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European Anti-Discrimination Law Review



In this Issue:

Articles on Discrimination by Association, Legal Standing, ECRI's view on Challenges for the Non-discrimination Directives and UN Convention on Disability | ECJ and ECtHR Case Law Updates | National Legal Developments | European Policy Update

For Diversity



Against Discrimination

An initiative of the EU

THE EUROPEAN NETWORK OF LEGAL EXPERTS IN THE NON-DISCRIMINATION FIELD

European Anti-discrimination Law Review

No. 5 - 2007



Lia | 1986

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(on the grounds of Race or Ethnic Origin, Age, Disability, Religion or Belief and Sexual Orientation)

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The Action Programme has three main objectives. These are:

1. To improve the understanding of issues related to discrimination
2. To develop the capacity to tackle discrimination effectively
3. To promote the values underlying the fight against discrimination

For more information see: http://europa.eu.int/comm/employment_social/fundamental_rights/index_en.htm

Editorial Board:

Christine Bell	Mark Bell
Isabelle Chopin (Executive Editor)	Fiona Palmer (Managing Editor)
Sandra Fredman	Mark Freedland
Christopher McCrudden	Jan Niessen
Gerard Quinn	Lisa Waddington

Production:

human european consultancy	Migration Policy Group
Hooghiemstraplein 155	Rue Belliard 205, box 1
3514 AZ Utrecht	1040 Brussels
The Netherlands	Belgium
www.humanconsultancy.com	www.migpolgroup.com

The executive editor can be contacted at info@migpolgroup.com

To receive a free copy by post you can send an email to: review@non-discrimination.net

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The information contained in this fifth issue of the review reflects, as far as possible, the state of affairs on 15 January 2007

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Country information in this Review has been provided by:

Dieter Schindlauer (Austria), Olivier de Schutter (Belgium), Nikos Trimikliniotis (Cyprus), Pavla Boucková (Czech Republic), Niels-Erik Hansen (Denmark), Vadim Poleshchuk (Estonia), Timo Makkonen (Finland), Sophie Latraverse (France), Matthias Mahlmann (Germany), Yannis Ktistakis (Greece), András Kádár (Hungary), Shivaun Quinlivan (Ireland), Alessandro Simoni (Italy), Gita Feldhune (Latvia), Edita Ziobiene (Lithuania), François Moyse (Luxembourg), Tonio Ellul (Malta), Rikki Holtmaat (Netherlands), Monika Mazar-Rafal (Poland), Manuel Malheiros (Portugal), Zuzana Dlugosova (Slovakia), Maja Katarina Tratar (Slovenia), Lorenzo Cachón (Spain), Ann Numhauser-Henning (Sweden), Colm O'Cinneide (United Kingdom).

Contents

7	Introduction
9	Making anti-discrimination law work: An Update from the European Network of Legal Experts in the Non-discrimination Field Jan Niessen and Piet Leunis
13	Protection for Family and Friends: Addressing Discrimination by Association Lisa Waddington
23	Legal Standing, The Practical Experience of a Hungarian Organisation Bea Bodrogi
31	The Challenges ahead for European anti-discrimination legislation: an ECRI perspective Giancarlo Cardinale
41	The New UN Convention on the Rights of Persons with Disabilities Gerard Quinn
45	EU Policy and Legislative Process Update
51	European Court of Justice Case Law Update
54	Council of Europe Update
57	News from the EU Member States
58	Austria
58	Belgium
62	Cyprus
65	Czech Republic
65	Denmark
68	Estonia
68	Finland
71	France
74	Germany
77	Hungary
80	Ireland
81	Italy
82	Latvia
83	Lithuania
85	Luxembourg
86	Malta
86	Netherlands
91	Poland
92	Portugal
95	Slovakia
96	Spain
97	Sweden
97	United Kingdom

Marinka | 2000



Jeff | 1981



Introduction

This is the fifth issue of the bi-annual European Anti-discrimination Law Review, prepared by the European Network of Legal Experts in the non-discrimination field. The review provides an overview of the developments in European anti-discrimination law and policy in the six months prior to publication (the information reflects, as far as possible, the state of affairs on 15 January 2007).

In this fifth issue, Jan Niessen and Piet Leunis, the Directors of the Network give a short update on the latest activities of the Network. Giancarlo Cardinale, Lawyer at the Council of Europe's European Commission against Racism and Intolerance (ECRI) Secretariat presents the ECRI's perspective on the challenges ahead for European Anti-discrimination legislation; Lisa Waddington, European Disability Forum Chair in European Disability Law at Maastricht University and disability ground co-ordinator of the European Network of Legal Experts in the Non-Discrimination Field, addresses the issue of whether protection of discrimination by association is covered under the anti-discrimination directives, a question which is currently the subject of a preliminary reference before the European Court of Justice (see ECJ Update); and Bea Bodrogi, a lawyer at The Legal Defence Bureau for National and Ethnic Minorities (NEKI) in Hungary considers the implementation of the anti-discrimination directive's provisions on legal standing and makes an initial assessment as to their effectiveness.

In addition, you can find the usual updates on legal and policy developments at the European level in the regular sections on EU policy, European Court of Justice Case Law and European Court of Human Rights Case law which include important complaints that have been brought before the European Committee of Social Rights. At the national level, the latest developments in non-discrimination law in the countries that make up the European Union, can be found in the section on News from the Member States. These four sections have been prepared and written by the Migration Policy Group (Isabelle Chopin and Fiona Palmer) on the basis of the information provided by the national experts and their own research in the European sections.

Meet ordinary people in this Review, facing discrimination

Making anti-discrimination law work: An update from the European Network of Legal Experts in the non-discrimination field.

Jan Niessen and Piet Leunis

The members of the Network met in Brussels in February to look back at three years of hard work. Three years ago three networks of independent legal experts on discrimination on the grounds of race and religion, disability and sexual orientation were merged into one network which together with the new ground of age covered five grounds of discrimination. The network reported on the transposition of the Racial Equality Directive (2000/43) and Employment Equality Directive (2000/78), produced national reports¹ and thematic reports, provided legal expertise to the European Commission and launched the European Anti-Discrimination Law Review.

Another activity of the network is the organisation of legal seminars. The second was organised with the European Commission and dealt with the transposition of the Directives. It took place in Brussels on the 13 February 2007. The seminar brought together officials from Member States and the Commission, representatives from equality bodies, national organisations and of various European networks working against discrimination on the different grounds with members of the Network.

At the seminar it was noticed that while the transposition of the Directives has led to many positive changes in the anti-discrimination laws of most Member States, there remained some formidable challenges to be tackled. For example gaps remain in the transposition of the material scope provisions to both the public and private sectors. As far as racial and ethnic discrimination is concerned there remain difficulties to be overcome in areas outside employment (particularly in access to services and housing) and question marks around the scope of exceptions in the areas of discrimination on the grounds of age, sexual orientation and religion and belief.² Clearly, there is still scope for legal assistance to the Commission and Member States to solve technical and legal problems of complex issues of anti-discrimination law.

The seminar demonstrated that the implementation of the Directives requires a range of mechanisms and strategies, including voluntary compliance, proactive engagement and enforcement. Governments, specialised agencies, social partners and civil society organisations all have their (distinctive) roles to play. Litigation is an important tool and the Network noticed that this tool is increasingly being used. The number of preliminary references to the European Court of Justice has steadily increased; in the area of age discrimination one decision has been rendered and four cases are pending, in the area of disability legislation one decision has been handed-down and one is awaited. The first reference relating to sexual orientation discrimination is also before the Court.

¹ The national reports presently being updated are available at:

http://ec.europa.eu/employment_social/fundamental_rights/public/pubst_en.htm. The updated reports will be made available on the Commission website: http://ec.europa.eu/employment_social/fundamental_rights/policy/aneval/legnet_en.htm

² For further information see Bell, Chopin & Palmer "Developing Anti-discrimination Law in Europe – The 25 EU Member States compared," November 2006

On a national level cases are being reported concerning disability discrimination in employment; age discrimination in employment, particularly regarding job advertisements and selection processes; discrimination on grounds of religion and belief in employment and education; racial/ethnic origin discrimination in education and access to goods and services, the latter mainly affecting the Roma Community, and slowly sexual orientation in employment. Consequently, the Network intends, increasingly to report and comment on the development of case law at European level, across the European Union and in the Law Review.

The participants of the seminar also recognised that anti-discrimination law has its limits. For example, on its own it does not necessarily reverse the legacy or effects of cumulative discrimination that may have grown over time. Positive action measures may therefore be necessary to secure equal opportunities in fact as well as in theory. The Network is preparing a thematic report on this issue that will be published before the autumn.³ A thematic report on non-discrimination and minorities will also be published then. Other recently finalised thematic reports were made available at the seminar, namely one on the equality bodies,⁴ one on the religion and belief provisions under Directive 2000/78⁵ and another on measuring discrimination.⁶

It is expected that legal but also policy issues of implementation and enforcement will demand the greater attention of all stakeholders in the non-discrimination field. Questions will be raised as to the effectiveness of anti-discrimination law and policies. The work of the Network has laid a solid foundation for the development of legal and policy impact assessments with a view to better protection of victims of discrimination, as well as more effective prevention of discrimination.

³ Thematic Study on Positive Action (Marc De Vos) (forthcoming)

⁴ Catalysts for Change? Equality Bodies according to Directive 2000/43 – existence, independence and effectiveness (Rikki Holtmaat)

⁵ Religion and Belief Discrimination in Employment – the EU Law (Lucy Vickers)

⁶ Measuring Discrimination – Data Collection and EU Equality Law (Timo Makkonen). All of the above are available at: http://ec.europa.eu/employment_social/fundamental_rights/legis/legln_en.htm

Members of the European network of legal experts in the non-discrimination field

Project Director:	Piet Leunis, Human European Consultancy	piet@humanconsultancy.com
Deputy Project Director:	Jan Niessen, Migration Policy Group	jniessen@migpolgroup.com
Support Manager:	Evelyn van Royen, Europic	evelyn@europic.org
Content Manager and Executive Editor:	Isabelle Chopin, Migration Policy Group	ichopin@migpolgroup.com
Managing Editor:	Fiona Palmer, Migration Policy Group	fpalmer@migpolgroup.com
Scientific Directors:	Sandra Fredman, Oxford University	sandra.fredman@law.ox.ac.uk
	Christopher McCrudden, Oxford University	christopher.mccrudden@law.oxford.ac.uk
	Gerard Quinn, National University of Ireland, Galway	gerard.quinn@nuigalway.ie
Ground co-ordinators:	Christine Bell, University of Ulster (religion and belief)	C.Bell@ulster.ac.uk
	Mark Bell, University of Leicester (sexual orientation)	Mb110@leicester.ac.uk
	Isabelle Chopin, Migration Policy Group (race and ethnic origin)	ichopin@migpolgroup.com
	Mark Freedland, Oxford University (age)	mark.freedland@sjc.ox.ac.uk
	Lisa Waddington, Maastricht University (disability)	Lisa.Waddington@FACBURFDR.unimaas.nl
Legal Expert on Roma Issues:	Lilla Farkas, Hungarian Helsinki Committee	lilcsik@hotmail.com
Country Experts:	Dieter Schindlauer (Austria)	dieter.schindlauer@zara.or.at
	Olivier de Schutter (Belgium)	deschutter@cpdr.ucl.ac.be
	Nikos Trimikliniotis (Cyprus)	nicostrim@logosnet.cy.net
	Pavla Boucková (Czech Republic)	poradna@iol.cz
	Niels-Erik Hansen (Denmark)	neh_drc@yahoo.dk
	Vadim Poleshchuk (Estonia)	vadim@lichr.ee
	Timo Makkonen (Finland)	makkonen@kaapeli.fi
	Sophie Latraverse (France)	slatraverse.geld@free.fr
	Matthias Mahlmann (Germany)	mahlmann@zedat.fu-berlin.de
	Yannis Ktistakis (Greece)	yktistakis@yahoo.gr
	András Kádár (Hungary)	andras.kadar@helsinki.hu
	Shivaun Quinlivan (Ireland)	shivaun.quinlivan@nuigalway.ie
	Alessandro Simoni (Italy)	alessandro.simoni@unifi.it
	Gita Feldhune (Latvia)	Gita.Feldhune@lu.lv
	Edita Ziobiene (Lithuania)	ziobiene@takas.lt
	François Moyse (Luxembourg)	f.moyse@as-avocats.com
	Tonio Ellul (Malta)	tellul@emdlex.com.mt
	Rikki Holtmaat (the Netherlands)	H.M.T.Holtmaat@law.leidenuniv.nl
	Monika Mazar-Rafal (Poland)	m.rafal@twarda.pan.pl
	Manuel Malheiros (Portugal)	ManuelMalheiros@lisboa.taf.mj.pt
	Zuzana Dlugosova (Slovakia)	dlugosova@changenet.sk
	Maja Katarina Tratar (Slovenia)	mtratar@fundacija-gea2000.si
	Lorenzo Cachón (Spain)	lcachon@terra.es
	Ann Numhauser-Henning (Sweden)	Ann.Numhauser-Henning@jur.lu.se
	Colm O'Cinneide (United Kingdom)	uctlcoc@ucl.ac.uk



Pinka | 1933

Protection for Family and Friends: Addressing Discrimination by Association

Lisa Waddington, Chair in European Disability Law Maastricht University⁷

Introduction

C. is the primary carer for her son, who has a disability. She experiences adverse treatment at work, including being denied the possibility to return to her previous job after maternity leave and being criticised for being lazy when she sought to take time off to care for her child. Ultimately she is made redundant. She alleges that the primary carer of a non-disabled child would not have been so treated, and that the reason for the adverse treatment is the disability of her child.

The facts as outlined above are a much reduced and unelaborated description of a case which is currently before the Court of Justice of the European Communities (ECJ).⁸ The national court, which has been required to decide on this matter, has asked the ECJ for guidance as to whether an individual in such a situation is covered by the protection from discrimination provided by the Employment Equality Directive.⁹

The Employment Equality Directive and the Racial Equality Directive¹⁰ prohibit discrimination “on the grounds of” religion or belief, disability, age or sexual orientation; and racial or ethnic origin respectively.¹¹ As a consequence, there is no doubt that, when an individual experiences discrimination because he or she possesses one of these characteristics,¹² the national transposition of non-discrimination legislation based on the Directives should provide an appropriate remedy. However, what is the situation when a person experiences discrimination not because of a characteristic which they possess, such as their own disability, ethnic origin or religion, but because of their relationship with someone else who possesses such a characteristic, as described in the scenario above? Where person A discriminates against person B because of person B’s links to or association with person C? In this situation discrimination by association occurs,¹³ and the question is whether a legal remedy exists.

⁷ European Disability Forum Chair in European Disability Law, Maastricht University (NL) and disability ground coordinator of the European Network of Legal Experts in the Non-Discrimination Field. The author thanks Robin Allen QC (Cloisters Chambers, London) for commenting on an earlier version of this article and for providing access to an unpublished paper on this topic. This paper also draws on information provided in the national reports submitted to the European Network of Legal Experts in the Non-Discrimination Field. The 2004-2005 reports are available at: http://ec.europa.eu/employment_social/fundamental_rights/public/pubst_en.htm#legnet

⁸ Case C-303/6 *S. Coleman v Attridge Law*, reference for a preliminary ruling from Employment Tribunal (London South) made on 10 July 2006. See further section on ECJ Case Law Update [page 51]

⁹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, O.J. L.303/16, 2.12.2000

¹⁰ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, O.J. L. 180/22, 19.7.2000

¹¹ These two Directives will be referred to as the Anti-discrimination Directives to distinguish them from the Directives dealing with gender equality

¹² Assuming the discrimination falls within the material scope of the two Directives. Broadly speaking, this is employment and vocational training in the case of the Employment Equality Directive, and employment, vocational training, social protection, social advantages, education and access to goods and services in the case of the Racial Equality Directive (see Article 3 of both Directives)

This article examines the phenomenon of discrimination by association and considers to what extent EC, and various provisions of domestic law of the Member States, (explicitly) prohibit such discrimination. The article firstly considers the kinds of situations in which discrimination by association can arise, and then continues by examining the legal situation at both the EC and national level.

Discrimination by Association – a genuine problem

Discrimination by association can arise with regard to all the grounds covered by the Anti-discrimination Directives, as well as, potentially, with regard to gender and any further grounds covered by national non-discrimination law, such as nationality or trade union affiliation. The following are illustrations of the kinds of circumstances in which discrimination by association can occur:

- a man is harassed at work by colleagues because his son is gay;
- a landlord refuses to rent property to a white woman because her boyfriend is black;
- an employer declines to employ a man because he has a close family member with a disability. The employer knows that this will lead to higher health insurance premiums for the company, as health insurance for immediate families is a benefit provided to all employees;
- a group of people are denied access to a night club because one member of the group is of Roma origin;
- an employer instructs an employee not to allow any Muslims to enter the premises. When the employee refuses to do this, and does allow Muslims to enter, she is dismissed¹⁴;
- a woman lives with her elderly mother. Her employer selects the woman for redundancy because he suspects that, as her mother becomes older, the employee will need to take unplanned time off work to care for her mother.

These examples reveal that discrimination by association is potentially widespread and can arise with regard to all the grounds covered by the two Directives. The following section examines how the law responds to such situations.

Discrimination by Association – the legal response

The Anti-discrimination Directives

The two Anti-discrimination Directives both prohibit four kinds of discrimination: direct and indirect discrimination; harassment and instruction to discriminate. In addition the Employment Equality Directive establishes an obligation to make a reasonable accommodation in favour of persons with a disability.

¹³ Discrimination by association can also convey another meaning – namely where an association of individuals with certain characteristics are treated unfavourably when compared to other associations which do not share the same characteristics. This specific form of discrimination by association is not covered in this article. See Olivier De Schutter, Belgium Country report on measures to combat discrimination at page 19 available via http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/berep05_en.pdf

¹⁴ The victim of discrimination by association in this example is the employee who is dismissed. She is discriminated against not on the basis of her own religion, but on the basis of the religion of others (namely Muslims who, contrary to the instruction of her employer, she does allow to enter the premises). This amounts to discrimination by association with others on the grounds of religion. The employer's initial instruction is also a form of discrimination – namely an instruction to (directly) discriminate, which is contrary to the Employment Equality Directive

An initial reading of the Directives appears to suggest that they do not protect people who are associated with someone else from certain forms of discrimination. This seems to be the case for indirect discrimination. The Racial Equality Directive defines indirect discrimination as occurring where “an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons ...” A comparable definition can be found in the Employment Equality Directive. The definitions therefore seem to provide protection from indirect discrimination only for “persons of a racial or ethnic origin” and “persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation” who are disadvantaged. As a consequence, it is difficult to argue that an individual who is disadvantaged not because they possess one of the covered characteristics, but because someone they associate with possesses such a characteristic, is protected from indirect discrimination as a result of this association under EC law. Such protection would only be possible if, for example, “persons of a racial or ethnic origin” could be interpreted as including “persons who associate with persons of a racial or ethnic origin”. Nevertheless, one could argue that the ECJ should, given the opportunity,¹⁵ adopt such an interpretation – on the grounds that this would be in line with the broad purpose of the Directives, even though it would not be in accordance with a literal interpretation of the wording.

Secondly, the obligation to provide a reasonable accommodation found in the Employment Equality Directive only exists “in relation to persons with disabilities”. No obligation to accommodate is owed, for example, to family members who care or assist a person with a disability under EC law.

In contrast, the prohibitions against direct discrimination, harassment and instruction to discriminate are more open ended. The Directives specify that “direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin” or “on the grounds of religion or belief, disability, age or sexual orientation.” Therefore the Directives do not explicitly confine protection to individuals who have the covered characteristics themselves and arguably, by simply interpreting the term “on grounds of” in line with its every day meaning, the protection from direct discrimination can be extended to individuals who experience disadvantage based on their association with another person. A worker who is discriminated against because she has a child with a disability is, after all, discriminated against “on the grounds” of disability, albeit the disability of her child. As will be seen below, certain national courts have interpreted the requirement that the discrimination be “on the grounds” of a covered characteristic in this way.

Similarly, the Racial Equality Directive states “an instruction to discriminate against persons on grounds of racial or ethnic origin shall be deemed to be discrimination”. The Employment Equality Directive contains an equivalent provision with regard to religion or belief, disability, age or sexual orientation.

The concept of harassment also seems to be sufficiently widely defined so as to embrace discrimination by association. Harassment “shall be deemed to be discrimination ... when an unwanted conduct related to racial or ethnic origin [or religion or belief, disability, age or sexual orientation] takes place ...” Where that conduct is related to a characteristic not of the victim, but of someone the victim associates with, such as a spouse with a disability or gay family member, this would still seem to meet the requirement that the conduct “be related” to that ground.

This position that discrimination by association is, in some circumstances, covered by the two Directives, is shared by the European Commission. In its Annual Report of 2005 on Equality and Non-Discrimination the Commission stated that the Racial and Employment Equality Directives are intended to:

¹⁵ This question is not at issue in the *Coleman* case.

“protect everyone on EU Territory against discrimination on the grounds of their race or ethnic origin, their religion or belief, their age, their sexual orientation or any disability they have. ... This applies equally to anyone who is discriminated against because they associate with a person of a certain race, religion, sexual orientation etc.”¹⁶

A number of further arguments, based on Community law and the Directives themselves, can be raised in support of this proposition.

Equality is a Fundamental Principle of European Community Law, and the Directives should be interpreted broadly as a result

When interpreting European law the ECJ takes into account certain fundamental principles. These principles can influence the interpretation which the Court gives to EC instruments. In addition, the European legislator must also act in accordance with these principles. Amongst these fundamental principles is equality.

An example of how the principle of equality influences the interpretation of EC law can be found in the P v. S case.¹⁷ P. was dismissed by her employer after she had had gender reassignment surgery. She argued that this was in breach of the Equal Treatment Directive which prohibits sex discrimination in the area of employment. It was accepted that P. had been dismissed not because she was a man or a woman, but because she had changed her sex through surgical intervention. Whilst the Directive in question certainly did not easily lend itself to be interpreted in the way P. argued, the Court found that the “right not to be discriminated against on the grounds of sex is one of the fundamental human rights whose observance the Court has a duty to ensure” and that the principle of equality is “one of the fundamental principles of Community law”. As a consequence the Court held that the Directive also covered individuals who had undergone gender reassignment surgery and who experienced adverse treatment as a result. More recently the Court has followed this approach in Mangold,¹⁸ in which it stressed that the principle of non-discrimination on grounds of age is a general principle of Community law and interpreted the Employment Equality Directive in this light.

A reading of the two Anti-discrimination Directives inspired by this approach should lead to the conclusion that discrimination by association is covered, at least as far as direct discrimination and harassment is concerned, and therefore constitutes a prohibited form of behaviour under European law.

Prohibiting Discrimination by Association is in line with the Purpose of the Directives

Both Directives contain preambles which provide elaboration on the purpose of the Directives, and on the meaning of specific provisions contained within them. From a reading of the preambles it becomes clear that the Community, when adopting the Directives, recognised that the right to equality before the law and protection against discrimination constitutes a universal right, and that the Directives are one means of protecting this right.¹⁹ The preambles stress the importance of respecting fundamental rights and freedoms, including the right to freedom of association. Moreover, it is recognised that discrimination may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, the

¹⁶ Page 8. Available at: http://ec.europa.eu/employment_social/fundamental_rights/pdf/pubst/poldoc/annualrep05_en.pdf

¹⁷ Case C-13/94 *P v S and Cornwall County Council* [1996] ECR I-2143

¹⁸ Case C-144/04, *Mangold v Helm*, [2005] ECR I-9981

¹⁹ Recital 3 Preamble of both Directives

raising of the standard of living and quality of life, economic and social cohesion and solidarity.²⁰ Furthermore, the Racial Equality Directive refers to the need to respect the protection of private and family life and transactions with regard to access to goods and services,²¹ whilst the Employment Equality Directive stresses that employment and occupation are key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life to realising their potential.²²

These goals would all be undermined should discrimination by association not be prohibited by the Directives. Social cohesion and solidarity would, for example, be hampered if individuals could be exposed to discrimination for associating with individuals who others may regard as undesirable or unpopular, such as immigrants of a different ethnic origin or lesbians and gays. Likewise, the principle of solidarity, which relies on (members of) society supporting those who may be more vulnerable, including people with certain forms of disabilities, and younger and older people, would be dealt a blow, if those providing the support could be exposed to discrimination as a result.

However, whilst one can argue that the Directives do prohibit certain forms of discrimination by association, and that the fundamental Community principle of equality and preambles support this, there is currently no legal authority to confirm this standpoint. The wording of the Directives is certainly open to this interpretation, but it is not unambiguous and clear in this respect; and there are no judgments of the ECJ interpreting the provisions of the Directive in this light, or even addressing the issue. The Coleman case referred to above should clarify this point.

The Member States

An analysis of the (transposition) legislation and case law of the Member States reveals that, in the majority of cases, discrimination by association is not expressly provided for. Many Member States have copied the wording of the Directives, and have prohibited (direct) discrimination “on the grounds” of the covered characteristics, but have not elaborated on the exact scope of this protection. However, in a minority of States the matter is expressly provided for in legislation or has been the subject of comments in preparatory documents or case law. These instances are considered below

Discrimination by Association is prohibited for all or most grounds: Ireland and Sweden

Ireland

Irish non-discrimination legislation is framed extremely broadly. Two statutes, the Equal Status Act and the Employment Equality Act, prohibit discrimination on a wider range of grounds than are covered by the Community Directives, and they cover goods and services and employment respectively. Both statutes were amended in 2004 in order to bring them into line with the Directives and both statutes explicitly prohibit discrimination by association. The Employment Equality Act 1998-2004 provides:²³

²⁰ Recital 9 Preamble of the Racial Equality Directive and Recital 11 Preamble of the Employment Equality Directive

²¹ Recital 4 Preamble

²² Recital 9 Preamble

²³ Section 6(1)(b)

*(1) For the purposes of this Act ... discrimination shall be taken to occur where— ...
(b) a person who is associated with another person—
is treated, by virtue of that association, less favourably than a person who is not so associated is, has been or
would be treated in a comparable situation, and
similar treatment of that other person on any of the discriminatory grounds would ... constitute discrimination.*

An identical provision is included in the Equal Status Act 1998-2004.²⁴ The latter provision has been the subject of case law in *Six Complainants v A Public House, Dublin*.²⁵ In this case a group of individuals, including a man who had a disability which affected his balance, co-ordination and facial expressions, were denied entry to a pub. The doorman gave no reason for the denial, although both he and the owner of the pub had come to the conclusion that the group had been drinking, and their attention was drawn in particular to the individual who, it was later revealed, had a disability. It was the doorman's standard practice to engage patrons in conversation before deciding to deny them entry, but he did not do this on this occasion. In fact no members of the group had been drinking, and the Equality Office, who judged the case, came to the conclusion that the doorman and owner's decision was based on the disability of the individual. The Officer held that, by denying the group entry to the pub, discrimination on the ground of disability had occurred. One complainant had been discriminated against on the grounds of his own disability and the other five complainants had been discriminated against, by association, on the grounds of disability.

This case does not fall within the scope of the Anti-discrimination Directives,²⁶ as disability discrimination is only prohibited with regard to employment. Nevertheless, the case does provide an example of how discrimination by association can arise, and how the courts can respond to such situations.

Sweden

Prior to the adoption of the Directives, Swedish legislation prohibited discrimination on a variety of grounds. In 2003 the relevant statutes were amended to bring them into line with Community law, and discrimination by association was prohibited. As an example, the amended Prohibition of Discrimination in Working Life of People with Disability Act²⁷ now provides:

"An employer may not disfavour a job applicant or an employee by treating her or him worse than the employer treats, has treated or would have treated someone else in a comparable situation, where the disadvantage is connected to disability."²⁸ Comparable provisions can be found in the legislation addressing discrimination on grounds of ethnicity, religion or belief,²⁹ and sexual orientation."³⁰

²⁴ Section 3(1)(b)

²⁵ Equality Officer, 27 January 2004, DEC S/2004/009-014

²⁶ However, a similar scenario, involving the denial of a group of people, some of whom are of Roma origin and some of whom are not, would fall within the scope of the Racial Equality Directive. This Directive covers, in addition to employment related discrimination, access to services

²⁷ 1999:132

²⁸ Section 3

²⁹ 1999:130 Act on Measures against Discrimination in Working Life on grounds of Ethnicity, Religion or other Belief

³⁰ 1999:133 Act on a Ban against Discrimination in Working Life in grounds of Sexual Orientation

A broad formulation has therefore been chosen, and adverse behaviour which has some connection to the covered ground is prohibited. The preparatory works which preceded the adoption of the amendments to the Acts stressed that the protection from discrimination provided by the statute also applied “when a person is discriminated against on the grounds of his or her association to another person’s (...) disability.”³¹ In addition, they provide examples of other forms of prohibited discrimination by association,³² such as the refusal to rent property to an individual on the grounds that a member of his family has a particular ethnic origin or is gay.³³

Discrimination by Association is clearly prohibited for disability, but not for the other grounds - Austria and France

Some Member States have chosen to explicitly prohibit discrimination by association on the grounds of disability, whilst not paying similar attention to other forms of discrimination by association. The reason for this seems to be the particular risk of discrimination faced by those who provide care or assistance to people with disabilities, as well as the need to promote the provision of assistance to individuals with disabilities. The Austrian Disability Equality Act³⁴ and Act on the Employment of People with Disabilities³⁵ both extend the protection from discrimination to relatives who fulfill caring duties in relation to family members or partners with a disability. A similar motivation seems to lie behind the decision of the French legislator to extend the right to one specific form of reasonable accommodation, namely individualised working hour arrangements, to family members of people with disabilities under certain circumstances.³⁶ The goal of such accommodations is to allow family members and relatives to support the individual with a disability. It is recalled that, under the Employment Equality Directive, the right to an accommodation is limited to individuals with a disability.

Discrimination by Association is clearly prohibited for race, religion and/or sexual orientation, but not for other grounds – United Kingdom and Slovakia

In some Member States the question of discrimination by association has been explicitly brought within the scope of the legislation through case law dealing with discrimination on the grounds of race, sexual orientation, or religion or belief. One such example is the United Kingdom where a common definition of direct discrimination³⁷ exists for all these grounds which provides:

“A person discriminates against another person on racial grounds/on grounds of sexual orientation/ on grounds of religion or belief if he treats that other less favourably than he treats or would treat other persons.”³⁸

³¹ Prop. 2002/03/65 page 91

³² Such discrimination is prohibited under other legislation

³³ Prop. 2002/03/65 page 90

³⁴ Paragraph 4

³⁵ Paragraph 7b

³⁶ Labour Code (Legislative Part), Paragraph 1: Individualised working hours, Article L.212-4-1-1, inserted by Law N°. 2005-102 of 11 February, 2005, Art. 24 IV, Official Gazette of 12 February, 2005

³⁷ However, the definition is not specifically labelled as such

³⁸ See Race Relations Act 1976 Section 1(1)(a); the Employment Equality (Sexual Orientation) Regulations in Great Britain 2003, Regulation 3(1)(a); Employment Equality (Religion or Belief) Regulations 2003 Regulation 3(1)(a); Race Relations (Northern Ireland) Order 1997 Article 3(1)(a); Fair Employment and Treatment (Northern Ireland) Order 1 Article 3(2)(a); the Employment Equality (Sexual Orientation) Regulations in Northern Ireland 2003 Regulation 3(1)(a), Section 45 of the Equality Act 2006

Whilst the legislation does not explicitly state that discrimination by association is covered, the courts have held that the prohibition of discrimination “on racial grounds” covers such instances of discrimination. In *Showboat Entertainment Centre Ltd. v Owens*³⁹ the Employment Appeals Tribunal held that the term “on racial grounds” covers both the case where discrimination occurs on the basis of the complainant’s racial characteristics, and where discrimination occurs on the basis of characteristics of others. In this case the complainant was dismissed by his employer for refusing to obey a racially discriminatory instruction to exclude black people from an entertainment centre. Subsequently, a higher court – the Court of Appeal – upheld the reasoning used in *Showboat in Weathersfield Ltd. v Sargent*,⁴⁰ where it held that the Mrs. Sargent, a white employee, was discriminated against “on racial grounds” following her resignation from her job in reaction to her employer’s instruction not to rent vehicles to black or Asian people.⁴¹

The recently adopted Sexual Orientation⁴² and Religion or Belief Regulations⁴³ follow the wording of the Race Relations Act, and therefore adopt a similar approach. In this context the Explanatory Notes accompanying the Regulations⁴⁴ clearly state:

24. The use ... of the phrase “on the grounds of sexual orientation / religion or belief” (rather than “on the grounds of his/her sexual orientation / religion or belief”) follows the formula used in the RRA⁴⁵ (“on racial grounds”), which has been interpreted broadly by the courts and tribunals. The wider formula means that discrimination based on ... association ... is covered...

Direct discrimination: association

26. In addition, direct discrimination “on grounds of sexual orientation / religion or belief” covers discrimination against a person by reason of the sexual orientation / religion or belief of someone with whom the person associates. For example, an employee may be treated less favourably because of the religion of his or her partner, or because his or her son is gay. ...

A further example of a Member State where discrimination by association (on grounds of race and religion) is explicitly covered is Slovakia. The Slovakian transposition legislation, the Anti-discrimination Act, provides that discrimination on grounds of one’s relationship with a person of certain racial, national or ethnic origin shall also be deemed to constitute discrimination based on racial, national or ethnic origin,⁴⁶ and that discrimination on grounds of one’s relationship with a person of certain religion or belief is deemed to constitute discrimination based on religion or belief.⁴⁷

³⁹ [1984] Industrial Relations Law Reports 7

⁴⁰ [1999] Industrial Relations Law Reports 94

⁴¹ It is worth noting that the English court, which referred the *Coleman* case to the ECJ, noted that it was “... common ground that the *Race Directive* (Council Directive 2000/43/EC) was modelled on the UK *Race Relations Act* and that the *Framework Directive* (Employment Equality Directive) was in turn modelled on the *Race Directive*.” Employment Tribunal, Case number 2303745/2005 *Miss S. Coleman v Attridge Law and Mr. Steve Law*, 17 February 2006, para. 24

⁴² Employment Equality (Sexual Orientation) Regulations 2003 available at: <http://www.opsi.gov.uk/si/si2003/20031661.htm>

⁴³ The Employment Equality (Religion or Belief) Regulations 2003 available at: <http://www.opsi.gov.uk/si/si2003/20031660.htm>.

⁴⁴ Explanation of the Provisions of: Employment Equality (Sexual Orientation) Regulations 2003 and Employment Equality (Religion or Belief) Regulations 2003, DTI, available at: <http://www.dti.gov.uk/files/file29350.pdf>

⁴⁵ Race Relations Act 1976

⁴⁶ Section 5, paragraph 3 and Section 6, paragraph 3(b)

⁴⁷ Section 6, paragraph 3(c)

Conclusion: The relationship between EC Law and Member State Law regarding Discrimination by Association

It has been argued that the two Anti-discrimination Directives should be interpreted as prohibiting discrimination by association on all the covered grounds. The wording of the provisions addressing direct discrimination and harassment readily lend themselves to such an interpretation, and it is argued that such an interpretation is the most logical one available. The provisions concerning indirect discrimination do not, according to a literal interpretation, cover discrimination by association; however, one could argue such an interpretation would be in line with the purposes of the Directives. Like the Directives, most national transposition legislation does not explicitly prohibit discrimination by association. However, it is submitted that, in the majority of cases, the national legislation is easily capable of being interpreted in this light,⁴⁸ and that the confirmation by the ECJ in the Coleman case that direct discrimination and harassment by association are prohibited would cause little disruption at the national level. This would be the case for States such as Cyprus, Finland and Portugal⁴⁹ where the definitions of direct discrimination found in national law can arguably already be interpreted as covering direct discrimination by association, and therefore could easily accommodate such a ruling of the ECJ.

As noted above, the provisions of the Directives addressing indirect discrimination and reasonable accommodation seem more restricted, and, on a literal meaning, confined to prohibiting the discrimination of individuals who actually possess the relevant characteristics. Nevertheless, this should not be taken as a signal that issues of discrimination by association cannot arise with regard to indirect discrimination and reasonable accommodation. One example of an area where there is a very real risk of such discrimination relates to individuals who, as a result of caring responsibilities for someone who is dependent (whether as a result of age [young or old] or disability), cannot meet certain demands of the employer relating to availability for work, e.g. working shifts, or over night stays away from home. Where these requirements are not strictly required (not “objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”) they could be classified as a form of indirect discrimination; where they are required, a reasonable accommodation could provide a solution. However, the opportunity to raise such arguments will only exist where the legislation covers such forms of discrimination by association. This may not seem to be the case for the current EC Directives, but Member States may extend the protection in this way.

⁴⁸ This is the conclusion reached by many of the national reporters of the European Network of Legal Experts in the Non-Discrimination Field

⁴⁹ Source: national reports submitted to the European Network of Legal Experts in the Non-Discrimination Field, 2005-2006



Gino | 1997

Legal Standing – The Practical Experience of a Hungarian Organisation

Bea Bodrogi, Practicing Lawyer at the Legal Defence Bureau for National and Ethnic Minorities (NEKI) in Hungary⁵⁰

The success of a discrimination case depends on a number of factors, without effective legal protection however, it cannot be expected that victims will receive an appropriate legal remedy. As soon as a discrimination case goes to court, the course of the procedure is strongly influenced by the fact of whether the victim is supported by an organisation or stands in front of the court alone. Recognising the importance of this issue, in order to secure the provision of effective legal protection, the Racial Equality Directive (RED) and the Employment Equality Directive (EED)⁵¹ oblige Member States to bestow associations and other legal entities with the right to participate in legal proceedings either on behalf, or in support of, the victim.⁵²

It seems that the legislators of most Member States have not taken this obligation seriously, as only in very few countries are the competent organisations able to effectively fight discrimination on behalf, or in support of, victims. The emphasis here is on “effective”, since although the laws in almost all countries contain general clauses or limited licences concerning legal standing, only few Member States provide these organisations with efficient means of legal protection.⁵³

The importance of legal protection for the victim

Effective legal protection is indispensable for the victim. In cases of ethnic discrimination victims are usually from the periphery of society and lack the appropriate knowledge and information and have insufficient means to vindicate their rights. In employment relationships the employee is subordinate to the discriminating employer, and the initiation of legal proceedings can easily lead to an unbearable situation at the workplace. There are innumerable examples of different factual situations in discrimination cases, however, the victim’s defencelessness, which the discriminator usually abuses, is a general feature of discrimination cases. Should the victim decide that they wish to seek justice and a legal remedy in front of the court, their defencelessness is alleviated if they do not have to fight alone for years in the unknown legal labyrinth.

⁵⁰ The author holds an LLM from the London School of Economics (LSE). The paper relies on the experiences of the Legal Defence Bureau for National and Ethnic Minorities (NEKI) where the author has been working for 10 years as a lawyer

⁵¹ Directive 2000/43/EC of 29 June 2000, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (known as Racial Equality Directive) and Directive 2000/78/EC of 27 November 2000, on equal treatment in employment and occupation (known as the Employment Equality Directive)

⁵² Article 7.2 of RED and 9.2 of the EED: “Member States shall ensure that associations, organisations or other legal entities which have in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of these Directives are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under these Directives”

⁵³ The paper relies on information as reported by the European Network of Legal Experts in the Non-discrimination field established by the European Commission and maintained by MPG (Migration Policy Group) and human european consultancy. Country specific and thematic reports are available at http://ec.europa.eu/employment_social/fundamental_rights/public/pubst_en.htm

Managing a discrimination case is arduous work, and often very costly. First of all, it requires special knowledge of discrimination law from the legal representative, which cannot be obtained during the basic legal studies in most countries. Lawyers in this field usually acquire the necessary knowledge and professional experience from, or by working for, civil society organisations. Beside special knowledge, work which does not require legal specialisation, but which is indispensable during the preparation of the case for legal proceedings, like fact-finding and continuous, and often contact with the clients over a period of years, is also significant. The Legal Defence Bureau for National and Ethnic Minorities (NEKI), specialising in litigation in ethnic discrimination cases in Hungary, carried out preparation work for filing a case against the local government of Pánd⁵⁴ for almost a year, during which it examined the cases of fifteen people, of which in the end it could represent only seven. The case involved the discriminatory practice of the local government against Romani inhabitants in connection with the allocation of social security payments. Two lawyers and a social worker participated in the fact-finding work of the organisation (obtaining documents, interviewing the clients, maintaining contact with the clients, finding and interviewing witnesses) for a whole year, only after this was the organisation able to file a well-grounded claim and provide an advocate for the clients. In most cases the court established the infringements and awarded a small amount of non-pecuniary damages to the victims. The case is considered a great success from the perspective of the victims and the organisation, since as a result of the proceedings, the earlier discriminatory practice was terminated and the notary responsible was relieved of her duties. This was, however, only one of the cases of the legal defence bureau the costs of which⁵⁵ placed a considerable burden on the organisation. Although in the case of success – as in this case – a limited portion of the costs and a small amount of the advocate’s fee is paid by the defeated party, the organisation itself does not profit directly from this, as it was not the organisation, but the advocate it had contracted, who represented the victim during the proceedings.

The above case was initiated before the implementation of RED and EED in Hungary, thus the clients were not able to choose between the court proceedings or proceedings before the Equal Treatment Authority (the “Authority”), which was established only later, and could not make use of those regulations of the Equal Treatment Act⁵⁶ – implemented also as a consequence of the two directives – that significantly alleviate the situation of the victim during the proceedings both in front of the court and the Authority. All this, however, does not change the fact that it is in the primary interest of the victim of discrimination to have professional help specialising in the given legal area during the proceedings – be they judicial or other procedures – and to avoid costs that may prevent them from vindicating their rights and, more importantly, to instigate actions in the first place.

Organisations and legal protection

Associations, organisations or other legal entities specialising in providing legal protection for victims of discrimination are to be found in every Member State, but they differ very much from each other not only regarding their past but also their type and effectiveness. In the new Member States, for example, it is civil society organisations that carry out such activities, while in older Member States, trade unions or other legal entities also take on discrimination cases in addition to their other advocacy activities, some with already decades of experience. This, of course, serves the interest of the victims, since the more areas in which victims have their own legal defence organisations, the more chance the victims have to initiate legal proceedings with appropriate help.⁵⁷

⁵⁴ <http://www.neki.hu/pdf/ff2003.pdf>, page 22-23

⁵⁵ This includes the costs of fact-finding and the lawyer’s fees

⁵⁶ Act 125 of 2003 on equal treatment and enhancing equal opportunities (ETA)

⁵⁷ For example, in the UK, organisations that support discrimination complaints are the equality bodies (CRE, DRC, EOC, ECNI), trade unions, race equality councils, citizens advice bureaux or other voluntary sector advice agencies, complainant organisations

With the implementation of RED and EED, the legal defence organisations of the Member States now have a better chance to carry out the legal protection of victims effectively, or at least more effectively than before. *“Member States shall ensure that associations, organisations or other legal entities which have in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of these Directives are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under these Directives”*⁵⁸

According to this article, Member States shall permit their organisations to participate in the cases as the victims’ legal representatives in front of the court and/or any other administrative procedures, furthermore, these organisations may instigate actions on behalf of one or more victims when trying to fight and eliminate a practice which discriminates against a whole group. Among such proceedings we may list *class actions*, the so-called representative proceeding, in which a representative claimant will sue in the name of the class and obtain a judgment binding on all the members of that class. The above quoted directive also enables Member States to introduce the institution of *actio popularis*, where in the absence of an individual victim an organisation is allowed to initiate proceedings on its own in order to terminate a discriminatory practice. This opportunity is provided by law, if there is a strong public interest to investigate certain infringements even in cases when the unlawful conduct has no specific victim

Although the legal standing of associations or other legal entities is not entirely alien to the legal systems of the Member States,⁵⁹ when we look at national regulations we can see that the significant majority of countries did not appropriately – or at all – integrate the requirements/obligations regarding legal defence into their national law.

In support of the victim

In those countries, which have a rich array of discrimination case law and where victims had enjoyed a fairly effective legal protection prior to the RED and EED, the organisations had already “solved” the legal representation of the clients in similar ways before the implementation of the two directives.

The system of legal aid provided in the above-mentioned Hungarian example, the “Pánd case”, is well-known to civil society organisations in other Central European countries, like Czech Republic, Slovakia, and Poland, but also in countries with greater experience and legal history in legal protection, like the UK. In this system, the victim of discrimination first contacts a civil society organisation which carries out professional fact-finding and prepares the case for litigation. In a second phase the organisation co-operates with an advocate who represents the client before the court and they decide on legal strategy together. The organisation – in the absence of legal standing – is not a party to proceedings and it is only the victim and their representative who stand in front of the legal forum. More specifically, the representation takes place on the basis of powers given directly by the victim to the advocate. In the practice of NEKI, a contract between three parties, the organisation, the advocate and the client is created, since the advocate’s expenses and fees are covered, obviously, not by the client, but the organisation, as are any additional costs which are payable by the defeated party in case of a loss.⁶⁰

⁵⁸ Article 7.2 of RED and 9.2 of the EED

⁵⁹ The legal standing of associations or other entities was a known and applied legal institution in some of the countries already before the implementation of the directive. Trade unions in older member states, for example, could represent employees in employment cases earlier as well, and class action can be found among the consumer protection regulations of most countries

⁶⁰ The defeated party has to cover the costs of the opposite party, among others a part of the attorney’s fees

This system encumbers efficient legal defence for a number of reasons. First of all, the civil society organisation never appears during the legal proceedings, consequently it cannot present its knowledge reaching beyond the specific case, but strongly connected to it, in front of the legal forum. The institution of *amicus curiae*, through which a civil society organisation can expound its opinion on a specific case and make professional remarks is not known to Hungarian law.

Another disadvantage of this system is the not insignificant factor that contracting an external lawyer for each and every legal proceeding is extremely costly for the organisation. Since a lawyer, who is an employee of the civil society organisation, cannot be a representative in front of court, the organisation has to pay a lawyer's fee in each and every case, consequently the organisation can take on the representation of less and less cases every year.

However, after the Equal Treatment Act entered into force in Hungary, any civil society organisation and advocacy group, as well as the Authority, may engage in proceedings initiated as a result of a possible infringement of the requirement of equal treatment in support of the victim.⁶¹ Exploiting the fact that Hungary appropriately implemented the regulations favourable for legal defence, NEKI now runs most of its cases on the basis of 'associational standing'. This means in practice that legal representation in the cases of individual clients and those initiated on the basis of *actio popularis*, introduced by the Equal Treatment Act,⁶² is provided by a lawyer experienced in discrimination cases and a colleague who is not a lawyer, both employed by the organisation, resulting in significant financial savings for NEKI. A similar situation can be observed in Poland, where the Helsinki Foundation of Human Rights made use of the new provisions and is engaged in some discrimination cases both as *amicus curiae* and on behalf of complainants.⁶³

The obligations of the Member States, of course, cannot be simply "checked", assumed by a literal implementation of the directive, since other guarantees are required as well through which the institution of legal standing can really be put into practice. Malta is a typical example, where conformity with the EED and RED seems to be perfect on the surface, as the legislator implemented the provisions on legal standing word for word,⁶⁴ in practice, however, civil society organisations cannot benefit from this, as there is no legal regulation on the legal status of civil society organisations in the country.

A review the national law of the other Member States makes it clear that Malta is, unfortunately, not a sole, glaring example of imperfect or deficient regulations. In connection with the implementation of the RED and EED, it is a general feature of the Member States that the legal standing of associations is limited in many ways. Such is the case, for example in Sweden, where only labour unions can act as legal representatives in employment discrimination cases,⁶⁵ or Germany, where only disability law provides a right for civil society organisations to act as legal representatives.⁶⁶

⁶¹ Article 18 of the ETA

⁶² Article 20 of the ETA

⁶³ See for the country reports: on Poland of the European Network of Legal Experts in the Non-discrimination field

⁶⁴ Regulation 11 of Legal Notice 461 of 2004

⁶⁵ Under 1999 Discrimination Acts, labour unions have legal standing to litigate discrimination cases where one of their members is involved. See on the country report http://ec.europa.eu/employment_social/fundamental_rights/policy/aneval/legnet_en.htm

⁶⁶ Section 13 of Disabled Equality Law (Country report on Germany)

Another frequent limitation concerns the functioning of these organisations, since most Member States provide legal standing only for those that state as an objective of their organisation the defence of human rights or the fight against discrimination. In Belgium and France the organisation also has to have existed for five years of existence.⁶⁷

Actio popularis and class action

So far the support of the victims and their representation, which is one of the main - but not the only - pillar of efficient legal defence has been discussed. As mentioned already, the RED and EED also provide an opportunity to challenge more institutionalised forms of discrimination by introducing the possibility of *actio popularis* and class action procedures. Although both procedures are known and applied in the legal system of most Member States,⁶⁸ it seems, however, that when implementing the two directives, the legislators of the Member States ignored them or were not aware of their importance in the fight against discrimination. Both procedures are perfect to fight discriminatory practices whose elimination would otherwise not be possible through individual cases, or would require arduous struggle and lot of time. In reality, class action as a form of legal regulation in the field of discrimination exists in the legal system of only two member states, in Austria and in Sweden, although in the absence of case law even their effectiveness is questionable. *Actio popularis* has so far been introduced only in the Netherlands and Hungary, where civil society organisations actively seek to use it to their advantage and make it the basis of their strategic litigation.

It is a requirement of the use of *actio popularis* in practically all cases that it should be preceded by an infringement with significant, wide-ranging effect but not necessarily have caused harm in an individual case. This is formulated differently in regulations for different sectors, sometimes they mention infringements affecting a wide range of consumers, or a larger group of individuals, as in Hungarian law.⁶⁹ Another important element of *actio popularis* is that it is not the victim, who had suffered the infringement, who turns directly to the court or another authority to vindicate their rights, but organisations which instigate actions or file cases in their own right. This opportunity is provided by law, if there is a strong public interest to investigate certain infringements even in cases when the unlawful conduct has no specific victim. A typical example is a case represented by NEKI, where a company published a racist rent advertisement on the internet.⁷⁰ The company excluded coloured people from the circle of possible tenants using the following phrase: “Reasons for disqualification: animals and coloured skin”. According to Hungarian regulations, in this case a procedure could be initiated only on the basis of *actio popularis*, since the advertisement did not name a specific person, and thus no-one could have invoked personal involvement and file an individual case. The case represented by the organisation, however, helped to remove an advertisement which was offensive and humiliating to many people without consequential harm. The

⁶⁷ See country reports on Belgium (Article 31 of the Law of 25 February 2003) and France (Article 48-1 of the Law on Press of July 29, 1881) of the European Network of Legal Experts in the Non-discrimination field

⁶⁸ According to the country reports, the institutions of class action or *actio popularis* are usually introduced by the Member States in the area of consumer protection, although it is also known in the areas of competition law, animal rights and the protection of the environment

⁶⁹ In terms of Article 20 of ETA, if the principle of equal treatment is violated or it is directly endangered, a lawsuit for the infringement of inherent rights or a labour lawsuit may be brought by a) the Public Prosecutor, b) the Authority, or c) any social organisation and advocacy group, provided that the violation of the principle of equal treatment or its direct danger was based on a characteristic that is an essential feature of the individual, and the violation affects a larger group of persons that cannot be determined accurately

⁷⁰ More information on the case can be found at <http://www.neki.hu/news/cpkft.html>

defendant company had already offered during proceedings to apologise to everyone concerned on the website.⁷¹

Actio popularis seems to be especially promising in the field of discrimination in education and the fight against segregation, since traditional human rights litigation and advocacy based on the protection of individual rights has so far been unable to address this systemic problem.⁷² This is a sensitive area, where it is probably “better”, but most of all more effective, if it is not the individual clients, that is the parents, who initiate proceedings against schools or the authorities maintaining them. Since the defencelessness of the clients - indirectly the children - is especially salient here, a procedure initiated by an organisation gives less room for victimisation. It is also important that during the proceedings it is easier to prove a discriminatory practice – thanks to, among others, the possibility to use statistical evidence – than to prove discrimination separately in each case. This latter aspect is especially important for civil society organisations, since identifying individual clients, collecting evidence and maintaining the client’s faith and trust throughout the proceedings requires enormous energy from the organisations.⁷³

Thanks to the activism of Hungarian organisations *actio popularis* – shortly after its implementation – was not only used, but modified to better effect as a consequence of the Károli case. The case was brought by a gay rights organisation⁷⁴ against a denominational university. During proceedings, the organisation entitled to initiate an *actio popularis* claim complained that the defendant, in one of its doctrinal theses, generally excluded from religious teachers’ and theology training those people, who lived a homosexual life or expressed their homosexuality.⁷⁵ Although the Supreme Court as a court of appeal did not find the claim to be well-founded, it interpreted numerous provisions of the Equal Treatment Act and, as part of that, the legal regulations of *actio popularis* as well. In the case, the court came to the conclusion that homosexuality is an inherent feature of one’s personality and that the future possibility of an infringement of rights is a sufficient ground to bring an *actio popularis* claim. Later on this latter statement of the judgment brought about the extension of the legal definition of the *actio popularis* claim. According to the regulations in effect, an *actio popularis* claim is possible not only in the case of actual infringement of the principle of equal treatment, but also if the principle is directly endangered.

Another legal means of instigating action against discriminatory practices perpetrated against several individuals is class action, which is known in Europe mostly not in connection with discrimination, but in the areas of the consumer protection, protection of the environment and in competition law. At present, this legal procedure is widely used in the fight against discrimination only in its place of birth, the U.S., where the Wal-Mart case, the largest employment discrimination class action case ever brought against a private employer in the U.S.,

⁷¹ The defendant accepted to publish an advertisement on the website for 30 days in which it apologized about the rent advertisement that offended the personal rights of coloured people. Since the defendant company fulfilled the agreement, NEKI dropped the claim for public interest fine. The agreement was approved by Decree 16.KP.631984/2005/7 of the Metropolitan Court of Budapest

⁷² The litigation strategy of the Chance for Children Foundation (CCF) is based on *actio popularis*. See more details on their two recent cases in the Hungarian country report

⁷³ For details see Lilla Farkas, “A Good Way to Equality: Roma seeking judicial protection against discrimination in Europe”, European Anti-discrimination Law Review III

⁷⁴ The case was taken by the Háttér Társaság a Melegekért (Háttér Support Society for LGBT People)

⁷⁵ The detailed case description can be found in the Hungarian country report of the European Network of Legal Experts in the Non-discrimination field

is still pending. The original claim, filed by six former and current female employees alleges Wal-Mart created a system that frequently pays its female workers less than their male counterparts for comparable jobs and bypasses women for key promotions. It could represent as many as 1.6 million current and former female employees of the retailing giant.⁷⁶

As is clear from the above, class action is a representative claim filed on behalf of named claimants for themselves and on behalf of a discernible group of people or legal entities similarly situated. Accordingly, class actions aggregate a large number of individual claims into one representational claim which seeks to provide compensation to injured persons by binding individuals with a common legal interest to pursue a common goal. The action ensures that a defendant who engages in widespread harm – but does so minimally against each individual claimant – must compensate those individuals for their injuries.

While *actio popularis* seems to be an efficient means of legal defence in cases of educational segregation, class action seems to be more useful in the fight against employment discrimination. Although we can report about first attempts using the former, victims of employment discrimination still have to fight against discrimination in the European Member States individually or – if they are lucky – with the help of an organisation.

⁷⁶ For more details see the official site of the case at http://www.walmartclass.com/public_home.html

Rivka | 1989

Natalia | 1989



The Challenges ahead for European anti-discrimination legislation: an ECRI perspective

Giancarlo Cardinale, Lawyer at European Commission against Racism and Intolerance (ECRI), Council of Europe.⁷⁷

Introduction

The legal aspects of combating discrimination, including racial discrimination, have been given considerable attention in Europe in recent years. As a result, legal protection against discrimination has been enhanced in many of the forty-six Member States of the Council of Europe.

The European Union's (EU) anti-discrimination directives⁷⁸ and their binding nature were the impetus for the adoption of anti-discrimination legislation in many of these countries. However, there remain areas in which further legal work is required in order to improve the effectiveness of these legal frameworks and to enable them to better respond to contemporary challenges.

Parallel and complementary to legal developments within the EU, the work of the European Commission against Racism and Intolerance (ECRI), the independent human rights monitoring body of the Council of Europe specialised in combating racism and racial discrimination, has provided valuable guidance on anti-discrimination legislation. Such guidance is important for both EU countries - ECRI's standards go in many respects beyond the requirements of EU legislation - and for the other Member States of the Council of Europe.

ECRI standards are the result of a pragmatic and empirical approach. This consists of a combination of regular in-depth country-specific monitoring⁷⁹, which allows good practices in Member States to be studied and monitored over time, with general standard-setting and guidance provided, on this basis, to governments of all Member States of the Council of Europe. In the field of anti-discrimination legislation, ECRI's standards are essentially

⁷⁷ Giancarlo Cardinale is a Lawyer at the European Commission against Racism and Intolerance (ECRI) Secretariat of the Council of Europe. The views expressed here are solely those of the author

⁷⁸ European Union Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and European Union Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation

⁷⁹ ECRI's country-monitoring reports review the situation as concerns racism and racial discrimination in a number of legal and policy areas in each of the 46 member States of the Council of Europe and contain recommendations to the government of the country in question on how best to respond to these phenomena. On the basis of approximately nine country reports prepared per year, it takes ECRI 5 years on average to complete a monitoring cycle covering all member States of the Council of Europe. ECRI is currently towards the end of its third cycle of country-monitoring reports, whose main objective is to assess the degree of implementation of the recommendations made by ECRI in previous reports, but also to address new developments and challenges intervened since previous reports. ECRI reports are the result of in-depth research work which combines information from a wide range of sources, including governments and other public institutions, members of Parliament, intergovernmental organisations, national and international non-governmental organisations and civil society representatives (associations of minority groups, academics, journalists, etc.). A crucial moment in the information-gathering process is the monitoring visit to the country in question, during which an ECRI delegation meets with both government and civil society representatives for one week to collect the necessary additional information in view of the preparation of the report

contained in its General Policy Recommendation No. 7⁸⁰ (GPR 7), which ECRI adopted almost five years ago. However, ECRI's country-monitoring exercise provides a continuing practical insight on the functioning of these standards and opportunities for their further refinement.

On the basis of ECRI's GPR 7 and country-monitoring work, it is possible to identify a number of useful directions in which national anti-discrimination legislation in Europe could develop. These directions, which reflect the pressing and specific need for anti-discrimination norms to combine repression and prevention, are the subject of the first part of this article.

At the same time as providing the framework for the adoption of effective national legislation and its implementation, European law and institutions have a key role to play in protecting against discrimination through the establishment of norms, which apply in and are enforced by Council of Europe Member States and, if the latter fail to do so, through the supervision of the European Court of Human Rights. Thus, in the second part of this article a brief update will be provided on Protocol No. 12 to the European Convention on Human Rights, which contains a general prohibition of discrimination.

Reflecting ECRI's mandate, this article only covers racial discrimination, which, in accordance with ECRI's definition of this phenomenon, encompasses discrimination on grounds such as "race", colour, language, religion, nationality (i.e. citizenship) and national or ethnic origin.

I – Key directions for the further development of national anti-discrimination legislation:

i) An independent specialised body to combat racial discrimination at national level

A first line of development of anti-discrimination legislation concerns the establishment of independent national specialised bodies against racism and racial discrimination. The establishment of these bodies, whose functions include providing assistance to victims of discrimination, monitoring the implementation of anti-discrimination legislation and conducting research and awareness-raising activities, has been a central issue for ECRI since the inception of its work.⁸¹

Considering the very heterogeneous legal landscape of greater Europe in this area (which includes countries with long-established and well-functioning independent bodies, alongside countries where neither such bodies nor primary anti-discrimination legislation exist), perhaps the keyword here is "independence". ECRI's General Policy Recommendations and monitoring reports indicate that the effectiveness of the national specialised bodies against racism and racial discrimination depend on a range of factors, which also include financial and human resources, the powers attributed to them, their entrenchment in legislation, their composition and accessibility. However, the formal and practical independence of these bodies is clearly a fundamental requirement.

⁸⁰ CRI (2003) 8: *ECRI General Policy Recommendation No. 7: National legislation to combat racism and racial discrimination*, European Commission against Racism and Intolerance, Council of Europe, December 2002

⁸¹ ECRI devoted to this issue the second in its series of General Policy Recommendations (CRI (97) 36: *ECRI General Policy Recommendation No. 2: Specialised bodies to combat racism, xenophobia, antisemitism and intolerance at national level*, European Commission against Racism and Intolerance, Council of Europe, June 1997). It provided further guidance on the functions of these bodies in its GPR 7 (see above)

Recent developments in the EU lend further relevance to this requirement. Thanks in particular to EU Directive 2000/43/EC,⁸² which requires Member States of the EU to “designate a body [...] for the promotion of equal treatment”⁸³ such bodies have seen the light in a number of Member States of the Council of Europe in recent years. This is of course a very encouraging development, which ECRI does not fail to welcome in its country reports. However, in these reports ECRI also addresses the shortcomings linked to a lack of independence of some specialised bodies, for instance in countries such as Spain, Italy, Portugal or Slovenia, who have introduced these bodies in recent years to comply with EU legislation. This is of course connected with the fact that EU Directive 2000/43/EC does not require that the body itself be independent, but only that its functions (assistance to victims, surveys on discrimination and reports and recommendations) be carried out independently. The impressive response, including in terms of the number of complaints and requests for assistance from victims of discrimination, received by recently established independent specialised bodies, such as France’s High Authority for Combating Discrimination (*Haute autorité de lutte contre les discriminations*) testifies to the need for an independent body in the area of discrimination.

In its General Policy Recommendation No. 2 (GPR 2),⁸⁴ ECRI provides detailed guidance on legal safeguards to guarantee the independence of the specialised body. These include: parliamentary approval of the annual budget; freedom in the appointment of staff and in the management of resources; an obligation to report activities for debate in parliament; and clear terms of reference setting out the provisions for appointments and safeguards against arbitrary dismissal or non-renewal of appointments.

As the country monitoring reports indicate however, in order for a specialised body to be truly accessible to victims of discrimination and therefore effective, formal independence must be coupled with the general public’s perception of the specialised body as an institution that acts independently.

ii) A duty on public authorities to promote equality and eliminate discrimination

The sometimes volatile contours of discrimination, which are also reflected in the continuing difficulties to prove it in its different forms, render reactive measures against this phenomenon all the more difficult and preventive measures all the more necessary. As mentioned above, a sound approach to countering discrimination through legal means must take this dimension into account.

One effective way of doing this is to place public authorities under a duty to promote equality and prevent discrimination in carrying out their functions. In essence, the main aim of this duty is to place anti-discrimination and equality at the heart of the activities of public authorities so that it is reflected in their policy making, service delivery, regulation and enforcement, and employment practice.

ECRI has consistently supported the inclusion of such a duty in national anti-discrimination legislation. As ECRI indicated in its GPR 7, however, it is not enough for public authorities to be placed under this duty. The specific obligations incumbent on public authorities under the duty should also be spelled out as clearly as possible in the law.⁸⁵ Public authorities should also be required to draw up and implement equality plans in which they set

⁸² See above, footnote 78

⁸³ Directive 2000/43/EC, Article 13

⁸⁴ ECRI’s GPR 2, Principle 5

⁸⁵ ECRI’s GPR 7, para. 8 and para. 27 of the Explanatory Memorandum

out how they are going to implement these specific obligations, including through training and awareness-raising, monitoring, setting equality targets, etc.

Even more importantly, there should be a mechanism for enforcing this duty. In ECRI's opinion, this role should be played by the national specialised body. Once again, this role should be spelled out clearly in legislation and accompanied by the attribution of adequate and relevant powers to the specialised body.

The EU equality directives do not address the issue of public authorities' duty to promote equality and prevent discrimination. So far, only a very small number of Member States of the Council of Europe have placed their public authorities under such a duty. Of these, only the United Kingdom has an enforcement mechanism that works through the national specialised body. The experience of this country highlights that while the public authorities' duty is seen as a powerful tool to bring about lasting changes in administrative practice and to improve equal access to services for all, the monitoring and enforcement mechanism requires very considerable resources from the national specialised body.⁸⁶ This experience should obviously be taken into account when considering the introduction of any public authority duty and a monitoring and enforcement mechanism thereof.

iii) Bringing all the functions of public authorities under the scope of anti-discrimination legislation

In the vast majority of the Member States of the Council of Europe, a number of important public authorities' functions are only covered by general anti-discrimination provisions that are not enforced in practice. This is true also for most of those countries where a body of anti-discrimination legislation is in force, since these functions fall, as a rule, outside the scope of such legislation. These public authorities' functions include vital areas such as the activities of the police, border control officials and immigration authorities. One of the challenges facing anti-discrimination legislation is precisely to bring these activities under its scope of application, as recommended by ECRI in its GPR 7.⁸⁷

ECRI's country-monitoring reports indicate that racial discrimination in policing is not only a widespread phenomenon in Europe, but one with important negative repercussions on members of minority groups' feeling of belonging to and acceptance by society. Furthermore, the need to counter discrimination in policing and, more generally, law enforcement has gained considerable additional prominence since the global war against terrorism, as mentioned below.⁸⁸

As concerns immigration, ECRI's general standpoint is that, in a world where people are increasingly moving, at their own will or otherwise, and where countries are inhabited by diverse populations, European countries need to learn to apply anti-discrimination standards to immigration, including areas such as the issuing of visas, or border controls. This is also reflected in ECRI's approach of including discrimination based on nationality (i.e. citizenship) in the notion of racial discrimination. Admittedly, this approach requires a certain degree of openness to re-thinking the relations between immigration and non-discrimination rules, as traditionally national and international standards in these areas have developed quite separately from each other. In fact, anti-discrimination standards are often drawn up without prejudice to immigration rules, and generally do not cover discrimination on the basis of nationality. For instance, the EU Directive 2000/43/EC does not cover, at least

⁸⁶ ECRI, Third report on the United Kingdom, para. 28

⁸⁷ ECRI's GPR 7, para. 7 and para. 26 of the Explanatory Memorandum

⁸⁸ See section on countering racial profiling

directly, differences of treatment based on nationality and is without prejudice to provisions and conditions relating to entry and residence of third country nationals and to any treatment which arises from the legal status of third-country nationals.⁸⁹

iv) Countering racial profiling

Closely connected to the previous point concerning the need to bring important functions of public authorities under the scope of anti-discrimination legislation, one crucial challenge facing anti-discrimination legislation today is to prohibit racial profiling.

One preliminary problem in this respect is to capture the actual notion of this phenomenon. Without intending to provide a definition, broadly speaking racial profiling refers to the use of personal characteristics such as “race”, colour, language, religion, national or ethnic origin or nationality in control, surveillance or other law enforcement activities.

Racial profiling in Europe is not a new phenomenon. ECRI’s monitoring reports, among others, have highlighted racial profiling practices in many Member States of the Council of Europe for a long time, essentially in the context of ordinary law enforcement. For instance, in its third report on Spain, ECRI addressed racial profiling practices in stop and search techniques, requests for identification and searches, which disproportionately affected Roma and non-citizens, notably Moroccans, South Americans and sub-Saharan Africans.⁹⁰

However, in recent years the global war against terrorism has lent even greater relevance to this issue, as racial profiling practices have extended and become more visible in the framework of counter-terrorism activities throughout Europe. While racial profiling practices are under-documented, there is ample evidence to indicate that such practices especially target those who appear to be Muslims or of Arab, South-Asian or North African origin. For instance, in the United Kingdom (one of the few countries in Europe where ethnic monitoring of stop and search is carried out and where racial profiling can therefore be better highlighted), between 2001/2002 and 2002/2003 there had been a 300% rise in the number of Asians who were stopped and searched under the Terrorism Act 2000, with a considerably higher rise in London.⁹¹

The prominence that racial profiling has taken is reflected in the various processes that are taking place at the moment in different international fora to grasp the contours of this phenomenon and propose ways of countering it. In particular, while racial profiling certainly constitutes a form of racial discrimination and is, as such covered in a general way by international standards against racial discrimination, there is a lack of international guidance on the specificities of racial profiling. For its part, at the time of writing (February 2007), ECRI is contributing towards filling this gap through the preparation of a General Policy Recommendation on Combating Racism and Racial Discrimination in Policing. This recommendation, of which racial profiling will constitute an essential part, is planned to be published in the summer 2007.

⁸⁹ Directive 2000/43/EC, Article 3 (2)

⁹⁰ ECRI, Third report on Spain, para. 18

⁹¹ ECRI, Third report on the United Kingdom, para. 103

v) *Enhancing positive action*

Another line of development of anti-discrimination legislation concerns a greater use of positive action measures. There are different types of measures that fall under the notion of positive action, but broadly speaking all these measures are designed to prevent or compensate for disadvantages suffered by the members of certain groups that are vulnerable to discrimination or to facilitate their full participation in different fields of life.

As concerns the legal framework for the adoption of these measures, the approach taken by ECRI's General Policy Recommendation No. 7 and the EU Directive 2000/43/EC is that, as a minimum requirement, the prohibition of discrimination should not prevent the adoption of positive action measures. In view of the resistance to the adoption of these measures still encountered in certain Member States of the Council of Europe - and often explained in terms of their breaching the principle of non-discrimination - this requirement certainly needs to be enshrined in legislation. Once again, however, the legal landscape in the Member States of the Council of Europe as concerns the issue of positive action varies, and there is national legislation where positive action measures are not only possible, but encouraged (for instance through programmatic Constitutional principles⁹²) or even mandatory (as, for instance, in Bulgarian anti-discrimination legislation.⁹³)

Quite apart from the legal framework, however, positive action measures are taken in practice in many Member States of the Council of Europe. Obviously, the extent to which this is actually happening (and the extent to which legislation should allow, encourage or require the adoption of positive action measures) depends on the notion of positive action itself. In this respect, it has to be noted that there is still little clarity about what measures positive action actually encompasses. Public discussions about positive action in Europe are often hijacked by the link made with quota systems providing members of certain groups with preferential access to certain services (such as university, education, jobs or social benefits), although such systems represent only one possible positive action measure. In an attempt to contribute towards shedding light on this issue, ECRI is organising a seminar with its network of national specialised bodies in February 2007, which will discuss the notion and scope of positive action, but also the specific role that these institutions can play in promoting or carrying out positive action measures in their respective countries.

Undoubtedly, at the very minimum, positive action appears to be one area of anti-discrimination work where measures to raise awareness of both key stakeholders and the general public are comparatively more necessary. ECRI's country-monitoring reports indicate that in certain countries where positive measures are taken, for instance for members of the Roma population, the authorities prefer to keep a low profile as members of the general public are unconvinced about the need for such measures or, in some cases, hostile to them.⁹⁴ Obviously, civil society support for such measures is primordial and such support can only be gained by raising awareness of the role played by racism and racial discrimination in effectively preventing members of certain minority groups from genuinely enjoying equal opportunities with the rest of the population and of the consequent need for measures to level the playing field.

⁹² See for instance, ECRI, Second report on Spain, para. 5, speaking of Article 9(2) of the Spanish Constitution

⁹³ Article 11 (1) of the Act on the Protection against Discrimination stipulates that "[t]he bodies of state power, the public bodies and the local self-governance bodies shall take measures [...] when that is necessary to achieve the objectives of this Law." These measures are the positive action measures described in Article 7, para. 1, points 13 (i.e. measures benefiting individuals or groups of persons in a disadvantaged position and aiming at their equal opportunities) and 15 (measures for the protection of the identity and culture of persons belonging to ethnic, religious or linguistic minorities) of the Act

⁹⁴ ECRI, Third report on Slovenia, para. 34; ECRI, Third report on Poland, para. 119; ECRI, Third report on Spain, para. 107

vi) Indirect discrimination

The need for better awareness does not only concern positive action measures. In spite of important advances in recent years, the very notion of discrimination needs to be better understood at pan-European level. A particularly low level of awareness is to be noted, both among the general public, the authorities and within the legal community, concerning indirect discrimination (i.e. discrimination which is not based on differential treatment on grounds, for instance, of a person's ethnic origin, but which results from the application of an apparently neutral factor that impacts in a disproportionately negative way on people from a particular ethnic group).⁹⁵

Legislation has obviously a central role to play, including as a powerful educational and awareness-raising tool. Thanks notably to the EU anti-discrimination directives, legislation in the Member States of the EU today prohibits indirect racial discrimination. However, this is not yet the case at the level of greater Europe.

Over and above the issue of legal texts, however, there appears to be a need for the concept of indirect discrimination to be more widely used in legal practice. As shown by ECRI's monitoring reports, indirect discrimination is reported to play a significant role in effectively excluding members of minority groups from access to employment and a range of goods and services, including housing.⁹⁶ Yet, in many national jurisdictions where indirect discrimination is prohibited, it is not clear that the full potential of these provisions has so far been adequately used.

From ECRI's perspective, which looks at racial discrimination as encompassing unjustified differential treatment on grounds such as "race", colour, language, religion, nationality (i.e. citizenship) and national and ethnic origin, indirect discrimination has an important additional dimension. Many national jurisdictions provide broader protection against discrimination on grounds of race and ethnic origin than on other grounds mentioned above. In these jurisdictions, a proper use of indirect discrimination would allow conduct or practices coming under other grounds (such as nationality) to fall within the net of anti-discrimination legislation.

vii) Ethnic data collection

Closely connected with both positive action and indirect discrimination, ethnic data collection constitutes one important area on which further work, including legal work, is needed in Europe to improve the effectiveness of existing legal frameworks and, more generally, advance to the anti-discrimination agenda.

By ethnic data collection, we mean the collection of data broken down by grounds such as race, colour, language, religion, nationality and national or ethnic origin, which help to gain insight into the situation of minority groups in different areas of life and into disproportionate disadvantage and possible patterns of discrimination members of these groups may face. In its country-monitoring reports, ECRI has consistently recommended that the governments of the Member States of the Council of Europe introduce ethnic data collection, while stressing that

⁹⁵ The definition of indirect racial discrimination contained in ECRI's General Policy Recommendation No. 7 (para. 1.c), which essentially coincides with that contained in EU Directive 2000/43/EC, is the following "indirect racial discrimination shall mean cases where an apparently neutral factor such as a provision, criterion or practice cannot be as easily complied with by, or disadvantages, persons belonging to a group designated by a ground such as race, colour, language, religion, nationality or national or ethnic origin, unless this factor has an objective and reasonable justification." This latter would be the case if it pursues a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised."

⁹⁶ ECRI, Third report on Italy, para. 49

this should be done in all cases with due respect to the principles of confidentiality, informed consent and the voluntary self-identification of persons as belonging to a particular group. ECRI also emphasises that these systems should be elaborated in close co-operation with all the relevant actors, including civil society organisations representing minority groups.

It must be noted that ethnic data collection is also a crucial element for making progress in other areas identified above as priority directions for anti-discrimination legislation. For instance, ethnic data collection is key to establishing indirect discrimination, inasmuch as it provides statistical evidence of the disproportionate impact of measures or policies on certain groups of persons. It is also an indispensable tool for identifying and measuring racial profiling practices - as mentioned above, these practices are much better understood and countered in countries which collect such data in the field of law enforcement. Ethnic data collection is also a useful tool for positive action as it allows positive action measures to be targeted where they are most needed.

Looking at the practices concerning ethnic data collection in Europe, once again the landscape varies considerably and includes both ends of the spectrum of possibilities. On the one hand, in some countries ethnic data collection has been carried out for many years now with the support of all stakeholders, both governmental and civil society, and has served as a powerful tool for driving the changes required by the anti-discrimination agenda. On the other hand, in a considerable number of countries ethnic data collection is not only not carried out in practice, but it is considered to be prohibited by law.

Perhaps the most important thing to note here is that, in spite of these very differing practices, by and large the legal frameworks regulating data collection (essentially data protection laws and laws on statistics), including collection of the data in question, are essentially the same throughout Europe.⁹⁷ This seems to point to the fact that the perception of the unlawfulness of ethnic data collection results more from interpretations or value judgments than from actual outright legal prohibitions, an issue that ECRI has occasionally dealt with in its country reports.⁹⁸ In order to shed light on this question, and possibly deconstruct certain assumptions about the issue of ethnic data collection, ECRI has commissioned a study on the legal framework and practices surrounding ethnic data collection in Europe, which is currently being finalised.

II – Protocol No. 12

If adequate primary national legislation is central to providing people in Europe with protection against discrimination, a fundamental feature of future European anti-discrimination legislation is the functioning of a general anti-discrimination clause, which is constitutional in nature: Protocol No. 12 to the European Convention on Human Rights (ECHR). Alongside violations of Article 14 of the ECHR, which prohibits discrimination in respect of the fundamental rights enshrined in the ECHR itself, the European Court of Human Rights (the Court) monitors compliance with this protocol, which provides for a general anti-discrimination clause in respect of all rights set forth by law.⁹⁹

⁹⁷ This uniformity is essentially the result of two international instruments: the Council of Europe's Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No.:108) and the Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data

⁹⁸ ECRI, Second report on Spain, para. 40

⁹⁹ Article 1 of Protocol No. 12 reads: "(1) The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. (2) No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1"

As an instrument essentially intended to establish a general framework for the protection of the right to non-discrimination within all aspects of the law and all actions and omissions by public authorities, Protocol No. 12 provides a natural complement to national legislations, which, as briefly sketched above, still suffer from a number of protection gaps. Without intending to be exhaustive, a few elements of this complementarity are worth recalling here.

A first element of added value offered by Protocol No. 12 relates to the grounds of discrimination against which legal protection is provided. As mentioned above, national legislation often does not provide protection against discrimination on all the grounds that a body like ECRI, for instance, would like to see covered or, when they do, they often do not provide the same level of protection. Through its non-exhaustive list of grounds, Protocol No. 12 provides the necessary flexibility to offer protection also on those grounds (including for instance, nationality, language, religion or national origin) that may not be covered by national legislation. In this respect, in the case-law developed under Article 14, the Court has already demonstrated such flexibility by providing protection on a number of grounds not explicitly mentioned in the list of grounds contained in Article 14 (which is the same list as that contained in Protocol No. 12). Not only has it done so, but for some of these grounds (such as nationality and sexual orientation) the Court requires “very weighty reasons” in order to justify differential treatment.

Another illustration of the complementarity of Protocol No. 12 with national legislation concerns its material scope. In most Member States of the Council of Europe, anti-discrimination legislation only applies in specific areas (employment, occupation, education, access to goods and services, etc.). However, by prohibiting discrimination throughout the public sphere, Protocol No. 12 extends the protection against discrimination to areas which fall outside the scope of most of national legislation. As mentioned above, these include vital areas such as law enforcement or the administration of immigration control. It is perhaps worth noting that these are precisely the areas covered by the cases where, in recent years, the Court has made its first findings of discrimination specifically based on racial or ethnic origin under Article 14 (i.e. in combination with a substantive article of the ECHR).¹⁰⁰

Although the legal and institutional frameworks against racial discrimination in force in the Member States of the Council of Europe vary considerably in scope and effectiveness, Protocol No. 12 would have a role in completing or perfecting protection against discrimination in virtually all Member States. It also allows for the elaboration of new standards by the European Court of Human Rights, which are much needed in Europe today. Reticence has been expressed by the governments of certain countries concerning Protocol No. 12, notably due to its uncertain scope, which only the concrete interpretation of the Protocol made by the Court will clarify. However, there can be no doubt that Protocol No. 12 constitutes an essential opportunity for all those in Europe who are genuinely committed to improving protection against discrimination.

The entry into force of Protocol No. 12 on 1 April 2005 (i.e. approximately four and a half years after its opening for signature in Rome) is therefore a very important step towards enhanced protection against discrimination, including racial discrimination, in Europe. On that day, the Protocol entered into force in respect of the first eleven Member States who ratified it: Albania, Armenia, Bosnia and Herzegovina, Croatia, Cyprus, Finland, Georgia, the

¹⁰⁰ See ECHR, Grand Chamber, *Nachova and others v. Bulgaria*, 6 July 2005 (Violation of Article 14 in combination with Article 2 – Right to life) and ECHR, *Timishev v. Russia*, 13 December 2005 (Violation of Article 14 in combination with Article 2 of Protocol No. 4 – Freedom of movement)

Netherlands, San Marino, Serbia and the former Yugoslav Republic of Macedonia). These countries have since then been joined by Luxembourg, Romania and Ukraine, bringing the total number of State parties to the Protocol at the time of writing (February 2007) to fourteen. A very small number of cases alleging a violation of Protocol No. 12 have reached the Court so far, but no judgments or decisions on admissibility have yet been rendered.

Protocol No. 12 is therefore not yet in force in respect of the majority of the Member States of the Council of Europe. These include twenty-one Member States who have signed it (Austria, Azerbaijan, Belgium, Czech Republic, Estonia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Moldova, Norway, Portugal, Russia, Slovakia, Slovenia, Spain, Turkey) and eleven countries who have not signed it (Andorra, Bulgaria, Denmark, France, Lithuania, Malta, Monaco, Poland, Sweden, Switzerland and United Kingdom).

The New UN Convention on the Rights of Persons with Disabilities

Gerard Quinn, Professor of Law, National University of Galway, Ireland

The recently adopted United Nations Convention on the Rights of Persons with Disabilities¹⁰¹ is the first human rights convention to be concluded in the 21st century.¹⁰² It was adopted amid much fanfare in the UN General Assembly on 13 December 2006 and was opened for signature/ratification on 30 March 2007. Nearly 90 States have already signed the convention.

The European Commission signed the convention on behalf of the Institutions of the Union on 30 March, signalling an intention to ratify at a later date. If this happens it will be the first such human rights treaty the Commission will ratify (reportedly on the basis of Article 13 Treaty of Amsterdam). It may be a portent of things to come.

The push for a disability-specific convention began in the late 1980s. The UN inaugurated a World Decade of Action on Disability (accompanied by a World Programme of Action) in 1982.¹⁰³ A high level panel of experts was convened in 1987 to determine whether the Decade was having any impact. It unanimously recommended that a legally binding treaty should be concluded urgently. Due mainly to treaty fatigue – but also to scepticism as to the need for such an instrument – the General Assembly decided instead to adopt a new ‘soft law’ instrument: The UN Standard Rules on the Equalisation of Opportunities for Persons with Disabilities.¹⁰⁴

The Standard Rules contained much that was positive and certainly placed a heavy emphasis on inclusion and participation through equal opportunities laws and policies. Regrettably – and maybe predictably – the Standard Rules also had little direct effect.

Something had to change. In 2001 the Office of the UN High Commissioner for Human Rights commissioned a Study on how existing human rights instruments dealt with disability and whether practical recommendations would be made to improve the situation. The Study, published in 2002, clearly demonstrated that the existing system did not work in the context of disability. It made several practical recommendations for change.¹⁰⁵ It also strongly argued that even if these changes were made operational a need for a new thematic convention on disability and human rights would still arise.

Logically, the issue should have come back to the UN Commission for Human Rights in the spring of 2002. However, and just before the Study was published, Mexico managed to get a Resolution passed by the General

¹⁰¹ The text of the convention is contained at: <http://www.un.org/disabilities/convention/index.shtml>

¹⁰² All documentation including previous drafts and inputs to the drafting process are contained on one composite UN website as follows: <http://www.un.org/esa/socdev/enable/rights/ahc8.htm>

¹⁰³ World Programme of Action Concerning Disabled Persons, General Assembly Resolution 37/52 of 3 December 1982

¹⁰⁴ UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities, adopted and Proclaimed by General Assembly resolution 48/96 of 20 December 1993

¹⁰⁵ G Quinn & T Degener (et al): Human Rights and Disability – The Current Use and Future Potential of the United Nations Human Rights Instruments in the Context of Disability, (Geneva, 2002)

Assembly in December 2001 to set up an Ad hoc Committee (i.e., of interested States) “to consider proposals for” a new legally binding instrument on disability. The Ad hoc Committee met for the first time in August 2002 and met altogether for nine sessions (usually of two weeks duration). The first sessions introduced procedural innovations that were new for the General Assembly. Civil society (NGOs) was allowed to be present and to speak (after delegations had spoken). National Human Rights Institutions (NHRIs - essentially human rights commissions) were similarly allowed to be present and speak. A caucus of disability NGOs formed that had great effect on the proceedings. The European Disability Forum was especially active and effective within the caucus.

The ground work was not done in the Ad hoc Committee (largely a diplomatic body), but by an expert Working Group convened in January 2004. Approximately 27 States were members (with an equitable geographic distribution). Strikingly, 6 leading global disability NGOs were full and equal members of the Working Group (e.g., Rehabilitation International) as well as one representative of the NHRIs. The text that emerged formed the basis of subsequent negotiations in the Ad hoc Committee.¹⁰⁶

The convention itself is a strange blend between non-discrimination and substantive human rights. Crucially, it does not aim to craft new rights – rather, it aims to “promote and protect the full and equal enjoyment” of all human rights for persons with disabilities. The convention contains a mix of both civil and political rights (e.g., right to liberty) as well as economic, social and cultural rights (e.g., education). Article 4(2) is to the effect that with respect to economic, social and cultural rights, States would only be expected to ‘progressively realise’ these rights.

The debate about socio-economic rights casts a shadow on how the key article on non-discrimination was negotiated. Many States wished to de-couple the obligation of ‘reasonable accommodation’ from the notion of non-discrimination. They feared that the concept of ‘reasonable accommodation’ could be the thin edge of a wedge that could allow courts to ‘enforce’ socio-economic rights through the back door of non-discrimination. In any event, the convention now explicitly states that a failure to perform ‘reasonable accommodation’ amounts to discrimination (Article 2). This is important in an EU context for it shows clear international legal support for the extension of the obligation into fields other than employment.

There are three cross-cutting provisions dealing with women with disabilities (Article 6), children with disabilities (Article 7) as well as situations of risk and humanitarian emergencies (Article 11) which includes armed conflicts, humanitarian emergencies (e.g., hurricanes) and natural disasters. Interestingly, the elderly did not merit a separate transversal Article. This was perhaps due to the fact that advocates for the elderly were not conspicuous in the drafting process.

The general principles of the convention are set out in Article 3 to include dignity, autonomy and the freedom to make one’s own choices, full and effective participation, respect for difference, equality of opportunity, and accessibility (Article 3). States Parties undertake several general obligations in addition to the specific one they have under individual Articles. The obligations include those to repeal inconsistent laws, to introduce new legislative measures, to mainstream disability into all relevant policies and programmes, to eliminate discrimination and to promote research (Article 4). The provision that gave the most difficulty to the drafters covered the issue of legal capacity.

¹⁰⁶ The Working Group documents are available at: <http://www.un.org/esa/socdev/enable/rights/ahcwgreport.htm>

Against strong opposition from some countries, the new treaty will set up an international monitoring committee to assess compliance with its obligations. Like all other human rights treaties, States will have to report on progress made and obstacles encountered in implementation (Article 33). A separate Protocol attaches to the treaty enabling the Committee to entertain individual complaints and inquiries of systematic abuses. This will have to be ratified separately. A new Committee on the Rights of Persons will be elected once the first 20 ratifications are in. This will be a traditional treaty monitoring body.

The convention calls for a focal point in domestic implementation. Presumably, if the Commission ratifies, it will have to designate a Unit to do this. The Convention also calls for independent domestic monitoring by one or more mechanisms in effective accordance with the Paris Principles for National Human Rights Institutions. It will be interesting to see which entity within the family of EU Institutions will perform this treaty task. The convention innovates in setting up a Conference of States Parties which will convene periodically to consider any matter in relation to implementation.

The convention requires States to ensure that their own development aid programmes are inclusive of, and accessible to, persons with disabilities. This is simply good practice and is already being implemented by the US development aid programme (USAID) as well as that of Germany. It will be interesting to see how this plays out in the context of the EU development aid programme. The convention also innovates in the fields of civic and political participation. It contains a provision on the right to live independently as well as a right to freedom from exploitation and violence.

The convention underscores trends already underway in comparative European law as well as in EU law and policy. It provides the tools necessary to imagine how broader and deeper disability laws and policies might look like. It is particularly relevant as the Commission ponders its next legislative moves in the field. It is especially welcome that the Commission is actively considering signing and ratifying. If one had to speculate about which provisions will loom large, it would be that the provisions that point to towards de-institutionalisation, freedom from exploitation and independent living will resonate in all parts of the world including Europe.



Monica | 1999

EU Policy and Legislative Process Update

1. European Year of Equal Opportunities for All

On 30 January 2007 the European Year of Equality for All was launched in Berlin by European Commissioner for Employment, Social Affairs and Equal Opportunities, Mr Vladimír Špidla at Europe's first-ever high level equality summit (see below). The Year is an initiative leading the way to a bolder strategy seeking to give momentum to the fight against discrimination in the EU, as the Commission explained in a document, published in June 2005, called 'Framework strategy for non-discrimination and equal opportunities for all'. During the Year, all discrimination grounds have to be treated in a balanced way and the different ways in which women and men experience discrimination on the grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation have to be considered.

The Year aims to: make people more aware of their rights to enjoy equal treatment and a life free of discrimination; promote equal opportunities for all; and launch a major debate on the benefits of diversity both for European societies and individuals. Each participating country will organise an event to launch the Year at national level.

http://ec.europa.eu/employment_social/eyeq/index.cfm?cat_id=LYCOUNTRY for further details of national launches

2. High-Level Equality Summit Berlin

On 30 and 31 January 2007 over 400 delegates met in Berlin for Europe's first ever high-level summit on equality and non-discrimination, a joint initiative by the European Commission and the German EU Presidency. Proceedings were opened by Vladimír Špidla and Ursula von der Leyen, German minister for family affairs, women, senior citizens and youth. Mr Špidla set out the three objectives of the Year: to provide people with more information on equality, to make real progress towards equality in society and to promote the benefits of diversity. Ms von der Leyen spoke of the value of the rich diversity in society and emphasised that equal opportunities is above all a question of behaviour and mentality. The delegates included political representatives from national and European levels, equality bodies, trade unions, employers and non-governmental organisations were present. The summit had two key goals: 1) to identify specific measures to make equal opportunities a reality in Europe; and 2) to share good practice and thereby maximise the benefits of diversity, both for individuals and European societies as a whole.

http://ec.europa.eu/employment_social/eyeq/index.cfm?cat_id=LY

3. European Commission Report on the Implementation of the Racial Equality Directive¹⁰⁷

The Report from the European Commission to the Council and the European Parliament on the application of Directive 2000/43 was published on 15 December 2006. Article 17 of the Directive requires the Commission to produce such a report on the basis of information which Member State governments are obliged to provide and also taking into account the view of the EUMC (now FRA), social partners and relevant NGOs. The report does not give a detailed account of the transposition provisions in the Member States but rather highlights certain problematic or important aspects and identifies some good practice. The report mentions that there are problems with the definitions of direct and indirect discrimination and harassment in national law, and that exceptions to the principle of non-discrimination are wider than those in the Directive. There are also problems concerning incorrect transposition of the rules on the burden of proof, the right of associations to assist victims and sanctions and remedies. The Commission is examining national legislative measures notified by Member

¹⁰⁷ COM (2006) 643 final/2 of 15 December 2006

States to assess their conformity with the Directive, but considered it too early to come forward with proposals for updating or revising the Directive, as it is permitted to do under Article 17, on the basis of lack of experience with the Directive since its entry into force and lack of ECJ jurisprudence. Kathalijne Buitenweg MEP (Greens/European Free Alliance) of the Committee on Civil Liberties and Fundamental Rights, has been appointed as the Rapporteur for the European Parliament report on the Commission Communication. The report will be presented in Plenary in the summer.

4. Council Regulation on EU Fundamental Rights Agency

The Council has adopted a Regulation establishing the EU Agency for Fundamental Rights.¹⁰⁸ The objective of the Agency will be to provide the relevant institutions, bodies, offices and agencies of the Community and its Member States implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights. The Agency will collect objective, reliable and comparable information on the development of the situation of fundamental rights, analyse this information in terms of causes of failure to respect rights, their consequences and effects, and also examine examples of good practice in dealing with these matters. The Agency will have the right to formulate opinions to the Union institutions and to the Member States when implementing Community law, either on its own initiative or at the request of the European Parliament, the Council or the Commission, without interference in the legislative and judicial procedures established by the EC Treaty. Nevertheless, the institutions should be able to request opinions on their legislative proposals or positions adopted in the course of legislative procedures as far as their compatibility with fundamental rights is concerned. It will present an annual report on fundamental rights issues covered by the areas of the Agency's activity, highlighting examples of good practice. Furthermore, the Agency will produce thematic reports on topics of particular importance to the Union's policies. The Agency will take measures to raise the awareness of the general public about their fundamental rights, and about the possibilities and different mechanisms for enforcing them in general, without, however, dealing with individual complaints itself. The Regulation repeals Regulation (EC) No 1035/97 with effect from 1 March 2007. The Agency will become operational by 1 March 2007. In December 2003, the European Council agreed to extend the mandate of the European Monitoring Centre on Racism and Xenophobia, established by Regulation (EC) No 1035/97, and transform this Centre into the EU Agency for Fundamental Rights. As such the seat of the Agency will remain in Vienna.
<http://register.consilium.europa.eu/pdf/en/06/st16/st16241.en06.pdf>

5. German EU Presidency to Revive Framework Decision to combat racism and xenophobia

The German EU Presidency has committed itself to returning the combating of racism and xenophobia throughout Europe to the political agenda. It intends to revive the negotiations on the Framework Decision to combat racism and xenophobia, frozen since 2005 when a compromise was on the verge of being reached. The German Presidency intends to attain a minimum harmonisation of provisions on criminal liability for disseminating racist and xenophobic statements. These include public incitement to violence and hatred or the denial or gross minimisation of genocide out of racist or xenophobic motives. The Framework Decision will not, however, seek to prohibit specific symbols such as swastikas. It is intended that the Framework Decision will include an express reference to the fundamental and human rights anchored in Europe and, in this context, will expressly call for respecting the right to freedom of expression. It will guarantee the Member States the necessary leeway for maintaining their established constitutional traditions.
http://www.eu2007.de/en/News/Press_Releases/January/0129BMJantiracism.html

¹⁰⁸ Council Regulation 16241/06 establishing a European Union Agency for Fundamental Rights from 12 February 2007

6. European Parliament Employment Committee adopts Report on opportunities for the disabled

A report adopted by the European Parliament's Employment Committee in October 2006 called for more opportunities for disabled people in education and the job market. The report states that improving access to public transport and making websites more usable are 2 vital steps in tackling unemployment among disabled people. Calls were also made for a special disability directive. Around 50 million Europeans - almost 10% of the population - have some form of disability and 1 in 4 have a disabled family member.

http://www.europarl.europa.eu/news/public/story_page/048-12173-296-10-43-908-20061025STO12172-2006-23-10-2006/default_en.htm

7. European Parliament Resolution on Disability

On 30 November 2006, the European Parliament adopted a resolution on the situation of people with disabilities in the enlarged European Union: the European Action Plan 2006-2007 (ref. P6_TA-PROV (2006)0527). The resolution has been forwarded to the Council, Commission and governments of the Member States, accession and candidate countries.

<http://www.europarl.europa.eu/sides/getDoc.do?Type=TA&Reference=P6-TA-2006-0527&language=EN>

8. Proposal for a regulation of the European Parliament and of the Council establishing a European Institute for Gender Equality

On 14 December 2006 the European Parliament adopted a legislative resolution, following a second reading of the Council's common position for adopting the regulation. The amendments adopted by the Parliament concern mainly structural issues. On 15 December 2006, the Commission commented that the amendments adopted by the European Parliament at second reading are acceptable given that they stem from a compromise between the Council Presidency and the European Parliament's rapporteurs with the support of the Commission. According to the Commission, they represent a balanced compromise.

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A6-2006-0455+0+DOC+XML+V0//EN&language=EN>

9. European Parliament's Civil Liberties Committee considers EUMC report

On 5 December 2006 the LIBE Committee of the European Parliament discussed the fact that migrant and ethnic minorities are suffering unchanged levels of discrimination in housing, education and jobs across the EU. That was the stark conclusion of a report presented to Parliament's Civil Liberties committee at the end of November. The report was drawn up by the EU's Centre on Racism and Xenophobia, which states that its policies are hampered by a lack of data collected by EU countries.

http://www.europarl.europa.eu/news/public/story_page/015-946-254-09-37-902-20061205STO00945-2006-11-09-2006/default_en.htm

10. Comparative analysis of non-discrimination law in 25 EU Member States

This publication examines the transposition into national law of the Racial Equality Directive and the Employment Equality Directive in 25 EU Members States. The analysis compares and draws some conclusions from the information set out in country reports prepared by the European Network of Independent Legal Experts in the non-discrimination field, a network established and managed by Human European Consultancy and MPG on behalf of the European Commission. The publication is available in English, French and German.

http://ec.europa.eu/employment_social/fundamental_rights/policy/aneval/legnet_en.htm

11. Mapping national measures and their impact in fields where there is no Community legislation

A study mapping national measures to combat discrimination in fields and on grounds where community legislation has not been introduced, namely outside the field of employment and occupation and on the grounds sex, religion or belief, disability, age and sexual orientation has been carried out by MPG and Human European Consultancy on behalf of the European Commission. The study also reviews the impact of these national legislative measures.

http://ec.europa.eu/employment_social/fundamental_rights/public/pubst_en.htm

12. High Level Group on Ethnic Minorities

The next meeting of the group will be held in Brussels in May 2007. The group will present policy recommendations to the European Commission before the end of 2007 on how the EU can address the social and labour market exclusion of disadvantaged minorities.

13. EUMC Report on Muslims in the EU

In December 2006, a report entitled 'Muslims in the European Union: Discrimination and Islamophobia' was published. The report presents available data on discrimination affecting Muslims in employment, education and housing and also includes initiatives and proposals for policy action by EU Member State governments and the European institutions to combat Islamophobia and to foster integration. The EUMC has also published a study on "Perceptions of Discrimination and Islamophobia" based on in-depth interviews with members of Muslim organisations and Muslim youth groups in ten EU Member States.

http://eumc.europa.eu/eumc/index.php?fuseaction=content.dsp_cat_content&catid=3fb38ad3e22bb&contentid=4582d9f4345ad

Late News! European Commission takes second step in infringement procedures under Article 226 EC Treaty. On 27 June 2007, The European Commission sent reasoned opinions to 14 Member States requesting the full implementation of Directive 2000/43. The Member States concerned are: Czech Republic, Estonia, France, Greece, Ireland, Italy, Latvia, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and the UK. If the States do not comply with the opinions within two months, the Commission will launch proceedings before the ECJ, a procedure which could eventually result in imposition of fines on those Member States found to be in breach. Problem areas include: national legislation limited in scope only to employment, definitions of discrimination which diverge from the Directive and inconsistencies in the protection against victimisation, shift in the burden of proof and rights of associations to assist individuals with their cases.



Fabian | 1980

European Court of Justice Case Law Update

Requests for Preliminary Rulings – Applications

Case C-267/06 Reference for a preliminary ruling in the case of Tadao Maruko v Versorgungsanstalt der deutschen Bühnen of 20 June 2006

Official Journal: 16.09.2006/C224/20

A reference has been made to the Court of Justice from the Bayerisches Verwaltungsgericht München. The questions referred are:

- 1) Is a compulsory professional pension scheme, such as the scheme at issue in this case administered by the Versorgungsanstalt der deutschen Bühnen, a scheme similar to state schemes as referred to in Article 3(3) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation?
- 2) Are benefits paid by a compulsory professional pension institution to survivors in the form of widow's/widower's allowance to be construed as pay within the meaning of Article 3(1)(c) of Directive 2000/78/EC?
- 3) Does Article 1 in conjunction with Article 2(2)(a) of Directive 2000/78/EC preclude regulations governing a supplementary pension scheme of the kind at issue here under which a registered partner does not receive a survivor's pension after the death of the partner like spouses do, even though he also lives in a caring and committed union formally entered into for life like spouses?
- 4) If the preceding questions are answered in the affirmative: Is discrimination on the grounds of sexual orientation permissible by virtue of recital 22 in the preamble to Directive 2000/78/EC?
- 5) Would entitlement to the survivor's pension be restricted to periods from 17 May 1990 in the light of the case-law in Barber (Case C-262/88)?

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en> (search term: Case C-267/06)

Case C-303/06 Reference for a preliminary ruling in the case of S. Coleman v Attridge Law, Steve Law of 10 July 2006

Official Journal: 30.09.2006/C 237/6

A reference has been made to the Court of Justice from an Employment Tribunal (London South) in which the following questions have been posed in relation to Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation:

- 1) In the context of the prohibition of discrimination on grounds of disability, does the Directive only protect from direct discrimination and harassment persons who are themselves disabled?
- 2) If the answer to Question (1) above is in the negative, does the Directive protect employees who, though they are not themselves disabled, are treated less favourably or harassed on the ground of their association with a person who is disabled?
- 3) Where an employer treats an employee less favourably than he treats or would treat other employees, and it is established that the ground for the treatment of the employee is that the employee has a disabled son for whom the employee cares, is that treatment direct discrimination in breach of the principle of equal treatment established by the Directive?
- 4) Where an employer harasses an employee, and it is established that the ground for the treatment of the employee is that the employee has a disabled son for whom the employee cares, is that harassment a breach of the principle of equal treatment established by the Directive?

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en> (search term: Case C-303/06)

Case C-427/06 Reference for a preliminary ruling in the case of Birgit Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH lodged on 18 October 2006

Another reference from the German courts in the area of age discrimination. This time from the Bundesarbeitsgericht which has referred the following questions:

1. a) Does the primary legislation of the European Communities contain a prohibition of discrimination on grounds of age the protection by which must be guaranteed by the Member States even if the possibly discriminatory treatment is not connected to Community law?
b) In the event that question a) is answered in the negative: Does such a connection to Community law arise from Article 13 EC or - even before the time-limit for transposition has expired – from Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation?
 2. Is any prohibition of discrimination on grounds of age arising from the answer to question 1 also applicable between private employers on the one hand and their employees or pensioners and their survivors on the other hand?
 3. If question 2 is answered in the affirmative:
 - a) Is a provision of an occupational pension scheme, which provides that a survivor's pension will not be granted to a surviving spouse in the event that the survivor is more than 15 years younger than the deceased former employee, within the scope of the prohibition of discrimination on grounds of age?
 - b) If question a) above is answered in the affirmative:
Can such a provision be justified by the fact that the employer has an interest in limiting the risks arising from the occupational pension scheme?
 - c) In the event that question 3 b) is answered in the negative:
Does the possible prohibition of discrimination on grounds of age have unlimited retroactive effect as regards the law relating to occupational pension schemes or is it limited as regards the past, and if so in what way?
- <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en> (search term: Case C-427/06)

Late news! *Case C-54/07 Reference for a Preliminary Ruling from the Arbeidshof de Brussel lodged on 6 February 2007 – Centrum voor gelijkheid van kansen en voor racismebestrijding v NV Firma Feryn*
Official Journal 14.04.2007/C82/21

For more information see the News from the Member States section below under 'Belgium', pages 60-61.

Requests for Preliminary Rulings – Advocate General Opinions

Case C-411/05 Opinion of Advocate-General Mazák in the case of Félix Palacios de la Villa v Cortefiel Servicios SA, from 15 February 2007

A reference was made to the Court of Justice in November 2006.¹⁰⁹ The referring Spanish court essentially wanted to ascertain whether the prohibition of discrimination on the grounds of age as laid down, in particular, in Article 2(1) of Directive 2000/78 precludes a national law allowing compulsory retirement clauses to be included in collective agreements. In the event of an affirmative answer, the referring court also wished to know if it is required to disapply the national law concerned. These questions have been raised in the context of a dispute between private parties, in which Mr Palacios claims that his dismissal on the ground that he had attained the compulsory retirement age laid down in a collective agreement was unlawful.

¹⁰⁹ See EADLR, Issue 3, page 42

The Advocate General proposes that the reply of the Court of Justice to the questions of the Spanish court should be that the principle of non-discrimination on grounds of age in Directive 2000/78 does not preclude a national law (specifically, the first paragraph of the Single Transitional Provision of Law 14/2005 on clauses in collective agreements concerning the attainment of normal retirement age) pursuant to which compulsory retirement clauses contained in collective agreements are lawful, where such clauses provide as sole requirements that workers must have reached normal retirement age and must have fulfilled the conditions set out in the social security legislation of the Member State concerned for entitlement to draw a retirement pension under the relevant contribution regime. Interestingly, the Advocate-General refers to the serious criticism from academia, the media and from most of the parties to the present proceedings concerning the approach adopted by the Court in *Mangold*.¹¹⁰ In his opinion the conclusion drawn in *Mangold* as to the existence of a general principle of non-discrimination on grounds of age is not particularly compelling. However, he states that it is clear from *Mangold* that the Court proceeds from the assumption that the general principle of non-discrimination on grounds of age is no different in substance from the equivalent prohibition under Directive 2000/78, in particular so far as justification is concerned. He therefore concludes that even by reference to the existence of a general principle of non-discrimination on grounds of age, a national rule such as that in issue would not be precluded by Community law.¹¹¹

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en> (search term: Case C-411/05)

Case C-227/04 P Opinion of Advocate General Sharpston in the case of Maria-Luise Lindorfer v Council of the European Union delivered on 30 November 2006)

This is the second Opinion delivered in an appeal from a decision of the Court of First Instance.¹¹² The appeal which had been due to be heard by the first chamber of the court was referred to the Grand Chamber following the *Mangold* decision. The case concerns the calculation of the length of pensionable service credited in the Community pension scheme to Ms Lindorfer, a Council official, following the transfer of pension rights previously acquired by her under a national scheme. Ms Lindorfer alleged that the Council's general rules implementing the Staff Regulations on which the calculation was based, infringed the principle of equal treatment in that *inter-alia* the actuarial values used discriminated on grounds of age, because they were increasingly less favourable for officials as their age on recruitment increased. Advocate General Jacobs gave the first Opinion in this case.¹¹³ In his Opinion, which was prior to the *Mangold* case, he had found that there was no unlawful discrimination on the grounds of age. Considering the case in light of the *Mangold* judgment, Advocate-General Sharpston was not persuaded that it affected the analysis of the present case in any significant way. Making reference to the fact that 'a fuller development of the issue and its implications may evolve' in the *Palacios* case above - a case in which 'Member States have had an opportunity to submit observations,' she agreed broadly with Advocate General Jacobs's general considerations,¹¹⁴ where he expressed the view that it is not appropriate – or indeed possible – to apply the prohibition of age discrimination to the present case as rigorously as the prohibition of sex discrimination. Consequently, like Advocate General Jacobs she considered that the contested provision of the Council's implementing rules is invalid in so far as it discriminates on grounds of sex.

¹¹⁰ For a summary of the Court's judgment in this case see EADLR, Issue 3, page 42

¹¹¹ paras 79-100 of the Opinion

¹¹² Case T-204/01 Lindorfer v Council [2004] ECR-SC I-A-83 and ECR II-361

¹¹³ Opinion of Advocate-General Jacobs of 27 October 2005. [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004C0227\(01\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004C0227(01):EN:HTML)

¹¹⁴ point 83 et seq. of his Opinion

Council of Europe Update

European Court of Human Rights (ECtHR)

Judgments: Late news! Grand Chamber Hearing

D.H. and others v. The Czech Republic, 17 January 2007 (no. 57325/00)

On 17 January the Grand Chamber of the ECtHR heard a case launched eight years ago by 18 Roma children forced to attend racially segregated schools in the Czech Republic. On 7 February 2006, the second chamber of the Court had delivered a judgment that although the Roma children suffered from a pattern of adverse treatment, the applicants had not proved the Czech government's intent to discriminate.¹¹⁵ The case was then referred to the Grand Chamber to be re-heard by a full court. The Grand Chamber is expected to render its judgment later this year.

Admissibility

Tysiac v. Poland, 7 February 2006 (no. 5410/03)

Having suffered for many years from severe myopia (approximately -20 dioptries in each eye), the applicant decided to consult several doctors when she discovered in February 2000 that she was pregnant for the third time, as she was concerned that her pregnancy might have an impact on her health. The doctors she met refused to issue a certificate for the pregnancy to be terminated on therapeutic grounds, despite the applicant's requests to that effect. She is now registered as significantly disabled and on that account receives a monthly pension equivalent to 140 euros. Relying on Article 13 (right to an effective remedy), she submits that she did not have an effective remedy in respect of the infringements of her right to respect for her private life (Article 8). In addition, the applicant complains under Article 14 (prohibition of discrimination) that she was discriminated against on the grounds of her sex and her disability.¹¹⁶

L. v. Lithuania, 6 July 2006 (no. 27527/03)

The case concerns an application brought by a Lithuanian national, Mr L. who was, at birth, registered as a girl, with a name clearly identifiable as female. However, from an early age, he submits that he felt his gender was male rather than female. The applicant complains about the lack of legislation allowing him to complete gender reassignment surgery and pursue his life as a person of male gender, relying on Articles 3 (prohibition of degrading treatment) of the European Convention on Human Rights, 8 (right to respect for private life), 12 (right to marry), and 14 (prohibition of discrimination). The application was lodged with the European Court of Human Rights on 14 August 2003 and declared admissible on 6 July 2006.¹¹⁷

Andrejeva v. Latvia, 11 July 2006 (no. 55707/00)

The Court declared that the application concerning the exclusion of non-nationals from pension rights in respect of the years of working abroad is admissible under Article 14 taken in conjunction with Article 1 of Protocol No. 1 and Article 6(1).¹¹⁸

¹¹⁵ For further information on the background to the case and to the first instance decision, see EADLR, Issue 4, page 45. For the admissibility decision see EADLR, Issue 2, page 42

¹¹⁶ <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=5410/03&sessionid=11645935&skin=hudoc-en>

¹¹⁷ <http://www.echr.coe.int/Eng/InformationNotes/INFONOTENo88.htm>

¹¹⁸ <http://www.echr.coe.int/Eng/InformationNotes/INFONOTENo88.htm>
<http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=55707/00&sessionid=11646027&skin=hudoc-en> (french only)

Vassilevski v. Latvia, 5 October 2006 (no. 73485/01)

The applicant's claim concerns a denial, on the basis of nationality, of entitlement to a pension in respect of years worked abroad. The applicant argues that the denial violates Article 1 of Protocol No. 1 and Article 14. The Court considered that the application admissible.¹¹⁹

Bączkowski and Others v. Poland, 5 December 2006 (no. 1543/06)

The applicants – a group of individuals and an association, the Foundation for Equality – sought permission from the Warsaw municipal authorities for a planned march through the city and the holding of a series of assemblies intended to alert public opinion to the issue of discrimination against various minority groups (including homosexuals) and women. Citing road traffic regulations and the risk of violent clashes with other demonstrators, the authorities refused to grant permission for the march and for some of the assemblies. Relying on an interview given by the Mayor of Warsaw to a Polish newspaper shortly before the date scheduled for the demonstrations, the applicants allege that the real reason permission was refused was homophobia on the part of the municipal authorities. The ECHR held that the application is admissible under Article 11, taken alone and together with Article 13 or Article 14.¹²⁰

European Committee of Social Rights

Decisions

Complaint No. 31/2005 European Roma Rights Center (ERRC) v. Bulgaria, 18 October 2006

The complaint, lodged on 22 April 2005, relates to Article 16 (right to social, economic, and legal protection) alone or in combination with Article E (non-discrimination) of the Revised European Social Charter. It is alleged that the situation of Roma in Bulgaria amounts to a violation of the right to adequate housing. The decision on the merits of the complaint was adopted by the European Committee of Social Rights on 18 October 2006 and transmitted to the Committee of Ministers in the form of a report on 30 November 2006. It will be published on 30 March 2007 at the latest.¹²²

Resolutions

Resolution on complaint No. 24/2004 Syndicat SUD Travail Affaires Sociales v. France, 12 July 2006

A complaint relating to Article 1§2 (prohibition of all forms of discrimination in employment) of the Revised European Social Charter was lodged on 6 February 2004. The complaint alleged that under the Labour Code (Article L.122-45) numerous categories of workers are excluded from protection against discrimination in employment. The European Committee of Social Rights concluded that there was a violation of Article 1§2 of the Revised European Social Charter and transmitted its decision on the merits of the complaint to the Parties and to the Committee of Ministers on 20 November 2005.¹²³ Following that decision, on 12 July 2006 the Committee of Ministers adopted Resolution ResChS(2006)5 which takes note of the decision from November 2005 and details provided subsequently by the French government of the French legal framework in response to that decision, but it expresses no value judgment on that information.¹²⁴

¹¹⁹ <http://www.echr.coe.int/Eng/InformationNotes/INFONOTENo90.htm>

¹²⁰ [http://www.echr.coe.int/Eng/InformationNotes/INFORMATIONNOTE%2092%20\(provisional%20version\).htm](http://www.echr.coe.int/Eng/InformationNotes/INFORMATIONNOTE%2092%20(provisional%20version).htm)

¹²¹ See Issue 3 of the EADLR, page 49

¹²² http://www.coe.int/t/e/human_rights/esc/4_collective_complaints/List_of_collective_complaints/default.asp

¹²³ http://www.coe.int/t/e/human_rights/esc/4_collective_complaints/list_of_collective_complaints/RC23_on_merits.pdf

¹²⁴ [https://wcd.coe.int/ViewDoc.jsp?Ref=ResChS\(2006\)5&Sector=secCM&Language=lanEnglish&Ver=original&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75](https://wcd.coe.int/ViewDoc.jsp?Ref=ResChS(2006)5&Sector=secCM&Language=lanEnglish&Ver=original&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75)

Hayat | 1961

Helen | 1999



News from the EU Member States

Austria

Case law

First Case under new Equal Treatment legislation decided by Austrian Court

At the end of November 2006 the first ruling of an Austrian court to use the new Equal Treatment legislation in relation to sexual orientation became legally binding.¹ The regional court of Salzburg (Landesgericht Salzburg), acting as a labour tribunal of first instance ruled on a case of an openly homosexual lorry driver who had been harassed by two employees of a transportation company.



The harassers are not immediate colleagues of the victim but worked for the biggest client of the cargo company that employed him. The two respondents had been intimidating the victim verbally for a period of more than two years. When they started to ask everybody whom they found talking to the victim, whether they were also gay, the lorry driver became more and more isolated and decided to complain. The complaint was backed by his employer, who had intervened on behalf of his client, but to no permanent positive effect. The driver therefore decided to go to court. The Litigation Association of NGOs against Discrimination joined the claim with their intervention, i.e. they were joined to the claim as a joint claimant but with the position of an intervener.

On 14 July 2006, the Landesgericht Salzburg found that this was a severe case of harassment on the basis of sexual orientation and also sexual harassment under § 21(1)(3) and § 7(1)(3) Equal Treatment Act.

The victim was awarded compensation of 400 euros from each harasser which is the minimum amount provided for under the Equal Treatment Act. However, the court clearly stated that he deserved much more, but it had been the victim's own decision to go for the minimum only as he wanted a "decision on the principle."

<http://www.klagsverband.at/news.php?nr=7328>

<http://salzburg.orf.at/stories/151959>

Belgium

Legislative developments

Reform of the federal anti-discrimination legislation

The three bills reported in the last edition of the review² which will reform the federal anti-discrimination legislation in Belgium are still in the process of going through the Belgian Parliament, with many amendments to the law currently expected. At this stage there is uncertainty as to whether the new legislation will be adopted before Parliament dissolves (first week of May) in view of the Parliamentary elections on 10 June 2007.

Case law

Discrimination in employment on grounds of health

The claimant (Ms D) and the Centre for Equal Opportunities and Fight Against Racism sought to obtain a injunction from the Employment Tribunal (Tribunal du travail) of Brussels against the repetition of what it saw as

¹ The judgment was served late on the parties and then 4 weeks had to pass without appeal before the judgment becomes binding under Austrian law

² EADLR, Issue 4, page 51

a discriminatory recruitment practice of the Public Centre for Social Aid (CPAS) of Evere, as well as the posting on the premises of the court finding that such discrimination took place in that administration. Ms D is epileptic, and was not offered a vacant position after her temporary employment contract as an Ergo Therapist expired in a residence for elderly persons. This, despite the fact that she had been found fit to be employed by the occupational physician (with one reservation: the physician considered that she should not be allowed to drive a service van with passengers). She was told by the Director of the home that the refusal to recruit her was attributable to her state of health. The administration denied that this was the reason for not recruiting her and considered that the refusal was not discriminatory.

For the first time, the Employment Tribunal agreed to rely on Article 19 § 3 of the Law of 5 February 2003 which provides for the shifting of the burden of proof in civil actions alleging discriminatory practices. While the administration, (the respondent), alleged that the refusal to recruit Ms D was not attributable to her state of health, it did state that Ms D lacked ‘frankness’ by not openly discussing her epileptic condition with the director of the residence and the type of accommodation which was required, and that therefore the relationship of confidence had been broken between the parties. Ms D considered that she was not under any obligation to divulge to the administration that she was epileptic. She considered this an element of her private life and invoked the Law of 8 December 1992 on the protection of private life *vis-à-vis* the processing of personal data.³

The Employment Tribunal concluded that as Ms D had the right to keep her state of health secret, she could not be reproached for having refused to provide further information on her condition, which, moreover was known to the management. The Tribunal considered that the refusal to recruit Ms D was based on her state of health, and was therefore discriminatory under Article 2 of the Law of 25 February 2003. The Tribunal awarded an injunction against the repetition of such discrimination. However, it refused to grant the claimant’s request to post the judgment on the premises of the administration, as this would be disproportionate as the discrimination complained of had ceased.

This decision illustrates the potential of Article 19 § 3 of the Anti-discrimination Law, as discrimination was found to have taken place despite the absence of any positive proof that the state of health of the claimant had been the basis of the refusal to recruit her (the respondent only conceded that the refusal was based on the unwillingness of Ms D to openly and frankly discuss her medical condition with the management).

Alleged ethnic discrimination in employment based on public statements by the employer

The Centre for Equal Opportunities and Fight Against Racism (the “Centre”) sought to obtain from the Employment Tribunal of Brussels an injunction against the continuation of what it saw as a discriminatory recruitment practice of the company, Feryn plc, as well as the publication of a court judgment finding that discrimination had been taking place in that firm. The Centre based its case on statements made to the media by a representative of the firm on 28 April 2005, according to which 20 candidates of Moroccan origin had made job applications for positions within the firm (the firm had widely publicised that it was recruiting garage-door fitters) and the applications were ‘unwelcome.’ The primary objective of the firm was to respond to the needs of their clients, and therefore to take into account their hostile reactions when they receive visits from persons of ‘allochthonous’ origin. Following the publication of these statements both in the printed media and on TV, the firm sought to insist that it was in favour of equal opportunities, and it entered into a dialogue with UNIZO, the union of self-employed entrepreneurs, with the aim of developing diversity initiatives. On 27 May 2005, following



³ adapted in 1998 to the requirements of the Data Protection Directive 95/46/EC of 24 October 1995

a dialogue with the Centre, the firm undertook to cease any discriminatory practices, to develop a diversity plan for the undertaking, and to send all its job advertisements to the public employment agency of the Flemish Region (VDAB) in order to ensure a diversity of applications. These commitments were made publicly in a joint press communiqué between the employer Feryn and the Centre. At the end of 2005 however, it appeared that it was not complying with the latter two undertakings.

In March 2006, the Centre filed a legal action alleging discrimination on the basis of race/ethnic origin.

On 26 June 2006, the Employment Tribunal considered whether the statements made in the media by a representative of the firm, which created the suspicion that the firm might have discriminatory recruitment policies, could be protected under Article 10 ECHR (and Article 19 of the Constitution) which protect freedom of expression. It was of the view that Articles 2 § 1, 2 § 2 and 2 § 4 of the Anti-discrimination Law of 25 February 2003 (direct and indirect discrimination in employment), could be seen as imposing a legitimate restriction on freedom of expression, to the extent that this legislation was applicable in the case. Secondly, the Tribunal examined whether 'statements' about the recruitment policy of the firm could be seen as 'acts' of discrimination, in the absence of any evidence that the statements made had been translated into acts (for instance rejection of applications filed by candidates of Moroccan origin). The Tribunal relied on the wording of Article 2(2)(a) Directive 2000/43 to conclude that 'potential discrimination' may be covered by the Law of 25 February 2003 read in conformity with Directive 2000/43, i.e., that there may be a finding of discrimination even in the absence of any proven instance in which a practice or policy has been implemented vis-à-vis a particular person. Thirdly, the Tribunal considered that an intention to fulfil the wishes of the clients could not be a justification for a form of behaviour otherwise proven to be discriminatory. However, the Tribunal concluded that it would not be justified to order a cessation of the discriminatory practice, as the attitude adopted by that firm in the months following the events (in the months from May 2005 to January 2006 (when the claim was filed)) could not be described as discriminatory, despite the fact that the firm finally decided not to launch a 'diversity plan' as a result of its financial implications. Both the injunction and the publication of the judgment sought by the Centre were therefore denied. On 28 July 2006, the Centre lodged an appeal against this decision, arguing that Directive 2000/43 imposes the adoption of effective, proportionate and dissuasive sanctions where discrimination is found to have occurred. www.diversiteit.be/CNTR/FR/about_the_center/press/cntr_press_06-06-29.htm

Late news!



Reference from Labour Court to the European Court of Justice on direct discrimination on grounds of race or ethnic origin in access to employment

On hearing the case of the Centre for Equal Opportunities and Opposition to Racism v. NV Firma Feryn on appeal from the Employment Tribunal on 24 January 2007 the Labour Court of Brussels stayed proceedings and referred six questions of interpretation of Directive 2000/43 to the European Court of Justice under the preliminary reference procedure.

The Labour Court asked the ECJ the following questions:

- **First**, is there "direct discrimination", within the meaning of Article 2(2)(a) of Directive 2000/43, where an employer seeks to justify apparently discriminatory practices by the alleged tastes of his clients, who, according to that employer, would be unwilling to be served by persons of a foreign origin?

- **Second**, is the existence of “direct discrimination” proven sufficiently by the use of selection criteria (in recruitment processes) which are discriminatory on their face (i.e., even without there being an identified victim of the discrimination)?
- **Third**, may the discrimination practiced by an employer in one of his undertakings be proven by taking into account the fact that in another of this employer’s undertakings (a subsidiary company), the recruitment process results in a situation where only persons of Belgian origin are being recruited?
- **Fourth**, what is the meaning of the expression in Article 8 of Directive 2000/43, ‘facts from which it may be presumed that there has been direct or indirect discrimination’, and in particular: a) to what extent is the past behaviour of a particular respondent (in the case at hand, the fact that in April 2005 the firm Feryn had publicly stated that it did not wish to recruit workers of foreign origin) relevant in establishing a presumption of discrimination? b) may the mere fact that the respondent has exhibited discriminatory behaviour in the past, be deemed sufficient to establish a presumption that the discrimination has persisted? c) may such a presumption be established on the basis of a press communiqué, published jointly by the respondent and the national equality body, which contains at the very least an implicit admission of discrimination? d) does the fact that an employer has no employees of foreign origin lead to the presumption of the existence of indirect discrimination on grounds of race or ethnic origin, where the employer has in the past experienced difficulties in recruiting workers in sufficiently high numbers, and moreover proclaimed publicly his unwillingness to recruit workers of foreign origin in the undertaking? e) is one fact sufficient to establish a presumption of discrimination, or is more than one fact required? f) may a presumption of discrimination be established on the basis of the fact that in another company of the same employer, no single person of foreign origin is employed?
- **Fifth**, under which circumstances must the national court consider that a presumption of discrimination has been rebutted successfully by the respondent? In particular, is such a presumption rebutted by a public declaration in the media from the respondent employer, that he is not discriminating, and that any candidate for the job is welcome to apply for a position in the company? Is it successfully rebutted by the affirmation by the employer that all the positions of garage-door-fitters are now filled in his company (although not in the subsidiary company owned by the same employer)? Is it successfully rebutted by the circumstance that the respondent company has a woman (in charge of cleaning) of Tunisian origin within its service? Is it successfully rebutted by the recruitment, as garage-door-fitters, of one or more employees of foreign origin, or by the establishment of a diversity plan for the undertaking and the commitment to send all job advertisements to the public employment agency, as initially stated in the joint press communiqué of 27 May 2005?
- **Sixth**, what implications follow from Article 15 of Directive 2000/43, stating that discrimination must be combated through ‘effective, proportionate and dissuasive sanctions’? In particular, is it compatible with this requirement that a national court finds discrimination to have occurred, without imposing any sanction, even in the form of civil compensation? Or must the court order the cessation of the discriminatory practice it has found to exist, as Belgian courts are allowed under the Law of 25 February 2003? Must the court order the publication of the judgment, since this might be considered a proportionate and dissuasive measure sanctioning the finding of discrimination?⁴

⁴ Judgments of the lower courts are not systematically published in Belgium. The Law of 25 February 2003 permits a judge who has returned a finding of discrimination to order the publication of the judgment in a newspaper



Legislative developments

Amendment to the legislation which transposed the non-employment aspects of the Directive 2000/43

Law No. 147(I)/2006 amends Law No. 59(I)/2004 on Equal Treatment (Racial and Ethnic Origin) by replacing Article 7(2) with a new provision. Three changes are introduced: (a) the burden of proof is reversed not only in civil proceedings, as was the case with the old law, but in “all judicial proceedings except criminal ones,” thus impliedly covering administrative court proceedings; (b) the claimant no longer has to *prove* facts from which a violation can be inferred, but merely to *introduce* such facts, upon which the burden of proof is automatically reversed; and (c) the respondent is no longer absolved from liability if he proves that his violation had no negative impact on the claimant.

Whilst the scope of Directive 2000/43⁵ includes employment, self-employment, occupation, vocational training, working conditions, membership of trade unions, the scope of Law No. 59(I)/2004 is narrower, only covering social protection, healthcare, social provisions, education and access to goods and services.⁶ The employment component of Directive 2000/43⁷ is transposed by Law No. 58(I)/2004 on Equal Treatment in Employment and Occupation, which purports also to transpose, part of Directive 2000/78/EC.⁸ Therefore, by only amending only Law No. 59(I)/2004 and not Law No. 58(I)/2004, the government has still not completely transposed Article 8 Directive 2000/43.

Meanwhile, Article 10 Directive 2000/78 (which contains a provision identical to Article 8 Directive 2000/43) was also incorrectly transposed, since the corresponding laws⁹ contain the same provision on the burden of proof as Law No. 59(I)/2004 prior to its amendment.

Equality body decisions/opinions/reports



Equality Body rules that knowledge of Greek for an operating licence is discriminatory

A complaint was submitted to the equality body by a tourist office, which was denied an operating licence by the quasi-governmental Cyprus Tourism Organisation (CTO) because it had no Greek-speaking manager. In support of its decision the CTO cited secondary legislation which provides for the requirement that a Greek-speaking Manager be employed for an operating licence for a tourist office to be granted.

The decision criticised the requirement of knowledge of the national language, finding that it constitutes discrimination on the ground of language, and indirect discrimination on the ground of race/ethnic origin. The decision described the legislative framework governing this case by referring to Regulation 1612/68/EEC which sets as a target for the EU the elimination of all forms of discrimination as a result of nationality in the field of employment, as well as to Article 6(1) of Law No.58(I)/2004¹⁰ transposing Directive 2000/78, which prohibits direct or indirect discrimination on the ground of race or ethnic origin in employment, occupation and self-

⁵ Article 3.1

⁶ Article 4(1) Law No.59(1) 2004

⁷ Article 3.1(a), (b) and (c)

⁸ The disability component of Directive 2000/78 is transposed by a third law; Law No. 57(I)/2004

⁹ No. 57(I)/2004 and No. 59(I)/2004

¹⁰ Law No.58(I)/2004 purports to transpose some of the provisions of Directives 2000/78 and 2000/43

employment, based on which the language requirement amounts to discrimination. The decision recommends that the secondary legislation be abolished, as required by the law transposing Directive 2000/78.¹¹

Although the decision recognises that nationality as a ground for discrimination appears to be relevant to this case, the decision is based on Law No.58(I)/2004 which does not cover national origin, but only race/ethnic origin. The decision raises the issue of the implementation of Article 16(1) of Law N.58(I)/2004 (transposing Article 16(a) of Directive 2000/78/EC) and the lack of an effective mechanism to check the conformity of existing laws and regulations with the anti-discrimination legislation.¹² The process for such repeal is for the Equality Body to refer this instrument to the Attorney General who will in turn prepare a bill and present it in Parliament for voting. So far, the Attorney General has not yet done so.

Equality body examines complaints of lack of suitable accommodation for dyslexic children in exams

The parents of a dyslexic pupil complained to the equality body about the absence of reasonable accommodation for dyslexic pupils at the secondary school in leaving certificate examinations and entry examinations to tertiary education. The national organisation for dyslexic children filed a complaint on the same issue.

The law on carrying out Pancyprrian School Exams (No.22(I)/2006) makes no provision for reasonable accommodation of children with dyslexia, other than extra time for examinations. Parents have to apply to a Special Exams Committee (SEC) consisting of persons not specialised in dyslexia, for a permit to make use of facilities for their dyslexic children. The criteria which, according to official policy, must be used by SEC in deciding whether or not to approve the parents' requests are: not to give the dyslexic student favourable treatment or advantage over other students and to preserve the validity and credibility of the exam. In the case under examination, the SEC refused to approve facilities for the admission exams to higher education other than additional examination time of 30 minutes.

In its decision dated 31 October 2006,¹³ the equality body criticised the provisions of Law No.22(I)/2006, which provides for additional examination time as the only accommodation for dyslexic students. It pointed out that on its own this measure is considered by experts to be unsatisfactory. The use of a spell-checker is forbidden; and where exemption from dictation and grammar has been allowed,¹⁴ this is marked on the pupil's leaving certificate, which amounts to "labelling" and violates data protection laws.¹⁵ Citing international disability reports, the equality body found that dyslexic students require special teaching techniques, they deliver better orally than in writing, require longer notice for examinations than non-dyslexic students and may be driven to academic failure if not handled properly. The body cited the practices followed in other countries, which cover rights to use auxiliary equipment and to take the exam orally. It found that such measures do not give the dyslexic student an advantage over other students, but merely serve to place the dyslexic student in an equal position to that of other students, whilst additional examination time granted does not, on its own do this. In support of this, the equality body cited the ECtHR decision in the case of *Thlimmenos v. Greece*¹⁶ which ruled that equal treatment can



¹¹ Law No.58(I)/2004, Article 16(1)

¹² Article 16(1) Law No.58(I)/2004 provides that all laws, regulations and directives containing provisions contrary to Law No. 58(I)/2004 are repealed to the extent that they contain direct or indirect discrimination.

¹³ File No. A.K.I. 24/2006, A.K.I. 27/2006

¹⁴ This is permitted under a circular from the Education Ministry

¹⁵ As certified by the Commissioner for Personal Data

¹⁶ <http://www.bailii.org/eu/cases/ECHR/2000/162.html>

also mean the different treatment of unequal persons. The decision criticised the Education Ministry assigning the decision regarding what accommodation measures ought to be taken to the SEC, stressing that according to the law, the SEC's duties were only of an administrative nature. The decision found that the Education Ministry's practice was discriminatory towards dyslexic children and that the two national laws¹⁷ introduced indirect discrimination on the ground of special needs in education and on the basis of the anti-discrimination legal framework and asks the Attorney General to revise them. As the pupil had already taken the exam, it was not possible for the Equality Body to recommend that he be given reasonable accommodation to compensate for his dyslexia. The equality body did however recommend that the Education Ministry's future actions keep in mind the equal treatment of pupils with special needs in relation to all other pupils. This is the first attempt to reach a definition of "reasonable accommodation" for a person with a disability in education.

Equality body interprets law against discrimination in vocational training on request of governmental body

A trainee (hereinafter G.C.) who was taking a training course on air traffic control at the Civil Aviation Department (CAD) on a state scholarship, lost one eye in an accident. Trainees who successfully complete the course are eligible to apply for a position at the CAD as air traffic controllers and usually *are* offered placements but there is no guarantee. The medical assessment of the CAD medical officer was that, as a result of his visual impairment, G.C. would not be able to work as air traffic controller: he had lost his stereoscopic vision and his perception of depth and distance had been reduced. The same view was shared by the National Supervisory Authority, which based its decision on international regulations regarding the medical standards of air traffic controllers. The CAD applied to the equality body for an opinion as to whether G.C.'s training ought to be terminated, as he would be unable to work as air traffic controller upon completion.



This is the first instance where a governmental body applied to the equality body for an opinion prior to taking a measure that may lead to a complaint of discrimination.

The equality body was of the opinion that the eye injury acquired by G.C. was covered by the definition of disability in Article 2 Law on Persons with Disability 2000. The same law prohibits discrimination in access to all levels of vocational training (Article 5(1)(b)) but does not apply to occupational activities for which a certain physical characteristic constitutes a genuine and determining requirement, provided the objective is legitimate and the requirement proportionate (Article 3A(1)(b)). In a decision of 20 September 2006 the equality body concluded that the discontinuation of G.C.'s training would amount to less favourable treatment prohibited by law, adding that the training constitutes a source of knowledge that may be utilised for purposes other than work as air traffic controller. The decision recommends that the issue of training should be seen separately from the issue of employment with the CAD as an air traffic controller after completion, which was not guaranteed and which would, under the circumstances, fall under the exception of Article 3A(1)(b). The decision urges CAD to utilise the skills of G.C. after completion of his training first by employing him in an area other than air traffic control.

¹⁷ The Laws and Regulations on the Training and Education of Children with Special Needs 1999-2001; Law for the Carrying out of Pancyprrian School Exams No. 22(I)/2006

Czech Republic

CZ

Legislative developments

Following the failure of the Anti-discrimination Bill to pass successfully through the Czech Parliament,¹⁸ a new Anti-discrimination Bill started its inter-departmental consultation stage in February 2007. This stage is limited to three weeks. After this period expires, all comments submitted by governmental departments and other bodies are to be dealt with (there is no public consultation as such but if third parties request the Bill from a department, the latter has a duty to provide it to them and if they chose to submit comments they are party to inter-departmental commenting).

The new Anti-discrimination Bill was submitted to inter-departmental consultation in a version similar to the Bill which was not approved by the Parliament in 2006.¹⁹ The only important difference is that no mediation procedure on behalf of victims is proposed, and no provisions allowing for positive action measures are contained in this draft.

Denmark

DK

Policy Developments

New Anti-discrimination complaint body

In the new catalogue of legislation intended to be proposed in the coming parliamentary year is a bill scheduled to be proposed in parliament in February 2007. The governmental bill contains a proposal to abolish the Complaints Committee on Ethnic Equal Treatment which was established as part of the Institute for Human Rights after the adoption of the Act No. 374 of 28 May 2003 on Ethnic Equal Treatment which formed part of the transposition of Directive 2000/43.

The purpose of the Complaints Committee was to give access to complaints about unfounded differential treatment based on race or ethnic origin in the labour market, education, housing and other areas of life. In addition, the Gender Equality Board will be closed and made part of the new structure.

The new equality body will be called “Det Fælles Klagenævn for Ligebehandling”, in English – The Common Complaints Board for Equal Treatment (unofficial translation). It should be able to deal with all grounds of discrimination, including race, ethnicity, nationality, gender, disability, religion, sexual orientation, age, social origin, and political orientation in what fields?. The model for the new equality body will be the structure and the mandate and powers of the Gender Equality Board.

http://www.bm.dk/graphics/Dokumenter/Presse%20og%20nyheder/Pressemeddelelser/2006/061003_notat.pdf

Legislative developments

Legislative amendment permitting differential treatment for the under 18s enters into force

Issue 4 of the EADLR reported on the introduction of Bill No.98 into Parliament.²⁰ The aim of the Bill was to amend

¹⁸ Reported in Issue 4 EADLR, page 54

¹⁹ *ibid*

²⁰ For further detail see Issue 4 EADLR, page 55

Act No.31 on the prohibition of discrimination in employment and occupation, which prohibits discrimination on the grounds of age, disability, race and ethnicity, sexual orientation and religion and belief. The Bill added a Section 5A to Act No.31 which permits collective agreements to include specific provisions for salaries of people under the age of 18, thereby allowing for differential treatment on the grounds of age. The Bill has been passed and the law entered into force.

Case law

No discrimination on grounds of disability in case of dismissal of employee with multiple sclerosis

In September 2003 the claimant was recruited by the telephone company Orange for a marketing job (unskilled work). From 2000 she had suffered from multiple sclerosis, however, the company was not informed about this until spring 2004. From July 2004 her full time job was reduced to part time (25 hours a week), and her wage was also reduced partly due to the nature of the contract. Her salary was calculated according to the number of people she persuaded to sign up with Orange each working day. As a result of an agreement with the local municipality however, she now received a wage subsidy in accordance with section 69 of Act No. 685 of 29 June 2005 on Occupational Effort. The effect of this was that her wage remained the same for the part time work as it had been for the full time work as a result of the wage subsidy.

By the end of 2004 the number of relapses she suffered increased and she did not work from mid February until the end of February 2005. From February 2005 Orange was, however, taken over by another company and the number of people who signed up with the company reduced significantly.

On 28 February she was informed that her performance in the last three months had not been adequate and that she would be dismissed by 31 May 2005. With the support of her Labour Union HK she took her case to the Aarhus City Court. The claimant argued that the employer had not fulfilled the duty to secure reasonable accommodation under Section 2a of Act No. 31, the Labour Market Discrimination Act prohibiting unequal treatment in employment and occupation of 12 January 2005. The employer argued that this duty had been fulfilled in July 2004 when her full time job was changed into a part time job.

In its judgment of 13 July 2006 the Aarhus City Court did not find any violation of Act No. 31. According to the Court, disability requires the presence of an impairment which can be compensated for. According to all the medical facts of the case, the Court was of the opinion that she was not disabled within the scope of the definition in Section 1 of Act No. 31, which as of 2005 covers discrimination on grounds of age and disability. Furthermore, no other facts indicated that the motive behind the decision to dismiss her violated that Act. The Court stated therefore that multiple sclerosis was not a form of disability and therefore it was not necessary to consider the issue of reasonable accommodation. The decision has been appealed.

This decision limits the definition of disability significantly. Usually a person is considered to have a disability if s(he) has a permanent, usually life-long functional limitation that is significant, be it of a mental, sensorial or physical nature. People suffering from life-long multiple sclerosis with a high numbers of relapses causing functional limitations, seem to fulfil this definition. The present decision however, excludes such people from protection, including the right to reasonable accommodation from the employer.

First Complaints Committee case turned down by High Court

On 27 June 2006 the Eastern High Court delivered its judgment in the first case concerning discrimination on the



grounds of ethnic origin brought under the Ethnic Equal Treatment Act from July 2003. In contrast to the Complaints Committee,²¹ the High Court did not find that the claimant had established proof of discrimination. In so doing it thereby confirmed the decision of the Copenhagen Court.²²

In the High Court employees from the school admitted that in a written note which stated that an employer did not want "P," "P" was used to indicate "Perker" (Danish slang for people of Pakistani/Turkish origin). The employees of the school claimed before the court that the reasoning behind the note was based on previous events where employees at that particular workplace had harassed young people from ethnic minorities and consequently the school decided not to allocate any ethnic minorities to that workplace as trainees, but instead some white Danes. At the same time the school argued that the claimant was not qualified for a position as trainee at that time. This argument had also been used by the school before the City Court and during the Complaints Committee procedure. However, the Committee had not viewed it as relevant and consequently the issue of qualification is not mentioned in their decision at all.²³ However, the City Court and the High Court accepted the argument that the claimant was not qualified for the position as a trainee at that time. The High Court found that no violation of the legislation had taken place, as the claimant had not been qualified for the position at that time.

racial
or ethnic
origin

Decision of the City Court of Randers from 20 December 2006

A refugee in Denmark used to work as a postman in the Former Yugoslavia. He was employed as an unpaid trainee with Post Denmark from May 2002 until November 2002 and simultaneously he attended a language school. From December 2002 he was employed as a substitute postman on Saturdays. In July 2003 he was employed at the post centre in a position financially supported by the local municipality. In the letter of employment from July 2003 the claimant was recruited on a permanent contract which did not contain any conditions for the employment. In December 2004 the claimant was dismissed from his job, and the redundancy notice stated that the reason was his lack of language qualification. The employment ended on 1 April 2005.

racial
or ethnic
origin

Based on the presentation of the evidence, such as the redundancy notice, and the fact that the claimant had not given evidence of his language qualifications during the hearing of the case, the Court ruled that the reason the claimant was dismissed was that his language qualifications were insufficient for him to discharge the job as postal worker satisfactory after two and a half years of employment. The Court further held that the demand for language qualifications were sufficiently objectively motivated, and that the demands were proportional to the purpose in the concrete job situation. The Court did not therefore find that the claimant had been indirectly discriminated against, finding instead that the dismissal did not violate Sections 1 (2) and 2 (1) of the Act on the Prohibition against unequal treatment on the Labour Market.

Decision of the City Court of Frederiksberg from 1 December 2006

On 23 October 2005 the company HVL Gruppen (HVL Group) published a job advertisement in a newspaper in which it sought a new employee, Age 17-45. Mr. A. who is 50 years old applied for the job. He was interviewed for the position, but rejected without any reasons. Consequently Mr. A filed a complaint with the police according to Section 5 of the Act prohibiting unequal treatment on the labour market on the basis of discrimination in the job advertisement. In addition, his solicitor commenced a civil action under the same Act (Section 2) demanding compensation for damage caused, according to Section 7. The complaint noted that according to the same Act,

age

²¹ EADLR, Issue 1, pages 44-45

²² EADLR, Issue 3, page 60

²³ EADLR, Issue 1, page 44

Section 7 (a) there is a shared burden of proof, and the fact that the job advertisement openly state Age 17-45, shifted the burden of proof to the employer.

The Court stated that it was undisputed that HVL Group violated Section 5 (by advertising for manpower age 17-45 years old), and that this circumstance is a fact that established that the burden of proof now rests with the employer, according to Section 7 (a) of the Act prohibiting unequal treatment on the labour market. However, Mr. A included his age in his application and was nevertheless called for an interview. Furthermore, the employer had testified about the age composition of his labour force and consequently established facts that the rejection of Mr. A was not because of his age.

EE



Estonia

Legislative developments

Estonian draft legislation: official status for sign language

On 21 December 2006 the government submitted a draft Law on Amendments to the Law on Language (Bill No. 1077) to the parliament. The first reading of the bill will take place on 17 January 2007. If adopted, the bill will assign official status to the Estonian sign language. The amended Law on Language will guarantee the right to use this language under the circumstances provided for in other legal acts. The bill has a good chance of being adopted before the national elections in March 2007.

The amendments to the Law on Language are worded in a declaratory manner. However, they will enable the authorities to adopt specific legal norms to improve the access of people with hearing disabilities to education, to the labour market and to assist them in communicating with the public. First, the draft law proclaims that the State shall support the use and development of Estonian sign language. Second, a provision provides the government with the right to adopt secondary legislation regarding the use of sign language (Article 1). The draft law does not however mention minority sign languages, such as the Russian sign language.

<http://web.riigikogu.ee/ems/plsql/motions.show?assembly=10&id=1077&t=E>

Late news! On 8 February 2007 Parliament adopted the draft Law on Amendments to the Law on Language (Bill no. 1077).

<http://www.riigiteataje.ee> (text in Estonian)

FI

Finland

Policy development

Finland launches a process to evaluate its equality laws

The Government of Finland has started a process, the objective of which is to assess the domestic equality legislation, and if the need be, amend or supplement it. The most important reason for assessing this relatively new piece of legislation (it has been in force for less than three years) is the fact that the Parliament, upon passing the laws in question, issued a statement in which it urged the Government to prepare a new, comprehensive

proposal for equality legislation. The Parliament considers that the new legislation, which followed the two directives closely in many respects, including scope of application, did not fit well into the existing domestic framework of equality laws. It expressed the view that the material scope of application and the remedies available to victims of discrimination should be equal as a matter of principle, irrespective of the discrimination ground. The objective is therefore to consider the widening of the scope of legal protection against discrimination. A second objective is to evaluate whether the existing legislation has been effective, or whether it should be strengthened in some way.

The Ministry of Justice is leading the review process, and is in the process of setting up a working group to deal with this matter. The working group is to be composed of, *inter-alia*, representatives of various key government departments. To facilitate the work, the Ministry of Labour has commissioned an impact assessment study to find out what the impact of the equality legislation has been and how well it has worked in practice. The study is to address the following questions: How the different pieces of domestic legislation (with e.g. different definitions of discrimination) have played out together in judicial practice; has the present (fragmented) equality legislation been able to tackle multiple discrimination; have the various stakeholders, including interest groups and the judiciary found the new legislation to be effective; has the legislation been effective in promoting the adoption of positive action measures; how aware are ordinary people of the equality laws? The study, which is the first of its kind in this area, is to be finalised by the end of the year 2007. No deadline has yet been set for the working group.


Case law

Court decides age discrimination case, interpreting the burden of proof rule

A case heard by the Supreme Administrative Court on 1 December 2006 (KHO:2006:93) concerned the City of Naantali which had declared open a vacancy for a Building Inspector. Altogether 35 individuals applied for the job, including A, the complainant, and B, the person chosen for the job. 9 applicants were invited for interview, but A was not among them. A filed a complaint, submitting that he was better qualified than B and that he was not invited to interview because of age discrimination. The respondent (the city) submitted that B fulfilled all the essential qualifications required for the job, and that no discrimination had taken place. According to the respondent, statistical evidence confirmed the absence of age discrimination: the 9 selected for the interview had been born between 1950-1965; their median birth year being 1954, whereas the median birth year of all applicants was 1959. The complainant himself had been born in 1949. The Administrative Court of Turku, which examined the case in the first instance, found no discrimination. It furthermore submitted that even though A had formally better qualifications than B, B had met all the essential qualification criteria, as required by section 125(2) of the Constitution (731/1999), and therefore the city had acted within the limits of its discretionary powers in choosing who, from among all qualified applicants, was invited to interview and eventually employed.

The Supreme Administrative Court focused upon the discrimination claim in its decision. It reaffirmed that the prohibition of discrimination in section 6(2) of the Constitution and section 6 of the Non-discrimination Act (21/2004), had to be complied with at all stages of the employment process, including short-listing and invitation to interview. This means that unequal treatment at any stage of the selection process, such as invitation to interview, constitutes discrimination in itself even if it is not taken to have affected the final outcome of the selection process. It also took note of section 17 of the Non-discrimination Act which requires sharing of the burden of proof. It however arrived at the conclusion that a *prima facie* case of age discrimination had not been made. Age discrimination could not be presumed from the fact that the applicant had not been invited to interview, as exclusion of some applicants



A high-contrast, black and white close-up portrait of actor Steven Seagal. He is looking slightly upwards and to the right with a serious expression. The lighting is dramatic, with deep shadows on the left side of his face and bright highlights on the right. He has a small hoop earring in his left ear and a light stubble on his chin and upper lip. The background is solid black.

Steven | 1977

is an inevitable part of all selection processes, nor could it be presumed from the fact that the age of the complainant differed from the average age of the other applicants. The Court found no discrimination.

The Supreme Administrative Court is the highest court in Finland in matters pertaining to the use of public power. Its decisions are final and carry considerable factual authority among lower courts.

France

FR

Policy development

Ministry of Education and National Commission on data protection²⁴ authorise collection of nominative data on French citizens of foreign origin (second generation)

In the context of a large project relating to the “integration of immigrants, the future of second generation immigrants and discrimination,” the National Institute of Demographic Studies (INED) has initiated a number of inter-related projects aimed at a deeper exploration of the data obtained in a number of previous studies of the National Statistics Institute (Institut National de la Statistique et des Etudes Economiques – INSEE), INED and the National Centre for Research on Qualifications (Centre d’Etudes et de Recherches sur les Qualifications – CEREQ). The aim of the projects is to develop a theoretical framework for the concept of “integration indicators.” One of these projects relates to INED’s participation in a comparative study launched by the European Commission in several European cities in order to analyse and compare the integration of children of immigrant descent in the different Member States. In France this study will target 1,500 persons living in Paris and Strasbourg comparing groups of 250 people with either one Moroccan or one Turkish parent, with 250 French people with two French parents. The Administration responsible for INED - the Ministry of Education and the CNIL (Commission Nationale Informatique et Libertés) have authorised data collection for the purpose of this study.



The CNIL has authorised that groups be constituted on the basis of first names and surnames identified ethnically, by consulting the telephone directory, drawing an inference as to the ethnicity of the person on the basis of linguistic expertise, this inference being made before obtaining the investigated person’s consent. It reiterated that such a procedure is prohibited unless it is intended for research purposes and expressly authorised by the CNIL on grounds of public interest. However, on the basis of Article 6 IV of the Law of 6 January 1978, it considered that this study met the public interest requirements because it would contribute to compensating for the present deficit in statistical data necessary to pursue and define policies for integration at a National and European level.

The CNIL imposed a procedure to be followed to ensure that each person contacted in the context of this study receives an explanation of the procedure for selection of their phone number, of the fact that co-operating with the study is not compulsory and that each participant has a right to consult and rectify the data gathered. In addition, the interviews which will be organised to complete the study’s questionnaire require written authorisation of each participant be obtained. The decree of the Ministry of Education of 3 September 2006 expressly states that the INED and its partners are to be exclusive receivers of the information collected which must be kept in confidential, secure and in separate data files. Two of the main anti-racist NGOs, SOS Racism and the MRAP (Mouvement contre le Racisme et pour l’Amitié entre les Peuples), have publicly stated their opposition to this investigation process maintaining their

²⁴ Commission nationale informatique et libertés - CNIL

opposition to ethno-racial data. http://www.ined.fr/fichier/t_recherche/NoteDetPhare2006/P0825.pdf

CNIL's opinion: <http://www.cnil.fr/index.php?id=2061>

Law of 6 January 1978: <http://www.cnil.fr/index.php?id=301>

Equality Body decisions/opinions

Halde decision on refusal of access to healthcare of 6 November 2006

The Halde received a claim from a group of doctors called *Collectif des médecins généralistes pour l'accès aux soins* (COMEGAS) who tested the refusal by doctors to give appointments to persons who are covered by the universal healthcare programme (CMU) created by Law no 99-641 of 27 July 1999, that covers, beyond basic coverage, people who have low incomes in six cities of the *Val-de Marne* department (suburb of Paris). In this programme the patient does not have to pay, and the medical practitioner is reimbursed by the state with some delay at a minimal tariff. Therefore, many medical practitioners refuse to treat people covered under the CMU and simply refuse to take appointments. The testing revealed that the rate of refusal of access to appointments of people covered by the CMU, qualified here as refusal of access to healthcare, is 4,8% for general practitioners and 41% for specialist medical doctors.

In its decision, the Halde called the attention of the College of Doctors and of the Minister of Health to the absence of sanctions for this denial of access to healthcare which is contrary to national law. It asks that attention be given to the fact that this discrimination is illegal and that information is distributed making this known. It further requests that the Minister takes action to sanction these doctors and that a national enquiry be carried out by the National Social Inspection authorities (*Inspection Générale des Affaires Sociales*) to identify the doctors concerned.

This decision is not based on legislation transposing the Article 13 Directives. It is based on paragraph 11 of the preamble of the Constitution of 1946, protecting universal access to healthcare, and Article 1110-3 of the Code of Public Health, adopted by Law No. 2002-303 of 4 March 2002 on the rights of the sick and the quality of the health system, that prohibit discrimination in access to healthcare without basing this prohibition on a list of prohibited grounds. The Code of Public Health states a universal prohibition of discrimination of internal French Law in access to healthcare. It states that no-one can be subject to discrimination in access to preventative healthcare and healthcare. Article R 4127-7 also contains a universal obligation of the medical practitioner to provide care.

Claims relating to the revocation of administrative authorisation giving access to the secured zone at Charles De Gaulle/Roissy Airport to 72 Muslim workers²⁵

On 2 November 2006, the Sub-prefect Seine Saint-Denis responsible for Roissy Airport security declared to the press that as of May 2005 administrative authorisation to the secured zone of the airport had been revoked for 72 employees of the Airport or of businesses operating within the zone, further to administrative investigations by the security services. These investigations had reached the conclusion that these employees had relations with "Islamist Fundamentalist movements" with "potential terrorist orientations." According to the Sub-prefect, 10 have relations with Tamil Tigers, many are involved in union activities and an important majority have links with Islamist and Salafist movements. One was in continuous contact with a person who was in direct contact with "Richard Reid" who attempted a terrorist attack on a Paris/Miami flight on 22 December 2001. 68 investigations did not result in revocation of administrative authorisation of the individuals involved. 40 employees remain under investigation that could lead to revocation. 5 of the 72 employees whose authorisations were revoked obtained annulment of the decision after filing a claim before the Prefect and providing further evidence of their reliability.



²⁵ This report is based on a review of the press between 28 October and 15 November 2006.

According to the Prefect, the investigations supported a conclusion that these employees presented a significant danger and when questioned they were not able to establish that their behaviour was not likely to create a danger to airport safety. The Prefect's power to revoke is based on Article 2 of the Law for Interior Security which gives him a discretionary power to revoke administrative authorisation to ensure the safety of the airport.²⁶ In addition to these revocations, seven Muslim places of worship have been closed down around the premises of the Airport in 2006. Since 2004, 2,600 people have been denied administrative authorisation to have access to the secured zone of the airport for various reasons, including appearing in police administrative files. There are 80,000 authorised employees and 57,000 authorisations have been investigated since January 2006. These employees are flight personnel, security agents, luggage handlers, cleaning employees, mechanics or employees who work in the airport warehouses of the private mails services such as federal express, UPS, etc..

Suspicion leads to the summons of the employee to the offices of the Prefect for interrogation where he/she is required to establish that the suspicions are not founded. The Prefect takes his decision. In case of revocation, a letter is sent to the employee. Access is immediately denied and the employer's internal dismissal or reclassification procedure takes over. Of the 72 cases, no employee had been reclassified by his employers by being transferred to a different position. The employee can present a claim to the Prefect and provide further evidence to demonstrate that the suspicions are ill-founded. In the meantime, the administrative authorisation of access is suspended. On 28 October 2006 the Minister of Interior, Nicholas Sarkozy, stated that these measures have been taken further to a report of the Central Unit fighting terrorism and are based on a duty of precaution.

A number of actions have been taken including:

- A claim for religious discrimination has been filed before the penal prosecutor of Bobigny on 19 October 2006 by the CFDT Union. An investigation has been opened.
- The anti-racist NGO MRAP (*Mouvement contre le racisme et pour l'amitié entre les peuples*) filed a claim against the Prefect of Seine Saint-Denis on 15 November 2005.
- The Unions and workers filed a claim before the administrative tribunal of Cergy -Pontoise to challenge the legality of the administrative decision to revoke.
- The Halde unilaterally initiated an investigation on 31 October 2006 and has since received a number of individual complaints.
- On 8 November 2006 the Prefect announced that he had reconsidered his decision to revoke the authorisation of 2 of the 10 employees who had filed claims before the administrative court at Cergy-Pontoise.
- A preliminary hearing of the 10 administrative claims was held on 10 November 2006. The Prefect filed the UCLAT ("L'unité de coordination de la lutte antiterroriste") report on the basis of the revocation measures. The Administrative Court has jurisdiction to monitor the legality of the discretionary administrative decision of the Prefect relating to security (Administrative Court of Appeal of Versailles, 10 November 2005 no 04VE01695).
- On 15 November 2006, the Administrative Tribunal decided that of the 8 remaining claimants, 2 decisions to revoke were unfounded and 6 were justified. The test used by the court was whether the employee can be considered a potential threat to the safety of the airport based on a legitimate conclusion that the person presents a vulnerability (*vulnérabilité*) incompatible with safety requirements.
- The lawyers for the workers' whose action was denied at the preliminary stage, decided to appeal this preliminary judgment before the Conseil d'Etat on emergency grounds.

²⁶ Law No. 2003-239 of 18 March 2003: <http://www.legifrance.gouv.fr/texteconsolide/PPED1.htm>

Germany

Legislative developments

Act implementing Directives 2000/43, 2000/78, 2002/73 and 2004/113

On 18 August 2006 an anti-discrimination act was enacted, the *Gesetz zur Umsetzung Europäischer Richtlinien zur Verwirklichung des Grundsatzes der Gleichbehandlung*, BGBl. 2006, 1897 (the “Anti-discrimination Act”). This Anti-discrimination Act encompasses the *Allgemeines Gleichbehandlungsgesetz* (AGG) (General Equal Treatment Law), the *Soldaten und Soldatinnengleichbehandlungsgesetz* (SoldGG) (Law on Equal Treatment of Soldiers) and amendments to various legal regulations.

The general aim of the Anti-discrimination Act is defined as being to combat discrimination based on grounds of race, ethnic origin, sex, religion or philosophical belief (Weltanschauung), disability, age or sexual identity. The formulation “on grounds of race” (aus Gründen der Rasse) is supposed to indicate that the German legislature does not recognise the existence of different human races. As to general civil law, philosophical belief does not form part of the prohibited grounds. The Anti-discrimination Act defines direct and indirect discrimination, harassment, and instruction to discriminate, closely following the Directives’ definitions. A provision deals with multiple discrimination on various grounds: Any such discrimination has to be justified independently for every individual ground. Positive action is declared admissible if the discrimination serves to overcome existing disadvantages based on any of the grounds listed. The scope of application of the Act encompasses labour law, social security, social benefits, education and general civil law, closely following (in part verbatim) the provisions of the directives. For unfair dismissal the regulations of the Act against Unfair Dismissal (Kündigungsschutzgesetz) take precedent over the Anti-discrimination Act.

1. Labour Law

Justification of unequal treatment is possible if the treatment forms a genuine and determining occupational requirement. Unequal pay cannot be justified because employers have special duties of protection in relation to the grounds listed. There are further grounds of justification because of the ethos and duty of loyalty as defined by a religious or philosophical belief. Unequal treatment on the ground of age is justified if there are objective reasons, and the unequal treatment is appropriate and necessary. Examples are given for this following those in Directive 2000/78. Employers are under a duty to protect employees against discrimination and prevent its occurrence through organisational arrangements, or the content of vocational training. They have to take appropriate action against such action and inform employees of the legal regulations.

In case of discrimination, the victim is entitled to damages for material loss if the employer is liable for wilful or negligent wrongdoing. There is strict liability for damages for non-material loss. The amount of compensation has to be appropriate. If the discrimination was not a causal factor in a decision not to recruit an individual the compensation for non-material loss is limited to a maximum of 3 monthly salaries. There is a time limit of two months for a claim, beginning with the reception of the rejection of a job application or promotion, or in other cases knowledge of the disadvantageous behaviour. The Act does not establish a duty to contract, unless such duty is derived from other parts of the law, e.g. tort law. Victimisation is prohibited. The Act contains an appeal to the social responsibility of the social partners to realise non-discrimination. The rules of non-discrimination apply to professional associations and in case of discrimination in this sphere, there is a duty to admit the person to the association.

2. Civil Law

In civil law, discrimination is prohibited for all the grounds listed, not only for those prescribed by the Directives (race, ethnic origin, sex) with the exception of philosophical belief (*Weltanschauung*). The prohibition of discrimination on the ground of race and ethnic origin extends to all legal transactions available to the public. The prohibition for the other grounds extends to all legal transactions that are typically concluded in a multitude of cases under comparable conditions without regard to the person (so-called *Massengeschäfte*) or to legal transactions, where the characteristics of the person have only secondary importance. The prohibition of discrimination extends to private insurance.

In the case of housing, unequal treatment is permissible for all grounds if it serves to maintain the stable social relations of inhabitants and balanced patterns of settlement and economic, social and cultural relations. The prohibition of discrimination does not apply to legal relations of a personal kind or if there is a special relation of confidence between the parties concerned or their relatives. This is supposed to be the case if the parties or their relatives live on the same premises. The principle of non-discrimination is supposed not to apply in principle (though exceptions are supposed to be possible), if the landlord lets not more than 50 flats.

Unequal treatment is justified for religion, disability, age, sexual identity or sex in case of an objective reason for the treatment. As examples of objective reason the Act lists the prevention of danger and damage, the protection of the sphere of privacy and of personal security, the provision of special advantages without any given objective interest in equal treatment, and the ethos of a religion. In case of insurance, a difference of treatment – with different qualifications for sex and the other grounds – is only permissible if it is based on objective actuarial calculations.

In case of a violation of the prohibition of discrimination, the victim can take action to compel the perpetrator to cease the discriminatory act (*Unterlassungsanspruch*). The discriminator is liable to pay damages for material loss caused for wilful or negligent wrongdoing. There is strict liability for damages for non-material loss, the compensation for which has to be appropriate. There is a time limit of 2 months for making any such claims, as in labour law.

3. Burden of Proof

The burden of proof is shifted both for labour and general civil law.

4. Civil Service and Soldiers

The regulations of the Anti-discrimination Act are applicable to civil servants, judges, and conscientious objectors. The Law on the Equal Treatment of Soldiers contains regulations similar to those described above, in addition to existing legal regulations. Germany uses the possibility provided for by EC law not to include age and disability among the forbidden characteristics in the *SoldGG*. There is however, a regulation concerning severely disabled soldiers.

5. Enforcing the law

According to the Anti-discrimination Act, a victim of discrimination is entitled to be supported in legal proceedings by associations dealing with matters of discrimination. They have to have at least 75 members or have to be the association of at least 7 other organisations concerned with anti-discrimination.

6. Independent Body

The Anti-discrimination Act establishes the duty to create a federal anti-discrimination agency (Antidiskriminierungsstelle des Bundes). It was established on 1 October 2006 and can be contacted with complaints (for contact see below the link). Its mandate covers all grounds listed in the Act, notwithstanding, however, the competencies of specialised governmental agencies dealing with related subject matters. The body is organisationally associated with the Ministry of Family, Senior Citizens, Women and Youth. The head of the agency is appointed by the Minister of Family, Senior Citizens, Women and Youth after a proposal by the Government.²⁷ She is independent and only subject to the law. The tenure of the head of the agency is the same as the legislative period of the Bundestag. The agency has the task of supporting persons to protect their rights against discrimination, especially to inform them about the legal means against discrimination, to arrange legal advice by other agencies, to mediate between the parties, to provide information to the public in general, take action for the prevention of discrimination, produce scientific studies, and – every 4 years – a report on the issue of discrimination, together with the Commissioners (e.g. Commissioners for Integration), dealing with related matters. The agency can give recommendations and can commission together scientific studies. The agency can demand a statement of position in case of discrimination from the alleged discriminator, if the alleged victim of discrimination agrees. Other public agencies have to support the agency in their work. The agency is to co-operate with NGOs and other associations. An advisory body for the Agency is to be created. The agency is to have an annual budget of € 5,6 Mio.

The Act regulates the prohibition of discrimination under the general civil law for more grounds than foreseen by EC law. There are, however, various parts of the Act that might be found to be in breach of EC law, most importantly:

- an exception of dismissal from the application of the prohibition of discrimination,
- a legally unclear exception of housing from the material scope of application for all grounds, if the provider has less than 50 flats,
- an exception from the material scope of the provision of goods and services of all transactions which involve a special relationship of trust and proximity between the parties or their family, including the letting of flats on the premises of the landlord for all grounds including race and ethnic origin, which raises problems under Directive 2000/43, depending on its contentious interpretation in this respect,
- an award of compensation for material damage depends on the proof of fault or malign intent of the discriminator. This is contrary to ECJ jurisprudence.

See: www.gesetze-im-internet.de (AGG: <http://bundesrecht.juris.de/agg/>;

SoldGG: <http://bundesrecht.juris.de/soldgg/>;

<http://www.bmfsfj.de/Kategorien/Ministerium/antidiskriminierungsstelle,did=80804.html>

Case law

Preliminary reference concerning pensions and discrimination on the grounds of sexual orientation

A reference has been made to the European Court of Justice from the Bayerisches Verwaltungsgericht München in *Case C-267/06 Tadao Maruko v Versorgungsanstalt der deutschen Bühnen* of 20 June 2006. For the questions referred to the Court of Justice see the section of this Review on European Court of Justice Case Law Update.²⁸

²⁷ **Late news!** On 1 February 2007 the Head of the Federal Anti-Discrimination Agency was appointed by ministerial decision. The appointee, Martina Köppen has previously served as subject specialist for Europe in the commissariat of the catholic bishops in Berlin

²⁸ See page 51

Preliminary reference on age discrimination

A reference has been made to the European Court of Justice from Bundesarbeitsgericht in *Case C-427/06 Birgit Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH* lodged on 18 October 2006. For the questions referred to the Court of Justice see the section of this Review on European Court of Justice Case Law Update.²⁹

Miscellaneous

Charter of Diversity

On 13 December, leading German firms DaimlerChrysler, Deutsche Bank, Deutsche BP, Deutsche Telekom signed a Charter of Diversity pledging to adhere to a business culture of non-discrimination on the grounds of sex, race, nationality, ethnic origin, religion, philosophical belief, disability, age, sexual orientation and identity. This culture of plurality – it is stated – will provide economic advantages. This initiative is to expand during the next year. The German Government supports this initiative.

<http://www.bundesregierung.de/Content/DE/Pressemitteilungen/BPA/2006/12/2006-12-13-integrationsbeauftragte.html>

Hungary

HU

Legislative developments

Amendments to Equal Treatment Act entered into force on 1 January 2007

The Parliament has extensively amended the Equal Treatment Act with Act CIV of 2006, partly as a result of criticism from the European Commission. Among the numerous amendments the following are the most important: 1) The new law further specifies the general exempting clause (deeming a formally discriminative distinction lawful) by requiring the application of the test of proportionality and necessity in cases where the distinction concerns a fundamental right of the individual (so objective reasonability is not applicable anymore). Furthermore, in cases concerning discrimination based on racial or ethnic origin, no objective justification is applicable with regard to direct discrimination. Hypothetical comparison has been made possible in cases of both direct and indirect discrimination, 2) Cases of separating different groups based on a protected ground (formally falling under the category of "segregation") are only justifiable if there is a clear statutory authorisation for such separation (e.g. in the case of education of minorities). The test of objective reasonability is not applicable in such cases any more, 3) With regard to the shifted burden of proof, the person claiming to have been discriminated against only has to substantiate and not actually prove the occurrence of the disadvantage and the existence of the protected ground (from which it may be presumed that discrimination has taken place) in order for the burden of proof to be shifted to the respondent.

The amendment is a positive step towards compliance with the Directives. The transposition of "reasonable accommodation" is still missing however. Direct discrimination can still be objective justified with regard to age, disability, religion and sexual orientation. <http://www.magyarkozlony.hu/nkonline/MKPDF/hiteles/MK06149.pdf>

Equality body decisions/opinions

Equal Treatment Authority condemns company for calling off job interview with visually impaired lawyer

The applicant is a visually impaired lawyer, who sent his CV to the defendant company. The company's



²⁹ See page 52



Marieke | 1987

representative called him and they agreed on an interview. Following this, the applicant realised that the fact that he was visually impaired was not included in his CV. He immediately called the company's representative, who tried to dissuade him from the job, saying that he would have difficulties fulfilling his obligations, but in the end they agreed to carry on with the interview. A day before the scheduled date, the applicant received an e-mail in which the interview was called off. The e-mail contained specific reference to the applicant's disability.

In the proceedings before the Equal Treatment Authority, the applicant established the disadvantage he suffered and the fact that he belongs to a protected group. Due to the provision on the shifted burden of proof it was then up to the defendant to prove that either there was no causal link between the two, or that the company, as a result of the existence of a relevant exempting provision, was not obliged to abide by the principle of equal treatment in the given relationship. As the e-mail sent to the applicant contained reference to the applicant's disability, the lack of causality between the rejection and the lawyer's visual impairment could not be refuted by the company. As the person employed instead of the applicant performed tasks that the applicant could have carried out despite of his disability, the Authority did not accept the defendant's reference to Article 22 of the ETA on genuine and determining occupational requirements. In September 2006, the Equal Treatment Authority established the violation of the principle of equal treatment on grounds of disability, ordered the company to refrain from such behaviour, obliged the company to pay a fine of HUF 800,000 (EUR 3,080) and ordered that its decision be published on its website for 30 days. The company has applied for a judicial review of the Authority's decision.<http://www.egyenlobanasmod.hu/zanza/295-2006.pdf>

Challenge to Equal Treatment Authority decision finding discrimination in employment based on testing

In March 2006 a decision of the Equal Treatment Authority, reported in the last edition of the EADLR,³⁰ found that an employer had directly discriminated against a job applicant of Roma origin who had responded to a newspaper advertisement seeking painters and had been rejected. The employer has sought judicial review of the decision before the Hungarian courts.

Equal Treatment Authority decision establishing discrimination with regard to accessibility of court building upheld on judicial review

In the last edition of the EADLR was reported a finding of the Equal Treatment Authority³¹ which upheld the complaint of a disabled person who claimed that he had not been able to attend the court hearing of his own civil law claim because the actual court building itself – the Central District Court of Pest (CDCP) - was not accessible. The CDCP subsequently applied for a judicial review of the Equal Treatment Authority's decision, however, the court upheld the decision of the Equal Treatment Authority.

Miscellaneous

Equal Treatment Advisory Body issues guidelines on the application of the Equal Treatment Act (ETA) in making the environment accessible for disabled people

The Equal Treatment Advisory Body (six-members advisory board established to assist the work of the Equal Treatment Authority, Hungary's equality body) issued guidelines on 6 September 2006 (no. 10.007/3/2006.TT.sz.) to interpret certain legal issues related to the obligation to make the environment accessible for disabled people. The most important conclusions are:

³⁰ Issue 4, page 63

³¹ Issue 4, page 64



1. The Disabled Persons Act does not only set out the obligation to provide accessibility with regard to the “constructed environment” (a term encompassing buildings, pavements etc.). The law’s list of issues is not exhaustive, the obligation pertains to all public services (including public transportation for example).
2. The failure to provide accessibility shall be regarded as a form of direct discrimination under Article 8 of the ETA, as it leads to a situation in which persons with protected characteristics (disabilities) are treated less favourably than another group in a comparable situation.
3. The deadline for making public buildings accessible (as defined by the Act on Constructions) expired on 1 January 2005.
4. Based on Article 7 of the ETA (general exempting clause), a person obliged to make a building accessible may be exempted from the responsibility even after the above date, if he/she proves that – taking into consideration all factors and all possible technological solutions – it would impose a disproportionate burden on him/her to abide by the obligation. http://www.egyenlobanasmod.hu/index.php?g=tt_cv.htm

Ireland

Case law

The Equality Authority’s role as amicus curiae

The case of *Doherty and Anor v. South Dublin County Council, the Minister for the Environment, Heritage and Local Government, Ireland and the Attorney General*, concerned two elderly members of the Traveller Community who were in poor health and who sought habitable accommodation from their local housing authority, the First Named Respondent, through the provision of a caravan. The case raised by the Applicants in their pleadings was that they were discriminated against because in providing accommodation under the Housing Acts, 1966-2004, the housing authority merely provide a site (at a halting site) but no habitable accommodation (namely a caravan or mobile home) to Travellers, in contrast with their treatment of the settled community who are accommodated in houses. The Applicants relied on the Equal Status Act 2000-2004 and Directive 2000/43 and contended that discrimination in the provision of accommodation to members of the Traveller Community was contrary to the requirements of both Irish and EC law. They also contended that there was a failure to transpose Directive 2000/43 into Irish law by reason of a failure to amend Section 6(6) of the Equal Status Act 2000-2004 to render it compatible with the Directive. A further contention was that the housing authority is under a legal duty (based on the European Convention on Human Rights Act, 2003 and the provisions of the Housing Acts) to provide the applicants with a caravan that will allow them to lead a normal family life together. The Equality Authority, on 22 May 2006 was given permission by Justice Quirke in the High Court to appear as amicus curiae³² in these proceedings.³³

This case was brought before the Supreme Court by way of an appeal by the Second, Third and Fourth Named Respondents against the Order of Mr. Justice Quirke in the High Court. The basis of the Second, Third and Fourth named respondents appeal and the issue for the court to determine was whether the Equality Authority’s application to apply to be joined and to intervene as amicus curiae is within the power of the Equality Authority.

The appeal was heard on 30 June 2006 by a 3 judge court; judgment was reserved and was due to be delivered on the 10 July 2006. On that date Justice Mc Guinness stated that this was a matter of great importance not just

³² *Amicus Curiae* is where an opinion of a third party is permitted to be submitted to the court to assist it in making its decision

³³ Reported in EADLR Issue 4, page 65



for the Equality Authority but for other statutory bodies and that having discussed the matter with the Chief Justice it was decided that a full Supreme Court should hear the matter. On 26 July 2006, the Supreme Court (sitting as a 5 judge panel) heard the appeal. Judgment was delivered on 31 October 2006.

The arguments raised by the appellants were twofold: the first argument contended that the Equality Authority has no statutory power to act as *amicus curiae* and secondly that nothing in Directive 2000/43 or the principle of conforming interpretation requires the Court to interpret the legislation so as to confer such a power on the authority. The Court addressed the issue of the Equality Authority's powers and held, by a majority (Macken J., dissenting that the power to act as *amicus curiae* falls well within the scope of the general power of the Equality Authority. It is not merely ancillary or incidental. The Supreme Court also stated that it is a power of 'comparatively modest proportions,' being the power to intervene in court proceedings in circumstances where the Equality Authority considers that it can assist the court in reaching a conclusion. As the Supreme Court determined that the power to act as *amicus curiae* was distinctly within the realm of the Irish provisions the court determined it was unnecessary to consider whether the same conclusion could be reached by interpreting the legislation in light of Directive 2000/43.

<http://www.courts.ie/judgments.nsf/597645521f07ac9a80256ef30048ca52/D8FD29D09EB36F548025721900498F86?opendocument>

Italy

IT

Case law

Decision no. 645 of Tribunale Amministrativo Regionale Friuli Venezia Giulia, 16 October 2006

The mayor of a municipality of Northern Italy issued an ordinance that recalled the existing state provisions forbidding the use in public places "without justified reason" of "protective helmets or any other means that can make the recognition of a person difficult". The ordinance of the mayor added, by way of his own interpretation, that included among such "other means" was to be the use of a "veil covering the face." The ordinance was declared void by the representative of the government (*prefettura*), and the municipality appealed against this decision to the administrative court.

At the outset the administrative court discussed some technical points concerning the limits of the possibility of a government representative to annul ordinances of the municipalities. It concluded that annulment was possible in a case like that at hand. The court then explained that the mayor does not have a general competence in the field of public security, and that the ordinance at issue in this case could not be considered a simple reference to existing legislation, as it adds to this legislation by virtue of the interpretation which had the result of including among the prohibited means "traditional veils of the Muslim women including burqua [sic] and chador". According to the administrative court, "while a police officer can, on a case by case basis assess whether a legislative rule has been respected, a general prohibition to wear such kinds of clothing in public can derive only from an express legislative provision."



This decision came at a time where there is an increasingly lively political discussion on the legality of different forms of Islamic dress, at least those going beyond the simplest form of veiling commonly referred to as *hijab*.³⁴ According to some political actors, the wearing of "burqas" (such term is very often used vaguely and improperly) or comparable

³⁴ This term is used in Arabic countries and elsewhere to refer to the veiling which covers neck and hair, but not the face

apparel would represent a criminal offence, i.e. would violate criminal legislation which prohibits the use of masks in public places. Against this background, some municipalities of Northern Italy issued local orders prohibiting the use of Islamic veils, while some politicians proposed the introduction of specific legislative restrictions against their use. The practical weight of decisions like this is probably limited, since the local orders of the kind here at stake probably mostly serve political purposes. Unfortunately, in the absence of an actual prosecution of the use of stricter Islamic dress (like e.g. *nijab*³⁵) it is not possible to tell whether a case like that at hand can be considered as an example of a "justified reason" making exception to the general prohibition foreseen in the 1975 act.

Latvia

Legislative developments

Parliament votes to include sexual orientation as an express prohibited ground of differential treatment in the Labour Law

On 21 September 2006 Parliament voted to include in the non-discrimination provisions of the Labour Law express reference to sexual orientation as a prohibited ground for differential treatment. There were 46 votes "for", 35 "against", 3 abstentions and 9 MPs failing to take part in the vote. This was a repeat vote on the issue, after the President had, on 21 June 2006 vetoed the amendments to the Labour Law adopted on 15 June 2006 that did not include express reference to sexual orientation. The explanation provided by the President for using her veto powers was that the amendments as adopted did not comply with Latvia's EU obligations. Previously sexual orientation had been deemed to be covered by "other circumstances" in the open-ended list of prohibited grounds.



Legal Standing to NGOs extended to enable representation of interests of individuals

On 2 November 2006 amendments to the Law on Associations and Foundations were adopted. These amendments mean that organisations whose object is the protection of human and individual rights can, with the consent of the individual concerned, represent the interests of that individual before a court. These amendments entered into force on 23 November 2006.

Discrimination and Victimisation prohibited in the State Civil Service

On 2 November 2006 amendments were adopted to the Law on State Civil Service. They entered into force on 10 November 2006. The amendments provide that the general prohibition of discrimination and victimisation in the Labour Law also applies in the State Civil Service.

Case law

Appellate Court finds no discrimination on grounds of sexual orientation in access to employment

In August 2004 a former Lutheran minister Mr. Māris Sants who lost his position after he publicly admitted his homosexuality (an event which was widely publicised) responded to an advertisement for the position of teacher of history of religion. After his initial inquiry he was encouraged to submit his application, but when he later inquired about the progress of the application, he was informed that another person had already been engaged.



³⁵ A form of clothing which covers the whole body (ordinarily black) and leaves just the eyes visible. This form of dress is widespread in the gulf states

In April 2005 the first instance court³⁶ found that the submission of the school that the agreement with the successful candidate had been reached prior to Sants' application was contradicted by the facts, namely, the publication of the advertisement which showed that the school was continuing to look for suitable candidates and that in the circumstances when the candidate who was apparently more qualified was not even invited for an interview, direct discrimination based on sexual orientation in violation of Article 29 of the Labour Law had taken place. The school appealed to the Riga regional court.

On 8 June 2006 the Riga regional court accepted that the agreement with the successful candidate - who had found out about the vacancy from a different source - had already been reached and hence an employment contract with him concluded during the period between the submission of the advertisement for publication and its actual publication. Since the advertisement contained only information about the vacancy and was not an announcement of a competition, the director of the school did not have to evaluate the candidates in a comparative way, thus the person who had applied first and with whom an oral agreement had already been reached could be accepted even if the contract was concluded in writing only 3 weeks later. The fact that the claimant had a better education and greater experience was of no relevance in this case. Since the law does not prescribe the way in which a candidate has to be informed about the outcome of his application, the director had no obligation to inform him in writing about the outcome and the reasons for the rejection. Thus, no discrimination based on sexual orientation had taken place.

To the extent that it distinguishes advertisements for vacancies and announcements of competitions and considers that in the former case the candidates do not have to be evaluated in a comparative way the reasoning of the court opens the door to the possibility of discrimination in the vast majority of cases where a competition is not a legal requirement. In practice such announcements almost never mention that the person would be employed 'on a competitive basis'. The wording used by the respondent and the court, that during the initial inquiry on the telephone the claimant was informed that there already was another candidate ("*pretendents*" in Latvian) seems to indicate a contradiction in the reasoning of the respondent and the court – if the contract had already been concluded, the wording should have been different. The judgment has been appealed.

Lithuania

LT

Equality body decisions/opinions

Law on Citizenship violates the Principle of Equal Treatment

In July, 2006 D. K. approached the Equal Opportunities Ombudsman complaining about the actions of the Migration Department under the Ministry of the Interior of the Republic of Lithuania. His Lithuanian citizenship had been withdrawn, while the citizenship of the complainant's children and wife had not taken away when they gained Israeli citizenship. The complainant and his family were all born in Lithuania, the only difference being that the complainant was Jewish, while his wife was Lithuanian (ethnically Lithuanian).

Article 18 of the Law on Citizenship states that Citizenship of the Republic of Lithuania shall be lost upon acquisition of citizenship of another state, but that this provision shall not apply to a citizen of the Republic of Lithuania if he is a person of Lithuanian descent meaning those whose parent(s) or grandparent(s) are or were



³⁶ Case reported in EADLR Issue 2, page 67

Lithuanian and the person considers himself Lithuanian. Following Article 12 of the Law on Equal Treatment and Article 24 of the Law on Equal Opportunities the Ombudsman made a decision to recommend that the Committee on Legal Affairs and the Committee on Human Rights of the Seimas consider the possibility of amending the provisions of the Law on Citizenship which govern the loss of citizenship. The amendment should result in removing the unequal treatment of Lithuanian citizens of different ethnicity from the present regulation.

Article 18 of the Law on Citizenship and its objection to the Constitutional Principle of Equality has been a subject of national and international debate. The European Commission against Racism (ECRI) of the Council of Europe, The Commissioner for Human Rights A. Gil-Robles, the United Nations Committee on the Elimination of Racial Discrimination have all recommended that the Lithuanian Government ensure that the discriminatory provisions of the Law on Citizenship governing the loss of citizenship should not be used in a discriminatory way against Lithuanian citizens of different race, language, religion, or ethnic origin. Following the Ombudsman's decision, on 13 November 2006 the Constitutional Court decided that Article 18 of the Law on Citizenship is in conflict with the Constitution. Under the Constitution this law is no longer applicable from the day of the ruling of the Constitutional Court.



State examination of English language violates the Principle of Equal Treatment

An anonymous complaint was received in July 2006 by the Equal Opportunities Ombudsman's Office, alleging discrimination on the grounds of religion took place during the high school state examination of the English language. The written part of the examination consisted of two tasks: (1) writing of a formal letter in application for a job abroad and (2) writing of an informal letter to a friend living abroad (Taiwan). This imaginary friend, said to live in Taiwan, was interested in some Lithuanian celebrations, which were not national holidays in Taiwan – Halloween and Christmas Eve. Students were asked to write their imaginary friend a letter (140 – 160 words), explaining what kind of holidays were these and what they meant to each of them personally. The complainant claimed that, a part of the graduates faced difficulties completing the second (written) part of examination. While it was possible to write something about the holidays, it was very difficult for non-Christians to express what those holidays meant to them personally. One could not simply write a sentence like “the holidays do not mean anything to me”, if a person was a Muslim, Orthodox, Jewish) or was irreligious. Thus some pupils were forced to create an image in order to complete the task successfully. Meanwhile other pupils did not have to face this problem as they were Christians and the holiday really meant something special to them. The applicant concluded by stating that some of those writing the exam were discriminated against because they found the task more difficult than the others.

Following Article 12 of the Law on Equal Treatment and Article 24 of The Law on Equal Opportunities the Ombudsman decided, 1) To recommend that the National Examination Centre ensure equal conditions for persons regardless of their age, sexual orientation, disability, racial or ethnic origin, religion or belief during the graduation examinations. Additionally, the Centre recommended avoiding using topics concerning pupils' ethical (national) belonging, confession, identity, as they could be sensitive to vulnerable groups or cause different personal interpretations, and 2) To inform the Ministry of Education and Science about the results of the investigation.

Legislative developments

Parliament adopts two bills transposing Directives 2000/43 and 2000/78

A “package” including two anti-discrimination laws was adopted on 24 October 2006. It includes Bill No.5518 on private relations, including employment and Bill No.5583 on the public service. The two laws transpose Directives 2000/43 and 2000/78.³⁷

Luxembourg has been condemned twice for the non-transposition of the Directives by the European Court of Justice. The transposition process has been particularly long and difficult. A first attempt to transpose the two Directives in two separate bills, one on race and ethnic origin, and the other one for the other grounds in the employment field had failed, following formal opposition of the Council of State in December 2004. In response, a new single Bill No. 5518 was drafted by the administration. The Council of State gave its opinion on the single Bill No. 5518 and this time it formally opposed the differentiation in Bill No. 5518 between public service and private employers. On its first reading, Bill No.5518 transposing Directives 2000/43 and 2000/78 was passed by the Chamber of Deputies in July 2006. However, as the Council of State refused to exempt the Chamber from a second vote for not having included the public service in this bill a second vote was scheduled for 3 months later.

In the meantime, Bill No. 5583 transposing the two Directives for the public service had been drafted and the Council of State had given its opinion on this bill as well. Bill No. 5583 covers the grounds of race and ethnicity, age, sexual orientation, disability and religion but only in the field of employment.

The two bills were adopted together on 24 October 2006. Bill No.5583 on the public service transposes both Directives in the public service sector. Following the opinion of the Council of State, the transposition no longer involves the simultaneous transposition of Directive 2002/73 on the implementation of the principle of equal treatment for men and women in the public service. Bill No.5518 was slightly re-drafted in October 2006 to adapt it technically to the new Labour Code (which consolidated all individual employment laws). Bill No. 5518 now prohibits discrimination based on all the grounds under the two Directives, across the material scope of Directive 2000/43. In general the bills correctly transpose the two Directives and create a Centre for Equality of Treatment. The bills entered into force on publication in the official journal on 6 December 2006 <http://www.legilux.public.lu/leg/search/resultHighlight/index.php?linkId=3&SID=598f0153dfbb65319b325528ae3e987a>

³⁷ The Packages contains:

1. transposition of directive 2000/43;
 2. transposition of directive 2000/78;
 3. amendment to the Employment Code and introduction of a new title V on equal treatment in employment into the second book of the Code (Livre II);
 4. amendment to Articles 454 et 455 of the Criminal Code;
 5. amendment to the Law of 12 September 2003 on the Disabled
- Draft amendment to: 1. the Law of 16 April 1979 establishing the general status of State civil servants, as amended; 2. the Law of 24 December 1985 establishing the general status of territorial civil servants, as amended

Malta

Miscellaneous

Late news! Disabled children unable to take their medicines at school

On 18 January 2006 the National Commission for Persons with Disabilities (KNPD) filed a 'judicial protest'³⁸ against the Education Division of the government claiming that a number of state school students with disabilities are being discriminated against because they are not allowed to take their medicines.



In its judicial protest, the KNPD stated that it investigated complaints lodged by the parents of disabled children regarding the disorganised system in schools in terms of the administration of medicines during school hours to their disabled children. Discussions with the competent authorities were held to lay down a specific policy on this matter and a working group was set up within the Ministry for Education for this purpose.

Although a policy was drawn up, on the basis of the recommendations of the working group, the KNPD stated that it was not approved by the competent authorities and the policy was therefore never implemented. Consequently, a lot of hardship is being caused to disabled children and to their parents who have to go to the school daily to administer the necessary medication to their children. The KNPD also stated in the judicial protest that besides the effects of the failure of the competent authorities to provide the necessary medical remedies to disabled children and their families so as to ensure that these children receive the same level of education as children without disabilities who have access to the national minimum curriculum, such a failure constitutes discrimination against the disabled children.

The KNPD thus called upon the competent authorities to desist from such illegal and discriminatory behaviour and to act in accordance with the law by doing all that is required so as to provide all the necessary services in favour of such disabled children so that they may also follow the national minimum curriculum as other children do. It also held them responsible for all damage caused and which may be caused from such discriminatory behaviour.

Netherlands

Policy developments

Prohibition of the burqa

In October 2005 Mr. Wilders, Member of Parliament, requested the prohibition of the burqa³⁹ to secure public safety and to protect citizens in the light of the fight against terrorism. In December 2005 the motion was accepted by the Second Chamber. Due to the social sensitivity and the legal complexities of such a prohibition, the Minister of Immigration and Integration has consulted an independent committee of experts on the possibilities of carrying out this motion. The committee published its report in November 2006. The experts investigated four options: a) a general prohibition of Islamic face-covering veils; b) a specific prohibition in connection with place or function, exclusively against the Islamic face-covering veil; c) a general prohibition of all forms of clothing covering the face in public; d) specific prohibitions in connection with place or function of all forms of face-covering clothing.



³⁸ A judicial protest contains a brief description of the facts which led to its being filed and requests the recipient to honour its obligations.

³⁹ used in this context in the sense of the Islamic face-covering veil

In the committee's view, Islamic face-covering veils should be legally regarded as a religious expression. The freedom of religion is safeguarded by Article 6 of the Constitution and Article 9 of the European Convention on Human Rights (ECHR). General or specific prohibitions which are exclusively directed at Islamic face-covering veils are incompatible with these rights. It is discriminatory and incompatible with the equality norms laid down in Article 1 of the Constitution, Article 14 ECHR, Article 26 International Covenant on Civil and Political Rights (ICCPR) and the Dutch General Equal Treatment Act (GETA). Therefore, the Committee concludes that the first two options (a and b) should be dismissed.

As regards option c, the committee finds that such a general prohibition could in fact amount to indirect discrimination on the ground of religion or to a restriction of the freedom of religion. The committee admits that the freedom of religion can be subjected to restrictions when these are necessary on the ground of public order, safety and protection of the rights and freedoms of other civilians. However, the experts are not convinced that option c is proportionate and necessary to prevent alleged security risks. It points out that clothing requirements already exist in specific situations (option d), e.g. in the field of identification duty, unemployment benefits and dress codes of organisations (e.g. schools), which are permitted under the law. These will probably offer a sufficient solution to the problems that the Government wants to address.

In her letter of 28 November to Parliament, the Minister of Immigration and Integration (Verdonk) reported the official position of the government on the report. The Government agrees that options a and b are unlawful infringements of the freedom of religion and the principle of equality. It has though expressed its wish to regulate clothing covering the face in consideration of public order, safety and protection of civilians. The Government believes that the burqa obstructs the integration and emancipation of certain – Muslim – women and may cause trouble in relation to communication, state neutrality and criminal investigation. The Council of Ministers has therefore decided to prepare a bill to introduce a general prohibition of clothing covering the face in (semi) public areas. An inter-departmental working group will analyse existing legal possibilities and specific situations for which no such solution exists as yet.

- Kamerstukken II 2005-2006, 29 754, nr. 41.
- 'Overwegingen bij een boerka verbod. Zienswijze van de deskundigen inzake een verbod op gezichtsbedekkende kleding', The Hague 3 November 2006

See <http://www.justitie.nl/actueel/nieuwsberichten/archief-2006/nB-aanbieding-rapport-over-algemeen-verbod-gezichtsbedekkende-kleding.aspx?cp=34&cs=578>.

Report by Committee of experts on Article 1 of the Constitution

Article 1 of the Dutch Constitution reads as follows: All who are in the Netherlands, shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race, sex or on any other ground is prohibited. A Parliamentary motion to include 'disability' and 'chronic disease' in the list of covered grounds was accepted in 2001.⁴⁰ In 2004, the ETC advised the government to expand the list in Article 1 of the Constitution to all of the grounds that are covered by the General Equal Treatment Act, the Age Discrimination Act and the Disability Discrimination Act.⁴¹ In reaction to that the government commissioned an in-depth study

⁴⁰ "Motie Rouvoet," Tweede Kamer, 2001-2002, 28 000 XVI, nr. 63 06-12-2001 ["Motion Rouvoet,"] It is noted that in respect of 'disability and chronic disease' the discussion on an (explicit) expansion of Article 1 of the Constitution to include these grounds had already taken place during the Parliamentary debates on the AWGB. See the amendment handed in by Groenman which however did not receive sufficient Parliamentary support Tweede Kamer. 1992/1993, 22 014, nr. 15.

⁴¹ Cgb-advies 2004/03, 26/02/2004. [Advice of the ETC] All publications of the Commission can be found on its web site: www.cgb.nl

into this matter by experts in Constitutional law who published a report on 12 April 2006. It concludes that it is not necessary to expand the list of grounds in Article 1 of the Constitution since this provision has a direct horizontal effect for citizens and can be applied by judges also in cases of disability, age or the other grounds in the General Equal Treatment Act that are not covered in the list in Article 1 (e.g. marital status). The inclusion in the Constitution of such grounds does not offer additional protection against discrimination. In addition, the Commission remarks that there is a danger that by endlessly extending the non-discrimination grounds in the Constitution this will have an inflating effect in the sense that discrimination will no longer be seen as a very serious matter (restricted to serious grounds). The Minister has presented the report to Parliament and subscribes to the conclusions of the Commission.⁴²

http://www.minbzk.nl/grondwet_en/grondwet/grondrechten/persberichten/artikel_1_grondwet

Legislative developments

Amendment to the Disability Discrimination Act

In May 2006 three members of Parliament proposed an amendment to Article 5 of the Disability Discrimination Act (WGBH/CZ) to extend the scope to include all primary and secondary education. At present the WGBH/CZ only applies to employment relations and professional education. The political parties propose to amend the WGBH/CZ in such a way that in the future schools are not allowed to refuse pupils on the single ground of disability or chronic disease when it is proven that they are suitable to follow education and applicants can be reasonably accommodated. Schools do not have an obligation to accept any application, but can assess whether they have enough means (e.g. specially trained personnel) to offer good quality education to disabled pupils. The Dutch Equal Treatment Commission (ETC) will be given competence to give an opinion in the cases put before it. The members of parliament intend to decrease segregation in schooling by offering individual legal protection against discrimination. Parents can file a complaint with the ETC about alleged discrimination of their child by a school. The Council of State has already given advice on the amendment. On 15 September 2006, the parliamentarians concerned offered their comments to the chairman of parliament. The proposals have yet to be passed by a parliamentary majority.

Initiatiefwetsvoorstel (Kamerstukken II 2005/2006, 30 570, nrs. 1-3)

<http://www.overheid.nl/op/index.html>

Equality Body decisions/opinions

Discrimination in mortgage supply

According to Article 12§1 of the General Equal Treatment Act (GETA), the ETC may conduct an investigation on its own initiative. On the basis of signals that several mortgage financiers (mainly banks) were discriminating on the ground of national or ethnic origin, the ETC researched the policy of 9 finance institutions and produced a report, published in December 2006. The report concludes that the policy of the financiers is based on the (1) solvency of the applicant and (2) value of the property (the 'security'). As far as the security is concerned, equality is mainly at stake when policies are based on postcode or price of the property. 4 out of 9 financiers use the postcode as a selection criterion. As to selection on the basis of characteristics of the applicant, it appears to be more difficult to get a mortgage if he/she has neither Dutch nationality nor a permanent residence permit. The ETC found that this criterion was used by 7 out of 9 financiers. These conditions for acceptance constitute indirect discrimination on the ground of race/ethnic origin; on the one hand by excluding certain people from obtaining security below a certain

⁴² Tweede Kamer 2005-2006, 29 335 nr 28, dd. 1 May 2006

value in Amsterdam, Rotterdam, The Hague and Utrecht (cities with the highest density of non-western immigrants), on the other by excluding applicants with a fixed-term residence permit, regardless of their financial position and prospects. Although the policy goals – restricting financial risks of both mortgage financier and applicant – are legitimate, the generally formulated conditions are unnecessary. In the Netherlands there are approximately 335,000 residents with a fixed term residence; 98% of them receive a permanent permit in time. The ETC supports self-regulation by the sector, but has made some recommendations, e.g. a change of conditions so that an individual assessment of the circumstances and risks of each applicant with a fixed-term residence permit can take place.

This is a rare occasion that the ETC has used its power to conduct an investigation on its own initiative. The financiers have reacted positively to the investigation and the recommendations and have announced that they will adapt their policies in the near future.

http://www.cgb.nl/_media/downloadables/OUEB%20Risicoselectie.pdf

Indirect discrimination on the ground of religion: the refusal to shake hands with women and wearing the djellaba

The ETC has considered a case where the respondent, the local government of the city of Rotterdam rejected an applicant – who is Muslim – for the position of Customer Manager. According to the respondent in an official letter to the applicant, the reasons for this rejection were the applicant's Islamic dress style (*djellaba*) and his refusal to shake hands with women, which would obstruct applicant's functional relationship with customers.

In its opinion 2006-202 of 5 October 2006, the ETC held that the respondent's rejection of the applicant's Islamic dress style constituted direct discrimination on the ground of religion under Article 5 §1(d) of the GETA, which could not be justified under one of the justification clauses in the GETA. The ETC were of the opinion that not wanting to shake hands with women can be an expression of one's religious belief. Requesting employees to shake hands with all customers mainly affects Muslims, therefore, this can amount to indirect discrimination. In this case, although the respondent's purposes (customer-friendliness and prevention of discrimination on the ground of sex) were legitimate, the means used were neither necessary nor appropriate. The respondent could not prove that customers ever object to not being shaken hands with. Fear of intolerance was not a substantial reason for the rejection of the applicant on the ground of his refusal to shake hands with women. The respondent did not have a specific policy on how to treat customers and did not look for alternative ways of greeting customers. The respondent could not answer whether the applicant would not be rejected if he refused to shake hands with both women and men. Therefore, the ETC regarded the rejection as indirect discrimination, which was not objectively justified. In this case the ETC reaffirms earlier case law, in which it held that not shaking hands can be an expression of one's religion or belief.⁴³ The second issue in the case related to the Islamic style of dress for men and this was the first time this had been dealt with. The ETC held that rejection of an applicant on that ground constituted direct discrimination on the ground of religion. This decision is in line with its case law on Islamic headscarves.

<http://www.cgb.nl/opinion-full.php?id=453056479>

Homosexual dancing couples denied access to dancing competition

On 26 July 2006 the Chairman of the District Court in The Hague ruled in a procedure for urgent matters that the NADB (the Dutch General Federation for Dancing Sports) did not unlawfully exclude a homosexual couple from participation in national dancing contests. Earlier, the ETC had decided that exclusion of this couple was both

⁴³ See Issue 4 EADLR, page 74



direct discrimination on the ground of sex as well as direct discrimination on the ground of sexual orientation for which no (legally acceptable) justification existed.⁴⁴

The judge of the District Court agreed that this was indeed a case of direct sex discrimination. However, the judge accepted the reasoning of the NADB that this was justified under Article 2(2) of the General Equal Treatment Act which allows for 'gender specific requirements.' In the case of sports, one such requirement could be – according to a government decree – the fact that there is a relevant difference in physical strength between men and women. The claimants had not sufficiently proved that this was not the case. The claim that this (also) constituted direct discrimination on the ground of sexual orientation was not accepted by the District Court. The judge stated that it had not been proven that this was the case since the claimants had only stated that the requirement that a couple should consist of a man and a woman was based on a dominant heterosexual norm. However, as this argument was contested by the NADB, the judge did not think that the point had been proven sufficiently by the claimants. Homosexual persons can participate in dancing contests, provided that they are prepared to dance with a partner of the opposite sex. The District Court found that there had been no unlawful distinction on the ground of either sexual orientation or sex.

http://zoeken.rechtspraak.nl/zoeken/dtluitspraak.asp?searchtype=ljn&ljn=AY5005&u_ljn=AY5005



Church-related institute allowed to refuse re-admission of student who co-habits with girlfriend

On 20 July 2006 the ETC gave an opinion (2006-154) about a complaint by a former student of an institute providing education and training for religious spokesmen or leaders for a particular Christian Church. The student had already been at this institute for a year and wanted to spend some more time there to be able to take some exams. However, he had already expressed his feelings that he no longer fully subscribed to the beliefs and convictions of this Church. He wanted to live together with his girlfriend. The school refused (re)admission. The student complained that this was discrimination on the ground of marital status (prohibited under the GETA). The Institute held that this particular education falls outside the scope of the GETA. In Article 3 of the GETA it is stated that the law does not apply to "a) legal relations within churches and independent sections thereof and within other associations of a spiritual nature; b) the office of spiritual leader".

The ETC first examined whether this institute could be seen as an independent section of a church. This appeared to be the case since the institute was very closely related to the Church and was instrumental in obtaining the main goals of the Church. The ETC held that the requirement that students should not have sexual relationships outside marriage was considered of central importance for the internal affairs of this Church. The admission policy of the institute was closely linked to the religious identity of the Church and was applied equally to all students. Article 3 of the GETA is applicable and the case therefore falls outside the scope of the Equal Treatment Legislation. The ETC gave some clear guidelines on how Article 3 should be interpreted in this respect.

<http://www.cgb.nl/opinion-full.php?id=453056419>



Controversial court decision on refusal to admit pupil to Christian school

On 1 August 2006, the District Court in Utrecht decided that a Christian school for professional education is allowed to refuse admission to a student whose parent's ideas differ in some ways from (in the school's views) fundamental issues of moral behaviour. The school's admission policy involves parents filling in a questionnaire in which they declare that they do not have a television or open internet connection at home, that they use a certain translation of the Bible and that they respect the God-given natural order between men and women. The parents of the claimant

⁴⁴ See: ETC Case 2004/116 of 21 September 2004 <http://www.cgb.nl/oordelen.php>

had truthfully filled in this questionnaire, stating that they subscribed to all of the religious beliefs of the particular Christian churches to which the school was linked, but that they had some different opinions about the use of television or internet. It was known to the school board that the applicant's sister sometimes wears trousers. In the decision the judge did not refer at all to any relevant equal treatment legislation. The judge only stated that according to Article 23 of the Constitution, Christian schools are allowed to set their own criteria on admission of students. The criteria must be closely linked to the religious identity of the school and must be aimed at maintaining this religious identity. This Article of the Constitution is one of the key provisions that implement the fundamental right of religious freedom. As such it can be a ground for refusing pupils whose parents act against this identity.

http://zoeken.rechtspraak.nl/zoeken/dtluitspraak.asp?searchtype=ljn&ljn=AY5353&u_ljn=AY5353

Poland

PL

Case law

Supreme Court finds discrimination of disabled pupils involving transport to schools

In 2004 and 2005, Marek F., a disabled child, had to attend a special school, located 42 km from his home. On the basis of the Law on Education,⁴⁵ the Vogt of the Slawoborze Community had a duty to either arrange transport to the school, or to reimburse the cost of transport to his parents/guardians. However, the Vogt did not comply with its duty, nor did it refund transport costs. Consequently, the mother of the child had to take her son to school in her private car, despite having approached the Vogt several times. The mother filed a complaint against the inaction of the Vogt to the Voivodeship Administrative Court in Szczecin. On 19 April 2006 the Voivodeship Administrative Court returned a finding of inactivity of the Vogt and obliged it to examine the issue. The Vogt filed a cassation claim on the basis of this judgment which 1) questioned its duty to provide transport free of charge to the boy because the parents had not submitted a certificate on disability to it, 2) admitted that it offered a certain sum of money to the mother, who rejected it because it did not cover the actual cost of transport. Eventually the case was examined by the Supreme Administrative Court. In its judgment of 15 November 2006 (No. I OSK 1217/06), the Supreme Administrative Court dismissed the Vogt's cassation claim and found that there had been administrative inactivity.



The judgment is of crucial importance to parents/guardians of disabled children living in rural areas, where the distance to the nearest suitable school might be considerable. The sentence confirming the Vogt's duty to transport disabled children to school or to reimburse the actual costs of the transport, gives the parents a tool to assert their rights.

http://www.hfhrpol.waw.pl/precedens/artukul.php?precedens_artukul_id=215

Case of B.K. v "CZA-TA" Ltd.

In the last issue of the Review, we reported on the compensation claim for the unlawful termination of his employment contract on grounds of sexual orientation discrimination by B.K..⁴⁶ This claim was dismissed by the



⁴⁵ Article 17(3)(a), Law on Education (*Ustawa o systemie oświaty*) (Journal of Law of 2004 No. 256, item 2572 with later changes): every community (represented by the Vogt) has the duty to transport disabled pupils to schools free of charge and to provide protection during this time; in cases where parents or guardians transport a child, the costs of public transport (of a child and a guardian) should be reimbursed

⁴⁶ EADLR, Issue 4, page 76

District Court, which found that the claimant had not proved facts which would render it probable that discrimination on the ground of sexual orientation had occurred in his case.

The claimant's request for leave to appeal against the decision was dismissed on 12 January 2006 on procedure grounds. On the same day the claimant submitted a Constitutional complaint against the dismissal to the Constitutional Tribunal.

Portugal

Legislative developments

Law 46/2006 of 28 August 2006 prohibits and punishes discrimination based on disability and on aggravated risk to health

This new law complements existing Law 38/2004 of 18 August 2004 which sets out a legal system for prevention, rehabilitation and participation of people with disability. Article 1 (1) of the new law provides that "the objectives of this law are to prevent and forbid direct or indirect discrimination on grounds of any kind of disability and to sanction the practice of acts which violate fundamental rights, or the refusal or restriction of the exercise of any economic, social, cultural or other rights, by any persons on the basis of any kind of disability. The law is also applicable to the discrimination of persons with aggravated risk to their health and to the actions of all natural and legal persons, public or private. The law does not oppose the taking of positive action.

Article 4 states that "It is considered that discriminatory practice against disabled persons occurs through acts or omissions, with intention or negligence on grounds of disability violating the principle of equality. For instance: The refusal to provide or the impeding of the taking up of goods or services; impediment to or limitation of access to and normal exercise of an economic activity; impediment to or limitation of access to buildings and public premises; the adoption of measures which may limit the access to new technologies". Article 5 complements the articles in the Labour Code; the following constitute discriminatory practices against disabled persons: the adoption of procedures, measures or criteria directly by the employer or through the instructions given to workers or job centres, which may make the recruitment of employees and the termination of the work contract conditional upon factors of a physical, sensorial or mental nature. Also the production or publication of job advertisements or any other kind of publicity connected to the pre-selection or recruitment of workers which may, directly or indirectly contain any specification based on discriminatory factors on the basis of disability. The practice of discriminatory acts gives the disabled person the right to compensation for moral damages/injury to feelings. Furthermore, the law foresees a pecuniary sanction of between approx. 2.000,00 to 4.000,00 Euros. The application of this law will be monitored by SNRIPD the National Secretariat for the Rehabilitation and Integration of People with Disabilities). <http://redesolidaria.org.pt/noticias/leiad>
SNRIPD - <http://www.snripd.pt/interior.aspx?idCat=42>

Government Decree 163/2006 on accessibility for the disabled

On 8 August the government published Government Decree 163/2006 on a regime of accessibility to buildings and public premises, local roads and footpaths. This Decree sets out detailed rules based on the principles laid down in Law 38/2004 from 18 August 2004, which provided the general legal basis for deciding who is disabled and the rehabilitation and participation of people with disabilities. The social aim of this Decree is to integrate disabled

people into society to enable them to take an active part in society and lead a normal life. The environment created by the legislation should be barrier-free and adapted to fulfil the needs of all people equally. This Decree sets out the technical rules and measures to be taken into account in the public planning process. These rules need to be implemented in the design of open spaces and recreational areas, local roads and footpaths, the area outside any entry point to buildings, changes in building entrances and in the interiors of buildings. It also sets out the design requirements to access both new and existing constructions (public and private), and the minimum dimensions and materials, etc. It defines the problems encountered in existing constructions and recommends modifications. The Decree sets out the rules governing the issuing of authorisations and licences to open any premises to the public. For private buildings the competence lies with the municipalities (Town Halls) and for public entities the competence lies with Directorate General for National buildings and Edifices, a public body within the Ministry of the Environment, Land Use Planning and Regional Development.

Buildings constructed before 1997 are given 10 years to be adapted in line with the new rules; those constructed after 1997 are given 5 years. For new houses and apartments the Decree establishes a gradual period of 8 years for implementing the new requirements. Fines and disciplinary sanctions can be imposed by the municipalities and by DGEMN for non-compliance: for summary administrative offences, fines may range from between 250 and 3.740,98 Euros for natural persons and between 500 and 44.891,81 Euros for legal persons. Legal entities (NGO's and associations) representing disabled people's interests have legal standing in Court to take any action in order to ensure respect for the accessibility rules. http://www.escadafacil.pt/catalogos/DL_163_2006.pdf

Policy development

Prime Minister announces disability-specific measures for the period 2007-2009

The Plan of Action for the Integration of People with Disabilities or those who are incapacitated foresees 95 measures and will be implemented between 2007-2009. This plan sets out measures and actions which form a policy that is integrated and cross-sectoral aiming to promote the rehabilitation, integration and participation of people with disabilities in society. The three elements of the plan approved by the Council of Ministers on the 30 August 2006 are: access to employment and education, education, job qualifications and reasonable living conditions for people with disabilities.



"We are already preparing a training plan for local government officials in order that when the law enters into force in February 2007⁴⁷ they already have guidance and therefore no norms of accessibility will be violated", explained the Secretary of State responsible for Rehabilitation. Programmes in sign language, 400 training courses in companies and the application of the programme 'New Opportunities', aimed at the integration of people with disabilities are foreseen. In 2009, the government also wants to reach those students who are blind or have impaired vision by offering school manuals and books of extensive reading in digital format. The restructure of special education schools into centres of resources, creating 25 new ones is also foreseen.

As regards the creation of employment, the target is training and providing people with qualifications. "We want to include around 800 persons in pilot-projects in professional training centres up to 2008 to facilitate the return to work, and we are going to create centres of recognition, validation and certification of competences for people with disabilities." The government wants to create 4 new training centres to guarantee the entrance of the disabled into the labour market. Another objective of this plan is a 30 % increase in social housing with the

⁴⁷ Law 46/2006 of 28 August 2006 which punishes and prohibits discrimination based on disability and on aggravated risk to health discussed above

creation of residences where the people with disabilities will have autonomy. "Our commitment is to create 20 autonomous residences before 2009, as well as to create more 555 places in homes". The governmental commitment is also to create six centres before 2008 that should offer a preferential service to the disabled who do not possess qualifications obtained by those who have completed the 3º cycle of schooling. These people number around 200.000 persons between the age of 15 and 59 years, according to the Census of 2001.

The Prime Minister said that to have equality, "positive discrimination" is necessary and he also assumed "the political responsibility" of the State of leading this integration of people with this disability policy. Alongside the presentation of the Plan, the Minister of Labour and Social Solidarity guaranteed that the concession of fiscal benefits to the disabled will be kept next year, which will benefit persons on a low income according to the proposal approved by members of the Parliament.

www.portugal.gov.pt/Portal/PT/Governos/Governos_Constitucionais/GC17/Ministerios/MTSS/Comunicacao/Programas_e_Dossiers/20060201_MTSS_Prog_PAIPDI.htm

Case law

Violence against a transsexual

13 minors (under the age of 15) were accused by the public prosecutor of the attempted murder in Oporto, the second biggest Portuguese city, of a Brazilian transsexual immigrant of 46 years of age (known as "Gisberta") for homophobic reasons. They were also charged with grievous bodily harm, 'attempted profanation of corpses' and omission to help a person in danger. The young people were accused of causing the death of Gisberta, who was found, drowned after having been subjected to several types of physical violence. The Prosecution considered that the motive for this murder was the sexual orientation of the victim.

The Tribunal found that there had been no intentional killing and that Gisberta died from drowning and not as a result of the ill-treatment the minors inflicted on her prior to the drowning. The Tribunal did not consider whether the sexual orientation of Gisberta or even her nationality were motives behind the killing. It condemned the minors as follows: 6 of them were found guilty of grievous bodily harm and 'attempted profanation of corpses' and sentenced to 13 months internment in an educational institution; 5 were condemned for grievous bodily harm and sentenced to 12 months internment in an educational institution; 2 were condemned for omitting to help a person in danger and sentenced to 12 months of probation with tutorial attendance.

Almost all were from care homes and had learning difficulties. Under the law minors under the age of 16 years of age cannot be judged in common Courts and sent to prison. Another minor of 16 years of age is to be judged in another lawsuit. An appeal has been lodged both by the lawyer of the victim that considered the penalties too light. An appeal has been filed with the Tribunal da Relação do Porto asking for a reduction of the sentence of one of the minors condemned to 13 months custody as he has already served six months. The minor is living with his parents until the appeal is decided by the Tribunal.

See also : http://www.ilga.org/news_results.asp?LanguageID=1&FileCategory=6&ZoneID=4&FileID=823 (in English)

And <http://www.correiomanha.pt/noticia.asp?id=210165&idselect=10&idCanal=10&p=200> (In Portuguese)

Convictions for racially motivated murder, Criminal Court of Fundão

Issue 1 EADLR reported on a decision of the Criminal Court of Fundão which found the accused guilty of a racially motivated murder and sentenced him to 22 years in prison. The accused appealed. On appeal the court was of the opinion that there was not enough evidence to prove that the murder was racially motivated. The



sentences were reduced as follows: The moral author's sentence was reduced from 22 to 19 years. The sentences of the two hired Brazilian citizens who committed the crime were reduced from 22 to 20 years. The appeals were then lodged before the Supreme Court of Justice and the Constitutional Court but the sentences were maintained.

Slovakia

SK

Case law

First decision of the Slovak court applying the Anti-discrimination Act of 20 May 2004 which transposed the Directives into Slovakian law

In April 2005 three Roma activists from the NGO Nova Cesta (New Way) based in Michalovce, together with an activist from the NGO Poradňa pre občianske a ľudské práva (the Centre for Civil and Human Rights) based in Košice visited a local bar in Michalovce known for its hostile behaviour towards Roma customers. The group of activists decided to test the local bar in their policies towards customers of Roma ethnic origin. The three Roma activists were refused access to the bar as they were not able to prove "club membership" (they were not in possession of "club cards"). The white activists from Poradňa who followed them a few minutes later had no problem entering the bar. The activists made an audio recording of the communication between themselves and the bar personnel. Therefore there was no doubt that the incident happened. The Roma activists lodged a petition with the Michalovce District Court against the owner of the bar for the bar policy and for the actions of his employees. They claimed discriminatory treatment on the ground of their ethnicity and requested that the owner of the bar be ordered to issue a written apology and to pay financial compensation. As evidence they submitted the record of the incident. The defendant did not deny that the incident happened however he argued that he does not discriminate Roma people as he usually serves them in his bar. He supported his statement by several Roma witnesses who were heard by the court.



On 31 August 2006 the Michalovce District Court decided partially in favour of the applicants. It ordered the owner to issue a written apology for discriminating against the applicants. However the court failed to state on what ground discrimination occurred. The Court did not accept the applicant's arguments that they were discriminated against on the ground of their ethnicity. According to the Court's reasoning the bar owner was successful in proving that he serves Roma guests in his bar and therefore in generally establishing that he does not discriminate against them. Apparently however, the court failed to apply the shifting of the burden of proof. The Court did not grant the applicant's claim for financial compensation. The reason for the denial was that, in the Court's opinion, the use of situation testing could not cause any harm to the applicants as application of this methodology meant that they would have expected discriminatory treatment of the bar personnel. The judgment has been appealed.



Case law

Controversial court decision on separation of sexes in school classrooms

The Supreme Court has stated that it is not discriminatory to educate boys and girls separately. The trade union UGT brought a legal action against three “Fomento” schools (in Asturias), linked to Opus Dei, as they are fee-paying schools subsidised by public funds by virtue of agreements with the regional education authorities but which educate boys and girls in separate classrooms. The trade union argued that the sexes should not be educated separately and that any private schools doing so should not be able to receive public funding. In setting the rules for the admission of pupils to public and private schools, Organic Law 2/2006 on Education (LOE) provides that “Under no circumstances shall there be discrimination on the grounds of birth, race, sex, religion, opinion or any other personal or social condition or circumstance” (Article 84). But LOE makes no express reference to agreements with schools who teach the sexes in different classrooms.

In its ruling from 21 June 2006 (case reference 3356/2000), the Supreme Court states that separate-sex education in the private sphere is lawful, and adds that “nor is there any express provision barring public support for schools offering such education.” The ruling recalls that the International Convention against Discrimination in Education states that “separate education systems ... shall not be deemed to constitute discrimination,” and notes that “mixed education is one means, but not the only one, of promoting the elimination of sexual inequality,” and so its interpretation is that “international legislation leaves the issue open.” The court also mentions the arguments of the previous ruling of the National High Court, according to which “the mere fact that education is given solely to boys or to girls is not in itself discriminatory on the ground of sex, provided that the parents or guardians can choose, in a context of free education, between schools in a certain area.” The Supreme Court adopts the position of the State Legal Service, according to which “the fact that the compulsory education given in public schools is mixed does not mean that it must be mixed in all schools.” “This is an option that cannot be imposed, particularly as the Constitution enshrines a parent’s right to choose the form of education that they wish for their children and guarantees freedom of establishment for schools and protects the right of private schools to define their own constitution.” UGT are considering filing an appeal with the Constitutional Court. “We consider that schools opting for segregation; separating boys and girls, should not be state-supported. This has to do not with the freedom to establish schools but with the free nature of education.”

There is no data on the number of schools that separate pupils in their classrooms by sex. Of the 22,706 schools in Spain (in the academic year 2005-2006), it is estimated that between 120 and 150 separate their pupils by sex (according to the Spanish Confederation of Schools and Colleges), and that 80% of these are state-subsidised private schools and the rest are non-subsidised private schools. Most of them are linked to the Catholic Church (and especially to Opus Dei).

<http://www.poderjudicial.es/jurisprudencia/> (forthcoming)

Sweden

SE

Case law

Supreme Court judgment in case T 400_06, The State v. Lönn and Midander

Uppsala University reserved ten percent of the places on their Law Programme for applicants 'with both parents foreign born'. Such university 'alternative selection criteria' for ten percent of the places were admitted through secondary legislation introduced in January 2003, in order to enhance pluralism (mångfald).⁴⁸ The claimants argued that the selection criteria were discriminatory under the 2001 Student at Universities Act, which prohibits direct discrimination and does not give express scope for preferential treatment. The practice was tried against the exception rule under the ban on direct discrimination in Section 7 Student at Universities Act which provides 'the prohibition does not apply if the treatment is justified taking into account a special interest that is manifestly more important than the interest of preventing discrimination at the university'.

The case found its way all the way up to the Supreme Court. In its ruling of 21 December 2006 the Supreme Court found – and in doing so upheld the findings of the previous Appeal Court Svea Hovrätt and the District Court Uppsala (tingsrätt) – the University's practice to be contrary to the ban on direct discrimination contained in the 2001 Student at Universities Act. The general exception contained in Section 7 of the Student at Universities Act did not, according to the Supreme Court, cover 'strong' positive action, i.e. giving preference to somebody with inferior merits. The Court decided that as the practice at issue was considered by it to be incompatible with domestic legislation, 'there was no need to test the practice in relation to Community Law'. (The Uppsala District Court, at first instance, had earlier argued along the lines of the European Court of Justice's case law relating to the Equal Treatment Directive, it having found that positive action was not permissible when there was a clear difference in merits). The claimants, two women applicants with higher marks in their leaving certificates who would otherwise have been admitted into the Law Programme at Uppsala University, were awarded damages for the violation caused of 75 000 SEK (approx. 8,330 Euro) each.

<http://www.hogstodomstolen.se/2006/2006-12-21%20T%20400-06%20Dom.pdf>

United Kingdom

UK

Political development

Discrimination cases stir up debate about the wearing of religious symbols in the UK

In October 2006, Jack Straw a senior minister in the UK government expressed concern that the wearing of veils over the face (known as a *niqab*) by some Muslim women represented a rejection of integration within the mainstream of society and contributed to the 'separateness' of Muslims by preventing face-to-face contact and the development of mutual trust. This gave rise to a considerable public debate. Some Muslim groups and human rights NGOs have criticised the Minister for making 'irresponsible' comments that have contributed to stirring up anti-Islamic feeling. There have been media reports of several Muslim women having had their face coverings or headscarves torn off in the street. Other commentators, including author Salman Rushdie, have praised the Minister's comments and have suggested that he was correct to raise this issue.



⁴⁸ Sections. 10 and 16c Ch. 7 in the (1993:100) Higher Education Ordinance

Trevor Phillips, Chair of the new Commission for Equality and Human Rights stated that while it was valid to have a debate on the issue, the constant focus on the veil and the 'separateness' of the Muslim community could cause alienation and increase social tensions. Leading UK politicians, including the Prime Minister have largely supported Straw's comments. None of the mainstream UK political parties or any significant political figure has called for new laws to be introduced to prohibit the wearing of face veils or any other form of religious symbol, although some newspaper commentators in the right-wing press have called for such laws. It should be noted that Jack Straw's comments did not question the wearing of Islamic headscarves, Sikh turbans and other religious symbols that are common and widely-accepted in the UK. Two cases that are linked with this issue have attracted widespread media interest as a result of Mr Straw's comments. They are reported below under the heading 'case law'.

Legislative developments

Extension of protection against discrimination on the grounds of sexual orientation to the provision of goods and services, housing, the performance of public functions and education.

In Part 3 of the Equality Act 2006, the UK government was given the power to introduce regulations prohibiting discrimination on the grounds of sexual orientation. It has now issued the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006, which have been approved by Parliament and came into force on 1 January 2007. An attempt to annul these Regulations on the basis that they infringed the freedom of religious believers to choose not to accept homosexual behaviour was defeated in the House of Lords on 10 January 2007. The contents of the equivalent regulations for Britain are still been decided. However, media reports suggested that there was substantial disagreement between ministers as to whether adoption agencies, charities and other organisations with links to faith groups that disapprove of homosexual behaviour but also received state funds should enjoy special exemptions. The Catholic Church in particular expressed strong opposition to the ban on sexual orientation discrimination being extended to Catholic adoption agencies.

The Northern Irish Regulations prohibit direct and indirect discrimination on the grounds of sexual orientation, and also prohibit victimisation. This applies to the provision of goods and services, housing and accommodation, education and the performance of public functions. Exceptions exist for small dwellings and for very small clubs. More importantly, wide exceptions are made to accommodate charities or organisations with a particular religious or belief ethos that is hostile to homosexuality, which permit these groups to discriminate on the grounds of sexual orientation in access to premises, the provision of services and membership, but only where the main purpose of the organisation is not commercial or educational. The equivalent British legislation will probably contain similar provisions. However, these exemptions do not permit state-funded adoption agencies and other charities to discriminate against persons wishing to access their publicly-funded services. This issue created considerable controversy and has generated a very high level of public debate.

<http://www.opsi.gov.uk/sr/sr2006/20060439.htm>

Late news! On the 29 January 2007, Prime Minister Tony Blair confirmed that there would be no special exemptions from discrimination on the grounds of sexual orientation for faith-based adoption agencies offering publicly-funded services from the regulations for Great Britain, when they are introduced. The text of the Regulations is being prepared, and is expected to be laid before Parliament soon.

UK age discrimination regulations enter into force

The Employment Equality (Age) Regulations 2006 and equivalent legislation in Northern Ireland, which implement Directive 2000/78's provisions on age discrimination entered into force on 1 October 2006. Many age-related rules or practices in occupational pension schemes are exempted, and these are defined in a complex set



of provisions in Schedule 2, parts 2 and 3. Concern had been expressed by employers and the pensions industry that the original regulations were unclear and uncertain. As a consequence, the government delayed implementation of these provisions until 1 December 2006 (the final deadline allowed under the Directive) and it revised its initial draft regulations several times in this difficult and complex area to take into account the views of employers and the pensions industry.

In *R v Secretary of State for Trade and Industry, ex p. Heyday*, Heyday, a coalition of age equality NGOs, has sought judicial review of the Regulations on the basis that they permit an employer to have a mandatory retirement age for employees after they reach 65: Heyday is arguing that this retirement age cannot be objectively justified under Directive 2000/78, and that employers should be required to justify requiring employees to retire at 65. The matter has been referred by the English High Court to the European Court of Justice for resolution.

The discussion about the pension regulations has exposed some uncertainty about whether Article 6(2) of Directive 2000/78 exempts the use of age distinctions in paying out pension benefits (as distinct from acquiring pension rights), which is reflected in some unclear provisions in the Regulations. The Heyday challenge to the retention of retirement ages has resulted in a reference to the ECJ, which will decide whether such retirement ages are compatible with the Directive. There may also be a challenge to the provisions in the Regulations that classify the use of age distinctions in the UK's minimum wage scheme as automatically justified.

<http://www.opsi.gov.uk/si/si2006/20061031.htm>

<http://www.ageconcern.org.uk/AgeConcern/7AD13808425C4F8BAF86F43858CD0771.asp>

New disability discrimination laws in higher education enter in force

New provisions of the Disability Discrimination Act 1995 (the "DDA") as amended by the Disability Discrimination Act 1995 (Amendment) (Further and Higher Education) Regulations 2006 affecting the post-16 education sector came into force on 1 September 2006. Providers of certain forms of further and higher level education can no longer justify the failure to make reasonable adjustments, as had previously been the case. Harassment and direct discrimination have been also been made unlawful. The regulations aim to implement the anti-discrimination requirements of Directive 2000/78 in respect of vocational education and training. These changes have led to the Disability Rights Commission preparing a revised Code of Practice on Part 4 of the DDA for post-16 education ("the revised code"), which provides guidance on the interpretation of the new duties. The final text of this is awaiting approval by Parliament. Similar measures were introduced in Northern Ireland on 1 September 2006 by the Special Educational Needs and Disability (Northern Ireland) Order 2005 (Amendment) (Further and Higher Education) Regulations (Northern Ireland) 2006.



New disability discrimination duties for public authorities enter into force

From December 2006, public authorities are prohibited from discriminating unjustifiably on the grounds of disability when carrying out their public functions and are subject to reasonable adjustment requirements, as well as being subject to a new positive duty to promote equality of opportunity for disabled persons. Similar legislation is being introduced in Northern Ireland.

http://www.drc.org.uk/the_law/legislation__codes__regulation/future_development.aspx



Case law

Azmi v Kirklees Metropolitan Council (Employment Tribunal 1801450/06), 19 October 2006

A Muslim primary school teacher in Yorkshire was suspended for wearing the full *niqab*, including a face-veil, when teaching pupils English. The school argued that it was justified in doing this because the children, many of



whom did not speak English as a first language, were having great difficulty in understanding the teacher when she spoke through her face-veil. The teacher argued that she had been subject to direct and indirect discrimination, and had also been victimised for bringing the complaint. The tribunal held that she had not been subject to direct discrimination on the grounds of her religion, contrary to Regulation 3 of the Employment Equality (Religion or Belief) Regulations 2003, as the suspension was not on the grounds of her Islamic faith, but rather due to her decision to wear the face-veil: a non-Muslim woman who chose to wear a face covering would also in any case have been treated the same way. The tribunal considered that discrimination on the basis of wearing a religious symbol such as the niqab that was closely linked to one particular faith, could constitute indirect religious discrimination, but held that the school's action was justified in the circumstances on the grounds of educational necessity and the best interests of the pupils. However, the teacher was awarded £1,000 damages for victimisation, as the school had failed to follow proper procedures after she had made her complaint of discrimination. The claimant has announced that she will appeal to the Employment Appeals Tribunal.

Discrimination for non-membership of a Masonic Order constitutes discrimination on the grounds of religion or belief



In the case of *Gibson v Police Authority of Northern Ireland* of 24 May 2006, [2006] NIFET 00406_00 (??) a reserve police constable brought a complaint of religious discrimination to the Fair Employment Tribunal, with the legal assistance of the Equality Commission for Northern Ireland, about a decision to transfer him out of the Motor Transport Depot of the Royal Ulster Constabulary (the then Northern Irish police service) in 1999. Mr. Gibson alleged that he had been treated less favourably on the grounds of belief by being transferred out of the Depot. He was better trained than another constable who was retained in the Depot, but this other constable was a member of the Masonic Order, as was at least one other person involved in the selection process. The Masonic Order is linked to Freemasonry, and Masonic Orders have traditionally had a considerable degree of influence within police forces throughout the UK. Mr Gibson alleged that he had been discriminated against on the basis that he did not belong to the Masonic Order, and membership of this Order was a religious belief for the purposes of the Fair Employment and Treatment (Northern Ireland) Order 1998, which prohibits religious discrimination in employment.

The Employment Tribunal held that the claimant had been discriminated against on the basis of his lack of membership of the Masonic Order. It also held that this type of discrimination could constitute discrimination on the grounds of religion or belief, as membership of the Masonic Order was linked to a commitment to particular kinds of belief.

http://www.bailii.org/cgi-bin/markup.cgi?doc=/nie/cases/NIFET/2006/00406_00.html

Aziz v CPS [2006] EWCA Civ 1136



A solicitor employed by the Crown Prosecution Service (CPS) since 1991 was at Bradford Magistrates' Court in September 2001 and a security guard joked that she was a risk to security. She joked back that she was a friend of Osama Bin Laden and went on to describe her disgust at the 9/11 attacks but also to criticise the USA. Her remarks were overheard by some men who were in court for public order offences arising from racial disturbances in Bradford and this caused some additional disturbance. This was reported to her employer, the CPS, and resulted in her suspension. However, she was cleared of gross misconduct and she brought an employment tribunal claim that the treatment she had suffered constituted unfavourable treatment on grounds of race. On 31 July 2006, the Court of Appeal ruled in her favour, considering that the CPS's failure to conduct the disciplinary proceedings properly by failing to inform Ms Aziz that she was entitled to be represented and also

failing to carry out appropriate enquiries entitled the Court to infer the existence of racial discrimination.
<http://www.bailii.org/ew/cases/EWCA/Civ/2006/1136.html>

Preliminary Reference on disability discrimination

Official Journal: 30.09.2006/C 237/6

A reference has been made to the Court of Justice from an Employment Tribunal (London South) in Case C-303/06 *S. Coleman v Attridge Law, Steve Law* of 10 July 2006.

For the questions referred please see the section of this Review dealing with the updates on the case law of the European Court of Justice.⁴⁹

Late News!

R (on the application of X) v Headteachers and Governors of School [2007] EWHC 298 (Admin)

In a decision of the High Court of Justice (Queens Bench Division) of 21 February 2007, a 12-year-old schoolgirl was prohibited from wearing an Islamic *niqab* at her school, on the basis that it violated the school's new uniform policy and because teachers believed it would make communication and learning difficult. The girl's three older sisters had attended the same school and had worn the *niqab* with no problems. About 120 of the school's 1,300-plus pupils are Muslims. About half of them wear the hijab headscarf, which is permitted. Mr Justice Silber stressed that he was dealing with one particular case, not the wider issue of whether the *niqab* should be worn in schools or elsewhere. He held that there had been no violation of Article 9 of the ECHR, as the girl could have gone to an alternative school that permitted the wearing of the *niqab*, and in any case, the ban was proportionate due to the following factors: 1) the veil prevented teachers from seeing facial expressions, which was a key element in effective classroom interaction; 2) the need to enforce a school uniform policy, under which girls of different faiths would have a sense of equality and identity; 3) the need to maintain security, as the head teacher had said an unwelcome visitor could move around the school under a face-veil; and 4) the need to avoid peer pressure on Muslim girls to take up wearing the veil. He also held that the fact that her sisters had all worn the *niqab* did not create a legitimate expectation that she could also wear this garment, as the school policy had changed recently. After recent intense political and media controversy about the wearing of face-veils by some Muslim women, this decision will probably generate further controversy, and an appeal may be made.
<http://www.bailii.org/ew/cases/EWHC/Admin/2007/298.html>

Miscellaneous

Media controversy shapes decisions on equality issues

A female British Airways (BA) employee was told that she could not visibly wear her cross while working in uniform at a check-in counter, on the basis that BA's uniform policy stated that such items could be worn only if concealed underneath the uniform. Other types of religious symbols, such as headscarves and turbans, could be worn openly, as they could not be concealed under clothing. BA offered her a non-uniformed post where she would be able to openly wear her cross but she refused. After failing in an internal appeal against the decision, she threatened to bring the matter to an employment tribunal. However, after criticism from church leaders and the media for adopting such a policy, BA reversed its policy and from 1 February 2007 it will permit the wearing of crosses and similar symbols in addition to more obvious religious symbols such as the turban and headscarf.
<http://news.bbc.co.uk/1/hi/uk/6280311.stm>

⁴⁹ See page 51. For further information on the issue involved in this case, see the article by Lisa Waddington on disability discrimination by association at page 13



