL) for the first child, EUR 235 (TL 400) for the second child, and EUR 353 (TL 600) for the third child. If the mother has Turkish nationality, then she will receive the allowance. If one of the parents is an alien, then the allowance will be given to the one with Turkish nationality.
- *Temporary work and temporary work agencies permitted*: Turkey is one of the OECD Member States with the most rigid labour legislation. Temporary work and temporary work agencies are prohibited in Turkey as a result of the reactions from trade unions. The draft law permits temporary work and temporary work agencies. There is now a provision for a temporary worker to replace a female worker on maternity leave for the duration of the maternity leave or to replace, for a maximum period of six months, a woman worker who has opted for part-time work (Article 11).

The Draft Law amending a number of laws and statutory decrees with the aim of protecting families and a dynamic demographic structure is a comprehensive package of measures to promote the reconciliation of work and family life. With these new measures, working women will be in a stronger position to maintain their employment after having children.

Internet sources:

Draft Law amending a number of laws and statutory decrees with the aim of protecting families and a dynamic demographic structure (*Ailenin ve Dinamik Nüfus Yapısının Korunması Amacıyla Bazı Kanun ve Kanun Hükmünde Karamamelerde Değişiklik Yapılmasına Dair Kanun Tasarısı*), available at:

<http://www.tbmm.gov.tr/d24/1/1-1013.pdf>.

Law amending the Law on Primary Education and General Education (*İlköğretim ve Eğitim Kanunu ile Bazı Kanunlarda Değişiklik Yapılmasına Dair Kanun*), Law no. 6287, Official Gazette 11 April 2012, No. 28261, available at: <http://www.resmigazete.gov.tr>.

Statistics available at: <http://www.turkstat.gov.tr/PreHaberBultenleri.do?id=15844>.

OECD Economic Surveys: Turkey 2014, pp. 28-29, available via: <http://www.oecd.org>.

All last accessed 20 July 2015.

CASE LAW¹¹⁴

Constitutional Court sets a precedent by allowing, for the first time, NGOs to present an amicus curiae brief

The case concerns the enforced disappearance of a Kurdish individual following his detention by the police on 20 July 1992¹¹⁵ and originates from an individual petition filed before the Constitutional Court by the victim's wife, following the exhaustion of all prior legal remedies.¹¹⁶

All grounds

In a landmark decision constituting a first in Turkey, the Constitutional Court granted leave to seven national NGOs and a European NGO¹¹⁷ to submit amicus curiae briefs in this ongoing case. While this is not a discrimination case nor has the applicant made a claim under the equality clause of the Turkish Constitution or the anti-discrimination provision of the European Convention on Human Rights, the decision of the Constitutional Court to accept an amicus curiae brief from civil society has set a significant precedent which will likely be used by civil society organisations in supporting victims of discrimination.

The internal rules of the Turkish Constitutional Court are silent on the amicus curiae procedure. The applicant NGOs based their petition on the procedural rules of the European Court of Human Rights (ECtHR), specifically Article 44/3(a) which allows the submission of amicus curiae briefs. The willingness of the Constitutional Court to take the procedural rules of the ECtHR as a basis is a further aspect that renders the decision significant.

The Court has not yet issued a judgment in the case.

The amicus curiae procedure is by and large unknown to legal professionals in Turkey. While human rights lawyers and NGOs have in recent years made increasing efforts to intervene in discrimination and hate crime cases on behalf of the victims, the courts are notoriously reluctant to grant leave. The Constitutional Court's decision will likely start a new tradition among NGOs to push the courts to accept amicus curiae briefs and may send a signal to the lower courts to be receptive of NGO participation in human rights cases through amicus curiae briefs and intervention on behalf of victims.

Local court finds discrimination in access to services in a case brought by a LGBT individual

A lesbian woman was denied entry to the women's section of a Turkish bath in Istanbul during opening hours although other female customers were granted entry. She brought a discrimination case against the owner of the bath under Article 122(1) of the Turkish Penal Code, which prohibits the denial, due to hatred based on language, race, colour, gender, disability, political thought, philosophical belief, differences of religion or denomination, of the following: a) the sale, transfer or renting of movable or immovable property in public use; b) the provision of services to the public; c) employment; d) the carrying out of an ordinary economic activity.

Sexual orientation

The 42nd Criminal Court of First Instance in Istanbul issued its verdict during the second hearing which took place on 29 January 2015.¹¹⁸ The Court found 'the crime of discrimination' as prohibited under Article 122(1)(a) of the Turkish Penal Code, without specifying the ground which had been violated.

114 Internet references regarding Turkish case law are not available.

115 Information received from the Truth, Justice and Memory Centre, the leading NGO which prepared the amicus curiae plea with the contribution of the remaining six organisations.

116 Constitutional Court, application no. 13/2640.

117 Truth Justice and Memory Centre, Turkish Economic and Social Studies, Human Rights Foundation of Turkey, Human Rights Association, Human Rights Agenda Association, Helsinki Citizens Assembly, Human Rights Research Association and European Centre for Constitutional and Human Rights.

118 42nd Criminal Court of First Instance in Istanbul, decision no. 2014/230.

The Court sentenced the defendant to pay a fine of NTL 3 000 (around EUR 1 000), the equivalent of a judicial fine of 150 days but deferred the execution of the sentence for five years, during which time the defendant will be subject to judicial supervision. Unless the defendant intentionally commits a crime during that time, the verdict will be revoked thereafter.

Notwithstanding the lenient punishment, this landmark ruling is the first time a court in Turkey has found discrimination against an LGBT individual. In light of the court's reluctance to enforce Turkey's already limited anti-discrimination legal framework, which is accentuated in cases brought by LGBT individuals, this ruling is a victory for the anti-discrimination movement in Turkey.

The judgment is also significant in that the court expansively interpreted the text of Article 122, whose personal and material scope were narrowed by Parliament on 2 March 2014.¹¹⁹ Once open-ended, the list of anti-discrimination grounds under Article 122, which has never included sexual orientation, is now exhaustive. Furthermore, while the title of the provision retains a reference to discrimination, the text of Article 122 no longer explicitly prohibits discrimination. In enforcing Article 122 to protect an LGBT individual against discrimination, the court set an important precedent.

MISCELLANEOUS

More female representatives in the new Parliament following the general election of 7 June 2015

The total number of representatives (MPs) in Turkey is 550. The number of female representatives increased from 79 to 93 during the last general election on 7 June 2015, resulting in the largest ever proportion of women in Turkey's Parliament.

However, despite the increase, the percentage (16.91 %) of female representatives is still too low.

Internet sources:

Turkish Parliament:

<http://www.tbmm.gov.tr>; https://www.tbmm.gov.tr/develop/owa/milletvekillerimiz_sd.dagilim.

Directorate of Women's Status (*Kadının Statüsü Genel Müdürlüğü*), *Türkiye'de Kadın* (Women in Turkey), May 2015:

<http://kadininstatusu.aile.gov.tr/uygulamalar/turkiyede-kadin>.

Official Gazette, 18 June 2015, no. 29390bis:

<http://resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2015/06/20150618m1.htm&main=http://www.resmigazete.gov.tr/eskiler/2015/06/20150618m1.htm>.

All last accessed 21 June 2015.

UK

United Kingdom

POLICY DEVELOPMENT

Government announces intention to implement Section 78 of the Equality Act

The Government announced in July 2015 that the Prime Minister, David Cameron, had decided to implement Section 78 of the Equality Act 2010. This obliges the creation of regulations to ensure that employers of more than 250 staff publish information 'relating to the pay of employees for the purpose

¹¹⁹ See *European Anti-Discrimination Law Review*, issue 19, November 2014, pp. 88-89.

of showing whether, by reference to factors of such description as is prescribed, there are differences in the pay of male and female employees.’ The Prime Minister referred to the obligation to publish information relating to the difference ‘between average female earnings and average male earnings.’

As pointed out at the time of Cameron’s announcement, merely requiring information on the gaps between the *average* pay of men and women may be of limited use. For instance, the presence of a few very highly paid women in a company could disguise the gender pay gaps between men and women in lower-level positions. However, any transparency on gender pay gaps can only be welcomed.

Internet source:

<https://www.gov.uk/government/consultations/closing-the-gender-pay-gap>, last accessed 22 July 2015.

CASE LAW

Discrimination against travellers in planning matters

The Claimants, who were Romany Roma, challenged the policy of the Secretary of State by which first all and subsequently 75 % of applications for ‘traveller pitches’¹²⁰ on ‘Green Belt’ land (upon which building is generally not permitted) were ‘called in’ to the Secretary of State for his decision,¹²¹ rather than being determined by Planning Inspectors (as is the case for over 90 % of all planning applications¹²²). The effect of the policy was, as the judge pointed out at §39, that ‘a traveller wanting to live on a pitch in the Green Belt, but not erect any buildings, could now expect that his or her case would be [determined by the Secretary of State], whereas a person proposing to build one or more dwellings would not. That was true even in cases where the application or permission would be temporary...’

Racial or ethnic origin

The Claimants challenged the policy by way of an application for Judicial Review in the High Court. They, and the Equality and Human Rights Commission which intervened, argued *inter alia* that the policy was contrary to the prohibition on race and ethnic origin discrimination and to the Public Sector Equality Duty. The disadvantage they suffered as a result of the policy was that they had to wait much longer for decisions than would have been the case had their applications been decided by a Planning Inspector.

The Court ruled that the policy disparately impacted on travellers (comprising Romany Roma and Irish Travellers) and that it was not justified by the aim of the policy, which the Court found to have been the reduction of successful planning applications on the Green Belt. Such an aim could have been achieved by non-discriminatory means. The policy therefore breached ss. 19 and 20 of the Equality Act 2010. In addition, the Secretary of State had failed to comply with the duty of ‘due regard’ imposed by s. 149 of the Act in adopting the policy. In fact, he had had no regard at all.¹²³

What is perhaps of most interest in this case is the reference at §125 of the decision to the fact that the Secretary of State had been repeatedly advised by his officials that the policy here in issue ‘would and did cause delay, and that it could lead to unfair treatment of the particular ethnic group.’

Internet source:

<http://www.communitylawpartnership.co.uk/traveller-planning/277-moore-a-coates-v-ssclg>.

Last accessed 19 August 2015.

120 That is for permission to park caravans permanently or semi-permanently.

121 With the effect that the Secretary of State himself made decisions on whether such pitches would be permitted, rather than this decision being made by the planning inspectorate.

122 Planning applications also being necessary for the building of houses and commercial property etc.

123 High Court, *R (Moore & Coates) v. Secretary of State for Communities & Local Government & Ors* [2015] EWHC 44 (Admin).

Whether obesity can amount to a disability under national law

Disability

The Claimant had a BMI of 48.5 and suffered from sleep apnoea and gout. He was harassed by Mr Butcher, a work colleague, in connection with his weight. Mr Butcher said of him both that he was 'so fat he could hardly walk' and that he was 'so fat he would hardly feel a knife being stuck into him'. He claimed that he had been subject to disability-related harassment contrary to the Disability Discrimination Act 1995 (which still applies in Northern Ireland, but whose relevant provisions are materially identical to those of the Equality Act 2010 which applies in Great Britain). Unusually, the claim was brought against Mr Butcher alone and not against the employer, which had dismissed Mr Butcher in connection with the behaviour of which the Claimant complained.

The Tribunal referred to the decision of the CJEU in the *Kaltoft* case (C-354/13) and ruled that the Claimant was disabled, rejecting the argument put for Mr Butcher that the condition was self-inflicted.¹²⁴

Discrimination in the field of access to goods and services ('Gay cake case')

Sexual orientation

The case concerned a challenge to the refusal of the Respondents, a baking company run by a conservative Christian family, to make a cake for the Claimant. The cake in question was to bear the slogan 'Support Gay Marriage', and the Claimant wanted it in connection with a public event.

A County Court in Northern Ireland ruled that the bakery (Ashers) had discriminated on grounds of sexual orientation, religious belief and political opinion when it refused to bake a cake at the request of the Claimant, Gareth Lee, because the cake was to bear the slogan 'Support Gay Marriage'. The County Court awarded damages in the agreed sum of GBP 500. The Judge found that the bakery 'cancelled this order as they oppose same sex marriage for the reason that they regard it as sinful and contrary to their genuinely held religious beliefs'. But because the bakery was 'not a religious organisation' the Judge found that it had discriminated unlawfully and directly against the Claimant, and that there was no justification defence. The Judge also rejected the argument that the decision breached the Convention rights of the bakery.

The 'gay cake' case has generated significant political attention in Northern Ireland and could provoke amendments to the relevant regulations to provide a conscience clause. Ashers are to appeal.

Internet source:

http://www.equalityni.org/ECNI/media/ECNI/Cases%20and%20Settlements/2015/Lee-v-Ashers_Judgement.pdf.

Last accessed 19 August 2015.

124 Northern Ireland's Fair Employment Tribunal: [2015] 92/14 FET.

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