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European Anti-Discrimination Law Review



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Articles on the discrimination directives, the independence of Equality Bodies and the European Network of Legal Experts | ECJ and ECHR 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

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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

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*“We now need to ensure that these obligations
are made effective in practice”*

Preface

I am delighted to introduce this first edition of the new Review. The European Union is now an established leader in the fight against discrimination on the basis of age, race and ethnic origin, religion, sexual orientation, and disability.

It has established among the most progressive set of legal obligations prohibiting discrimination on these grounds in the world, set out in the Race and Framework Employment Directives (Directives 2000/43/EC and 2000/78/EC).

We now need to ensure that these obligations are made effective in practice.

The European Commission sees this task as among its highest priorities. To this end, it has established a Network of Independent Legal Experts to provide it with independent information and advice on the implementation and application of the two anti-discrimination directives.

This Publication is one of the products of the Network. It is rich in its content, covering legal developments regarding the Directives over the past six months at the Community level and in the Member States.

The Publication will be of particular interest to national policy makers, legal practitioners and NGOs in alerting them to developments in other Member States.

I want to congratulate the Editorial Board on this first edition, and I look forward to future editions.

Odile Quintin

*Director-General, Employment, Social Affairs and Equal Opportunities DG
European Commission*



Introduction

This is the first issue of the bi-annual European Anti-discrimination Law Review, prepared by the European Network of Legal Experts in the non-discrimination field, covering the grounds of racial or ethnic origin, age, disability, religion or belief and sexual orientation. The object of the Review is to provide an overview of developments in European anti-discrimination law and policies and their implementation in the EU Member States in the six months prior to publication, and to contribute to the debate around anti-discrimination law and policy through articles written by members of the Network. The information contained in this issue reflects, as far as possible, the state of affairs on 15 January 2005.

Each issue of the Review will include three short articles which provide commentary on topical issues in European anti-discrimination law, an update on European Policy and Legislation, an overview of pertinent recent case law of the European Court of Justice and the European Court of Human Rights, and news from the EU Member States on the implementation of the Racial Equal Treatment Directive (2000/43/EC) and Employment Equal Treatment Directive (2000/78/EC).

In this first issue, Project Director Piet Leunis and Deputy Project Director Jan Niessen introduce the European Network of Legal Experts in the non-discrimination field and its work. In a second short article, Professor Christopher McCrudden, member of the Network's Scientific Board, reflects on the interpretation of the Directives and conceptual options for European anti-discrimination policy. Finally in the third article, Jan Niessen and Janet Cormack consider the independence of specialised equality bodies, as required by the Racial Equal Treatment Directive, drawing on the recommendations of the Council of Europe's European Commission against Racism and Intolerance (ECRI) and the UN Paris Principles on the status, powers and functioning of national human rights institutions.

This first review comes at a time when the European Commission is, on the one hand, in the midst of checking national laws designed to implement the Racial Equal Treatment Directive (2000/43/EC) and Employment Equal Treatment Directive (2000/78/EC) with a view to enforcing them, where necessary, by initiating infringements procedures before the European Court of Justice against Member States, and, on the other, is considering options for the future of EU anti-discrimination policy. At national level, the last of the EU Member States are adopting legislation to transpose the Directives, and cases invoking anti-discrimination laws are beginning to be heard by the courts, with the first few requests for preliminary rulings being registered with the European Court of Justice. Details of all of these are included in the sections that follow.

Meet ordinary people in this Review, facing discrimination

An Introduction to the European Network of Legal Experts in the non-discrimination field

Jan Niessen and Piet Leunis

The European Network of Legal Experts in the non-discrimination field was established in 2004 on the initiative of the European Commission, in the framework of the Community Action Programme to combat discrimination (2001-2006), in order to provide the Commission with independent advice on all the grounds of discrimination covered by Directive 2000/43/EC and Directive 2000/78/EC.

The network, composed of some thirty anti-discrimination experts from across the European Union, will notably produce reports on developments in the Member States, thematic reports on cross-cutting issues and a bi-annual bulletin. This article briefly describes its origin, mandate and activities.

Background

Combating all forms of discrimination and promoting equality require a broad spectrum of instruments to be applied at various levels with the active involvement of many stakeholders. Over the last ten years, many approaches have been adopted, including legal measures, action programmes and campaigns, targeting specific vulnerable groups and covering different spheres of public and private life. Increasingly, these instruments are being developed and put into practice in a dynamic interplay between local, national and European levels. In some instances governmental actors have taken the initiative and the lead; in others, it has been the non-governmental actors who have called for action and shown how to put words into deeds. Characteristically, these activities have been responses to blatant expressions or persistent patterns of direct and indirect discrimination. They reflect a drive for greater equality and a growing awareness and rejection of new or hidden forms of discrimination. Council Directive 2000/43/EC 'Implementing the principle of equal treatment between persons irrespective of racial or ethnic origin' (hereafter, the Racial Equal Treatment Directive) and Council Directive 2000/78/EC 'Establishing a general framework for equal treatment in employment and occupation' (hereafter, the Employment Equal Treatment Directive) are landmarks in the development of European anti-discrimination law.

Monitoring transposition

Soon after the adoption of the two Directives, the European Commission intensified its co-operation in this area with the then fifteen Member States. It established three networks of independent experts with a view to facilitating the swift and effective transposition of the Directives. Delayed and insufficient transposition may well have a negative impact on the Directives' implementation. Of course, delays and inadequate transposition may be the result of several causes. Sometimes, delays and inadequate transposition result from a Member State's government's refusal to act, but more often these problems are due to domestic legal and administrative problems and, in particular, problems of understanding the often complex legislative texts. Given that the anti-discrimination Directives were adopted in record time and that for many Member States they contained new legal concepts, transposition problems were always likely to arise.

The three networks, one of which dealt with race, ethnicity, religion and belief, one with disability and one with sexual orientation, provided the Commission with independent information and legal advice, thus assisting with

transposition. (It turned out to be impossible to set up a similar network on age discrimination.) Country reports were produced which compared national law with the requirements of the Directives, providing the Commission with information in order for it to establish whether transposition had taken place correctly and on time.¹ For candidate countries similar country reports were prepared and used as background information in the final stages of accession.² In addition, thematic reports were prepared on the law in Europe on religious symbols, on reasonable accommodation, on the definition of disability, on health and safety regulations, on discriminatory partner benefits and on harassment.³

In 2004, the three ground-specific networks were disbanded and in their place a single network covering all 25 Member States and all five discrimination grounds of the Directives was established. The Network is managed by human european consultancy in partnership with the Migration Policy Group and supervised by a Scientific Board of Directors and ground co-ordinators for each discrimination ground. These persons also make up the editorial board of this Review. For each Member State there is a national expert whose responsibility it is to report on all five grounds of discrimination. Other experts are invited to work with the network on particular issues. The network also responds to particular requests of the European Commission (for example, to contribute to the writing of the annual report on anti-discrimination).

¹ Summary reports can be downloaded from the Publication list on http://www.europa.eu.int/comm/employment_social/fundamental_rights/public/pubst_en.htm. The printed version of the racial or ethnic origin summary reports and the religion or belief summary reports can be found in Isabelle Chopin, Janet Cormack and Jan Niessen (eds.), "The implementation of European anti-discrimination legislation: work in progress" (Brussels, 2004).

² See, Mark Bell, Isabelle Chopin, Aart Hendriks and Jan Niessen (eds.), "Equality, Diversity and Enlargement". The report can be downloaded from the same publication list referred to in footnote 1.

³ Emmanuelle Bribosia, Isabelle Chopin and Isabelle Rorive, "Rapport de Synthèse relative aux Signes d'Appartenance Religieuse dans 15 Pays d'Union européenne"; , Lisa Waddington, "Implementing and Interpreting the Reasonable Accommodation Provision of the Framework Employment Directive: Learning from Experience and Achieving Best Practice"; Theresia Degener, "Definition of Disability"; Olivier De Schutter, "Pre-Employment Inquiries and Medical Examinations as Barriers to the Employment of Persons with Disabilities: Reconciling the Principle of Equal Treatment and Health and Safety Regulations under European Union Law"; Alan Littler, "Thematic Study on Discriminatory Partner Benefits" (cf. publication list referred to in footnote 1).

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The work of the Network

Transposition should now be complete in all 25 Member States, except in those states which requested additional time - up to 3 years - for transposition of the provisions on age and disability.⁴ The first official report of the Commission on implementation of the Directives is due in 2005.

As instruments of Community legislation, Directives offer a degree of flexibility as to their implementation at national level. Directives generally define the goals to be achieved, but leave some freedom to Member States to incorporate these goals into national law. Therefore, the monitoring of implementation requires particular attention. This certainly applies to the two anti-discrimination Directives which expressly refer to the role of national legislation in a number of provisions, implying that rather more discretion will be accorded to Member States in these areas. The Directives set minimum standards allowing Member States not only to tailor these standards to fit in with their national traditions, law and practices, but also to go beyond these standards and offer more protection than the minimum standards require.

The new combined Network will prepare comprehensive country reports describing how the two Directives have been transposed in each of the 25 Member States. These reports will address questions such as: which changes have been introduced in national law? And are these in conformity with Community law? How are certain legal problems solved by Member States? Have preliminary rulings been requested? To what extent is use made of exceptions? What level of protection is offered and what kind of enforcement mechanisms have been put in place? Are there examples of positive action measures? Summaries of these reports and a comparative analysis will be published by the European Commission (in English and French). The reports may play a role in and enrich the debates at national and European level when Member States present their first reports on the implementation of the Directives.

Following developments in policies and law

Once anti-discrimination law is in force, it can be used to protect people against discrimination and to assist its victims. In conformity with new national anti-discrimination legislation, policies may be adopted to prevent discrimination and promote equality. Victims and those who support them may start legal action to stop discrimination and seek remedies from the perpetrators. The extent to which this will occur depends on many factors. Are organisations and individuals sufficiently aware of the existence and contents of the law? Is there among organisations and individuals enough willingness and capacity to apply equality and anti-discrimination principles in everyday life? Are (potential) victims protected against victimisation and sufficiently empowered to seek justice? It is reasonable to expect that policies and case law will develop over time.

The network reports on developments such as these through so-called "flash reports" being made available to the Commission. These reports form the basis for an overview of developments on a country-by-country basis. These will also form the basis of this bi-annual bulletin, the European Anti-Discrimination Law Review, which is being produced in English, French and German. This review will be available on-line and in print for a wide public of policy-makers, lawyers, scholars and activists. In addition to the country overview, the Review will present short overviews of policy developments at European level and the relevant cases of the two European Courts. It will also include short articles on topical issues.

⁴ For disability, one State is using three additional years and two States one extra year, while for age, five States will use the three extra years and one State one year.

Reflection and looking forward

Equality principles at EU level are traditionally linked to the establishment of the Common Market and to the Community's socio-economic policy goals. This is the case for Treaty provisions and secondary legislation prohibiting discrimination on grounds of gender and nationality (of Member States). Discrimination is prohibited between producers and consumers (in the context of the Common Agricultural Policy), in procurement and in the exercise of free movement rights. Whereas the two anti-discrimination Directives still refer to the Community's socio-economic goals, they reinforce at the same time a trend of defining equality as a fundamental right. The various Treaty provisions, the proposal for the Constitution, secondary EC legislation, developing case law and social policies at European and national levels are producing a new and inclusive concept of equality. Despite the significant differences between the various pieces of Community legislation, there are also substantial similarities and one may expect a drive to bring them all up to the same level and to fill gaps in protection against different forms of discrimination. This may happen in different ways. It may be the result of, for example, Court rulings on multiple or intertwined discrimination cases, or of pressure by interest groups. It seems likely that the introduction of further changes in EU legislation will be a step-by-step process (as is demonstrated for example, by the recent adoption of Directive 2003/109/EC pertaining to the position of long-term resident third country nationals, which includes provisions that constitute new building blocks for the better protection against discrimination based on nationality).

As part of its task of providing the Commission with independent advice on all grounds of discrimination covered by the Directives, the Network will provide reflection on and analyses of concrete developments in policy and law. For that purpose it will, for example, produce thematic reports. The first thematic report, soon to be published, is on the importance of the rulings of the European Court of Human Rights on anti-discrimination for the interpretation of the legal concepts of the two anti-discrimination Directives. This report will also briefly look at the European Social Charter and the Recommendations made by the Committee overseeing its implementation. The second thematic report will deal with age discrimination. Legislation on this type of discrimination is rather new but increasingly gaining attention. The report will explore how this form of discrimination is being combated in policy and law, focusing in particular on the extent to which the exceptions in the Employment Equal Treatment Directive are being, and should be, interpreted. A third report will deal with sanctions and remedies. The thematic reports will be published by the European Commission in English, French and German.

Further information about the work of the Network can be found on the Commission's website: http://europa.eu.int/comm/employment_social/fundamental_rights/index_en.htm



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Thinking about the discrimination directives

Christopher McCrudden

Benefits and risks associated with the Directives

The anti-discrimination approach that the EU Race and Employment Equal Treatment Directives is based on has certain major advantages, particularly in presenting race, age, religion, and disability issues as issues of rights, and therefore ensuring that those who have previously been invisible are empowered to become more visible and exercise choices. There are, however, several inherent risks associated with reliance on the EU Directive Model. I will concentrate on two in particular in this short comment: that there will be pressure to adopt interpretations of the Directive simply to ensure a rather superficial consistency with the way in which each ground of discrimination is interpreted. Second, there is a danger that the Directives will come to be seen as not only a necessary tool of policy regarding disability, but as a sufficient tool of policy.

False consistency

The first danger is one of false consistency. In many respects the Directives are open to considerable interpretation, some of which may not be advantageous to those who are disadvantaged. In particular, there will be pressures to adopt interpretations of concepts that are common to the legal regulation of all the grounds of discrimination (such as the meaning of direct and indirect discrimination, and the scope of remedies) that are seen to be consistent across these grounds.

As importantly, there will be pressures to adopt interpretations that are consistent with existing gender discrimination jurisprudence. This pressure for consistency in legal interpretation is potentially problematic because, unless considerable care is taken, necessary differences in the way the different types of discrimination should be treated may be sacrificed to consistency.

Interpretation of sui generis aspects of the EU Directive

This problem is not, however, confined to the interpretation of concepts that are common to all the grounds. In some ways, it is even more of a problem in the context of the interpretation of issues that are *sui generis*.

There are several *sui generis* aspects of the EU Employment Equal Treatment Directive, also common to such initiatives in other contexts, which generate debate and dispute. Taking the treatment of disability as an example, we can point to (a) the definition of disability, (b) the extent of the positive obligation to “reasonably accommodate,” and (c) the relationship between the new obligations of the Directive and other existing legal requirements that pre-date the Directive, as all give rise to considerable debate as to their meaning and reach.

As in America and the United Kingdom, the issue of “reasonable accommodation,” for example, is likely to be a key area of debate. It will involve the European Court of Justice and national courts confronting the issue of how far so-called “accommodation mandates” are to be given a generous or restricted interpretation. If the courts take a restricted interpretation of this positive duty, it is likely to drive the interpretation of the Directive into being simply about choice, without ensuring that that choice can be effectively exercised in practice.

Different meanings of equality

The general problem is that different grounds of discrimination appear to emphasise rather different meanings of equality. There are, essentially, *four* different (although overlapping) meanings currently attaching to the concept of equality as a policy goal: equality as individual justice, equality as group justice, equality as protecting and enhancing identity, and equality as participation. What may be suitable in one context, may not be in another.

Individual justice model

The first conception of equality I call the "*individual* justice" model. This model generally aims to secure the reduction of discrimination by eliminating from decisions considerations based on race, gender or other prohibited considerations that have harmful consequences for individuals. The key word is usually "discrimination."

This approach is not *primarily* concerned with the general effect of decisions on *groups*. It is markedly *individualistic*: concentrating on securing fairness for the individual. It is generally expressed in *universal* terms: blacks and whites are equally protected, for example, as are *men* as well as women, sexual *minorities* and sexual majorities. It reflects respect for efficiency, 'merit', and achievement. It preserves and possibly enhances the operation of the market. It often concentrates on the intention of the perpetrator of the discrimination, and the sense of grievance of the individual arising out of that intention.

Group justice model

The second conception of equality is *group* justice. This is the view that the aim of equality policy should be to concentrate more on the *outcomes* of the decision-making process, not just the process itself. Supporters of this model often seek to redistribute resources from the advantaged to the disadvantaged. Their basic aim is the improvement of the relative position of particular *groups*, whether to redress past subordination and discrimination, or out of a concern for distributive justice. The key word is usually "redistribution," rather than discrimination. It is here that other disability policies come closest to and sometimes substantially overlap with, poverty reduction and social inclusion policies, since these are essentially redistributive as well. This seems to be the conception of equality closest to the idea of "economic empowerment."

Equality as recognition of identity

However, a third conception of equality, where equality involves the recognition of diverse *identities*, also seems to underpin the disability rights policies like the EU Directives. In this conception of equality, the failure to accord due importance to such differing identities is a form of oppression and inequality in itself. *Diversity* becomes the key word in general debate. Discussions around sexual orientation are often framed in this way.

Equality as participation

The fourth approach to equality is to view claims by minority groups as, in part, struggles to be able to articulate their own perspectives and priorities, a claim for political participation in the broadest sense. The aim is that all, including those previously excluded, should have a voice in public affairs, especially in the daily decisions of those who shape their life chances. "Participation" becomes the key word. The provisions in the EU Directive regarding the need for social dialogue are good illustrations of this approach.

Coping with "equalities"

Which of these models of equality is "correct?" My argument is that no *one* model can or should claim to represent *the* central or best case of equality in interpreting and explaining equality rights policy. *All* these conceptions of

equality are necessary for us to capture its *full* dimensions and the richness of its meanings. We should embrace this diversity of equalities in equality rights policy-making, and refuse to narrow equality discourse to only one meaning.

Tensions

Let me assume that equality rights policy should reflect all four conceptions of equality. Attempting to achieve *all* these equalities will clearly lead to *profound* debate about the priorities *between* these equalities when they clash, as they sometimes will.

Evidence from the United States shows that there may, for example, be a tension between prohibiting age discrimination (a classic individual justice demand) and redistributive policies on race and gender discrimination. The principal beneficiaries of the American age discrimination legislation are, after all, older, white males.

In the particular context of disability rights issues, it will be important that an approach to the interpretation of the EU Directives that regards the protection of identity as the dominant value would be highly damaging. It is also important that equality rights policies not only be seen as encompassing issues of individual (or corrective) justice, but also distributive justice. There are important implications resulting from this. It is necessary not to overplay the “business case” for equality as essentially cost reduction, otherwise there is a danger that courts will interpret the equality rights law as driven by cost reduction. But, it is necessary also to refresh the European Social Model with the spirit embedded in policies like the EU Directives.

Anti-discrimination law as necessary but not sufficient

A second potential danger in the anti-discrimination approach is that it may come to be seen not only as a necessary but also as a *sufficient* policy response. There is a danger that economic, social and cultural supports, for example, will be seen as having been *replaced* by the anti-discrimination approach.

That would be unfortunate, given that the anti-discrimination approach involves a limited set of positive obligations on government, service providers and employers. In the future it will be necessary to ensure that the ability to choose is accompanied by economic, social and cultural supports that enable those choices to become real, rather than theoretical.

Mainstreaming

How then are we to deal with these complexities? A European debate is now underway on whether the implications of the different conceptions of equality are to be adequately explored and resolved, and if the anti-discrimination approach is properly perceived as part of an appropriate draft of policy responses.

Two problems have bedevilled these debates in the past. The first was the extent to which major areas of *economic* decision-making by government were untouched by these equality debates. Equality regarding minority groups was largely marginal to management of the economy.

Without underestimating the extent to which courageous individuals and organisations operating on behalf of these groups have contributed to the development of the current legislation, we can point to another problem: the extent to which choices between these different conceptions of equality have been made *on behalf* of those who are most affected by the choices, rather than by older people, ethnic minorities, women, and persons with disabilities on their *own* behalf.

I agree that *mainstreaming* offers a potentially effective mechanism for addressing both these problems: permitting the inevitable choices and tradeoffs between these conceptions of equality to be made with the full participation of all in the society, *and* requiring equality to pervade the economic areas of policy debate.

What is necessary, then, is recognition that different equalities are in play in different situations and that what is necessary is the ability of the protected groups to be able to engage with policy makers to help secure the adoption of the conception of equality that best suits their circumstances. We should not prejudge the outcome of that debate.

What we need to recognise, therefore, is the importance of "equalities"-talk, rather than "equality"-talk. Thus, it will be vital for the debate about equality rights to take place not only between such groups and government, but also between these groups themselves.

Role of human rights

One of the problems with emphasising dialogue and discussion, however, is that it sometimes appears to imply that everything is up for negotiations, and that there are no standards that should inform that dialogue. As I have mentioned, it is also vital, therefore, to situate the legal approach to discrimination, and the mainstreaming of equality issues in government, within a broader human rights approach.

Human rights approaches should be drawn on not only as a source of inspiration, but also as a direct source of legal rights. This should enable anti-discrimination policies like the EU Directives to be seen as situated within a broader set of obligations and rights. The EU Charter of Fundamental Rights provides a useful pointer in this direction.

The interpretation of human rights that needs to be drawn on is one that encompasses the duty to respect human rights, the duty to protect human rights and the duty to fulfil human rights. The current interest in and development of socio-economic rights generally, and the drafting of the UN disability treaty, that encompasses this broader human rights approach is one of considerable potential significance for the role and interpretation of anti-discrimination rights policies.

Limits of human rights

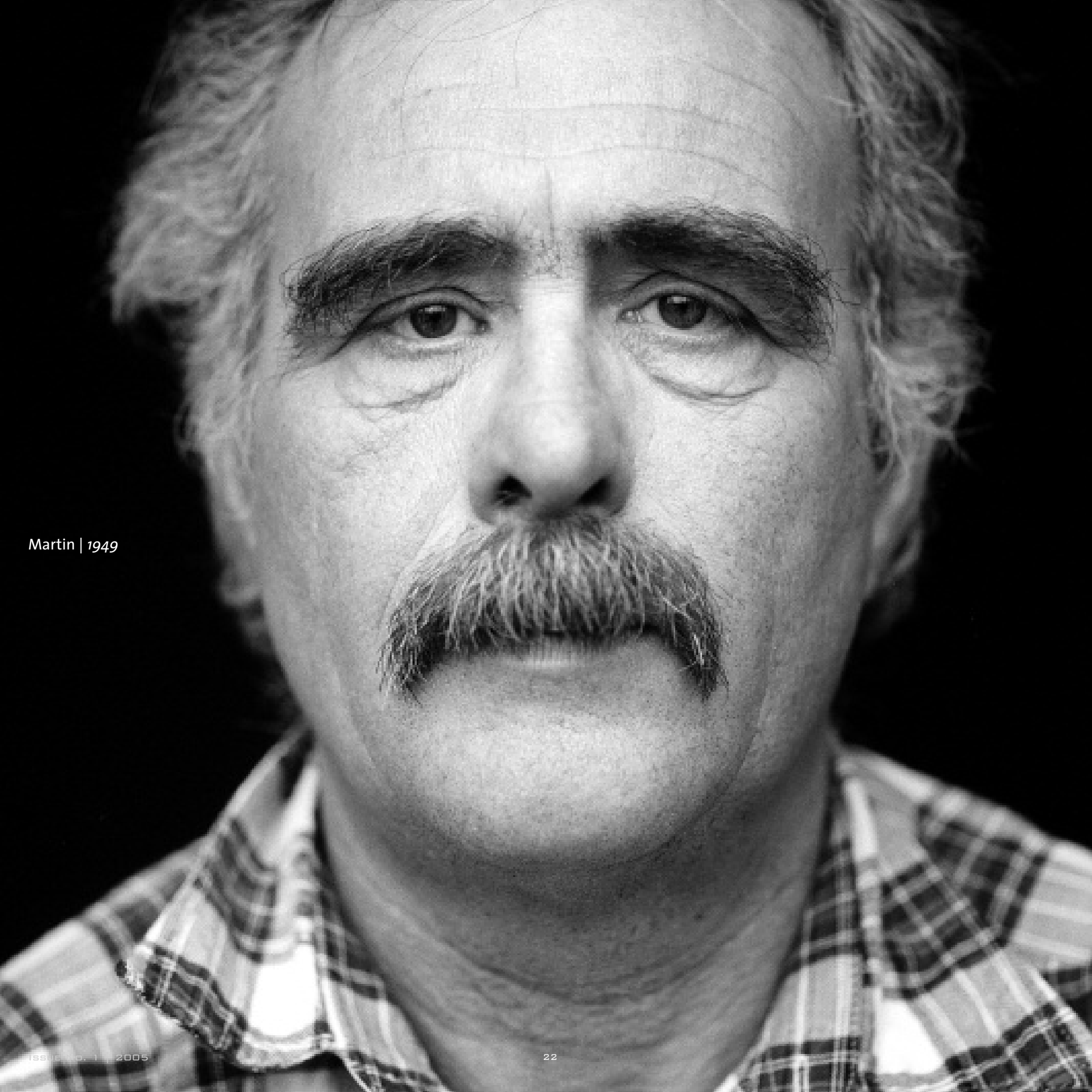
There are dangers with a human rights approach, however, if that approach is conceptualised as involving a narrow range of duties on the state, or the limited conception of equality common in international human rights law, with its emphasis on state responsibility, the broad scope for justification permitted, and the requirement that non-discrimination is supplementary to other rights. In drawing on human rights, we must be careful not to become trapped by too narrow a view of what this requires.

Role of comparative jurisprudence

To avoid a narrow view, it may well be useful to draw on comparative jurisprudence. Drawing on what other jurisdictions have done in the judicial interpretation of equivalent instruments may free us from constantly having to reinvent the wheel, and particularly in helping us identify the issues that will need to be taken into account as we proceed to interpretation in the field of equality rights. That is not to say that comparative law cannot be problematic, in particular where the implications of what another jurisdiction has done are misunderstood, or regarded as requiring any particular approach to be taken. But, on balance, if done appropriately, comparative jurisprudence will be of assistance.

Conclusion

The role of international human rights will be vital in setting the ideals that we must aim for in the area of equality rights. Comparative jurisprudence of the sort presented in this volume also will be important in identifying many of the issues that we must confront in reaching that ideal. Europe is now presented with a unique opportunity to develop a system that can integrate equality into the market in a way that is both sustainable and effective, moving from rhetoric to reality in the field of equality rights.



Martin | 1949

The Independence of Equality Bodies

Janet Cormack and Jan Niessen

Specialised equality bodies play a crucial, if sensitive, role in the implementation of anti-discrimination law. Such bodies' work is sensitive because discrimination is about rights and the dignity of people. These bodies operate in a complicated policy environment because for some, anti-discrimination is a matter of promoting human rights and for others it is (also) about achieving social policy goals and objectives, involving a wide variety of stakeholders. The expectation of what these organisations can do is high because often these bodies work on the basis of a diverse mandate to prevent discrimination, protect victims and promote equality. Their work can sometimes be contested because discrimination may serve the economic interests of some and adversely affect those of others. This article discusses their independence as a major requirement for their functioning.

The obligation on Member States under Article 13(1) of the Racial Equal Treatment Directive to set up a body or bodies for the promotion of equal treatment has given rise to a flurry of activity over recent years as Member States seek to ensure compliance of national institutions with the EC requirements.⁵ A considerable number of countries have adapted the mandates of existing institutions or set up new offices to this end. A few have given the competence to deal with racial and ethnic origin discrimination to agencies charged at national level with the defence of human rights or the safeguarding of individuals' rights, as is expressly permitted by the Directive. While there is no parallel obligation in the Employment Equal Treatment Directive, several Member States have also given equality bodies a mandate to deal with discrimination on the grounds included in that directive, i.e. religion or belief, age, disability and sexual orientation. Some Member States have also taken steps towards establishing bodies for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on the grounds of sex, which must be in place by October 2005 in accordance with Article 8a of Directive 76/207/EEC, as amended by Directive 2002/73/EC. Article 12 of Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services also lays down this requirement.

Central to the EC law equality body requirement is the guarantee of independence, free from government or other influence. Experience shows that to be most effective, equality bodies should have unfettered independence coupled with adequate resources. According to Article 13(2) of the Racial Equal Treatment Directive, bodies must provide *independent* assistance to victims of discrimination in pursuing their complaints about discrimination, conduct *independent* surveys concerning discrimination and publish *independent* reports and recommendations on any issue relating to such discrimination. The repetition of the word independent highlights its intended significance. Article 13(2) of the Racial Equal Treatment Directive is, however, relatively vague. The Preamble of the Directive does not offer any further clarification, simply stating in recital 24 that 'Protection against discrimination based on racial or ethnic origin would itself be strengthened by the existence of a body or bodies in each Member State, with competence to analyse the problems involved, to study possible solutions and to provide concrete assistance for the victims'.

⁵ For an overview of equality bodies in the EU, see the European Commission commissioned Study on Anti-discrimination Bodies, completed by PLS Ramboll Management in May 2002. For recent developments in the establishment of such bodies see, Janet Cormack and Jan Niessen, "Considerations for Establishing Single Equality Bodies and Integrated Equality Legislation," Report of the 7th Experts' Meeting of the project "Strengthening the cooperation between specialised bodies," hosted by the Equality Commission for Northern Ireland, Belfast, 17-18 June 2004.

Additional guidance must therefore be taken from other sources. The Council of Europe's European Commission against Racism and Intolerance (ECRI) adopted General Policy Recommendation No. 2 on Specialised Bodies to combat racism, xenophobia, anti-Semitism and intolerance at national level on 13 June 1997, recommending governments to consider carefully the setting up of a specialised body to combat racism, xenophobia, anti-Semitism and intolerance at national level. It recommends that in examining this, countries should make use of several basic principles set out in the appendix to the recommendation. These include a series of guiding principles on independence and accountability.⁶ Key recommendations are also embodied in the UN Commission on Human Rights' Paris Principles on the status, powers and functioning of national human rights institutions, which set out minimum standards. These were endorsed by the UN Commission on Human Rights in March 1992, and by the General Assembly in December 1993.⁷

With these two sets of recommendations in mind, three facets of independence can be distinguished: first, independence as the authority to implement its mandate free from state interference; second, independence as neutrality, enabling the body to act without being overly influenced by any one interest group; and third, independence in terms of competences and capacity to act. In relation to all of these, the independence must not only be guaranteed formally but also guaranteed in practice.

1. Authority to act independently

Specialised equality bodies must have the authority to implement their mandate free from state interference. To this end, a robust legal basis laying down an independent mandate, independent legal status and careful positioning vis-à-vis governmental structures is crucial. We shall explain each of these elements in turn.

A *robust legal basis*, anchoring the specialised body, its independence, mandate, powers, composition, and appointment procedures in the state's Constitution or in an Act of Parliament is advisable. A key criterion of the Paris Principles supports this, asserting 'a national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence.'

Bodies that are merely established by executive decree are more easily abolished and their powers can sometimes be more easily restricted upon executive whim. While not a fool-proof safeguard against abolition or weakening by an unsympathetic government (as the closure of the Board for Ethnic Equality in Denmark in 2002, notwithstanding its status in law, shows), having such a strong legal basis does make this more difficult, as any amendments will necessitate parliamentary debate and adherence to proper legislative procedures. Furthermore, it increases the likelihood that national and international actors will be alerted to any such attempts before it is too late.

Many of the newly established bodies in Europe have been anchored or at least referred to in the legislation transposing the Racial Equal Treatment Directive generally. In some instances secondary legislation sets out the particulars of the body's functioning. Referring in such legislative texts to the requirements of EC law should in itself accentuate the independence of the body.

⁶ Chapter C: Functions and responsibilities of specialised bodies, Principle 5 Independence and accountability.

⁷ Commission on Human Rights resolution 1992/54; General Assembly resolution A/RES/48/134.

The nature of the mandate laid down in the Constitution or Act of Parliament will be influential in determining the actual independence of a specialised body. Its mandate should enable it to act as a 'watchdog' for actions of the State and private actors alike and promote equality in the private and public sectors, including all public bodies. This must be accompanied by powers to compel State bodies to cooperate with any investigations or adhere to any sanctions levelled. In this regard, the specialised equality bodies can learn from the experiences of Ombudsmen in various jurisdictions, including the European Ombudsman.⁸

An *independent legal status* should ensure that a specialised body is formally autonomous and independent of the executive functions of government. An independent status ensures independence from the political leadership and party politics, meaning the body will not be overhauled with the election of a new government. According to the UN Handbook on National Human Rights Institutions, "Ideally a national institution will be granted separate and distinct legal personality of a nature which will permit it to exercise independent decision-making power. Independent legal status should be of a level sufficient to permit an institution to perform its functions without interference or obstruction from any branch of government or any public or private entity. This may be achieved by making the institution directly answerable to parliament or to the head of state."

Making the equality body or other agency accountable to parliament helps to *position it independently from governmental structures*, which is a key factor. As well as holding specialised bodies to account through the scrutiny of its annual report, the Parliament may also be involved in appointing commissioners or board members, and in overseeing the body's budget and planning.⁹

Equality bodies should not be placed within ministries or subordinate to a particular minister of the government. If there are such close links, proper safeguards should be in place to restrict ministerial interference. For example, the new Italian Office for the fight against Racial and Ethnic discrimination, launched in December 2004, is physically located within the Ministry for Equal Opportunities and under the political responsibility of the Minister for Equal Opportunities. However, a well-respected non-governmental body has been charged with the task of receiving complaints of discrimination from victims on behalf of the office, thereby going some way to curb fears of lack of independence. The work of bodies placed within a ministry or sponsored by a ministry should not be subject to ministerial approval, and they must also be able to publicly challenge that department or government actions generally.

Reporting obligations themselves contribute to the independence of equality bodies, as by publishing reports of their activities, bodies remain transparent, accountable and are seen to be fulfilling their mandate and open to scrutiny. ECRI Recommendation No. 2 recommends that 'Specialised bodies should independently provide reports of their actions on the basis of clear and where possible measurable objectives for debate in parliament' (principle 5.3). Sufficient parliamentary time must be made available for this purpose. In addition to the ongoing scrutiny of an equality body, bodies should be subject to periodical external reviews, which look in detail at how they are functioning and whether they are meeting their stated mandate and objectives.

⁸ Cf. The European Ombudsman, The European Code of Good Administrative Behaviour, http://www.euro-ombudsman.eu.int/code/pdf/en/code_en.pdf

⁹ On the other hand, there are warnings against too much involvement of parliament leading to politicization of the work of the body and restrictions of a body's freedom to manoeuvre. In Sweden, where there is a gentleman's agreement that the Ombudsmen should be independent but their independence is not actually guaranteed by legislation, there has been considerable debate around the issue of whether the Ombudsmen should be accountable to parliament or to government. Mindful of risks of politicization, the Ombudsmen favour a firm legal basis and a clear mandate over accountability to parliament.

The authority generated through the safeguards described in this section should help an equality body to remain sufficiently independent of the state to be able to carry out its mandate without interference. This is especially important where the state is the alleged discriminator. Authority is necessary in order to gain the respect of all stakeholders that is so vital for the equality body's success.

2. Neutrality

Independence calls for equality bodies to maintain complete neutrality and to ensure they are not overly influenced by any one interest group or be seen as the voice of one interest. Equality bodies must remain impartial in the face of demands from many sides, representing different parts of society – government, NGOs, employers, trade unions etc. – and representing different disadvantaged groups, the number of which will only increase with the number of discrimination grounds a body is mandated to deal with.

There are different approaches to the question of impartiality among specialised bodies in Europe. A body whose mandate is to promote equality and protect against discrimination in whatever manner is most appropriate, essentially has the duty to do all it can to defend equality as a principle and any relations with other stakeholders come second to that. The Dutch Equal Treatment Commission, as a quasi-judicial body, takes great care to make sure it is seen as impartial and neutral. Only then will its opinions in individual discrimination cases carry any authority. Concerns of dissatisfied employers or victims' groups questioning their decisions must be heard, but the authority of the Commission and its decisions must be maintained.

Some equality bodies whose main activity is impartially defending the principle of equality before the courts may feel it is appropriate to assist not only alleged victims of discrimination, but also alleged perpetrators, depending on the circumstances of the case.

In contrast, the Commission for Racial Equality in Great Britain sees its primary role as promoting and defending the rights of victims of discrimination. Traditionally it has channelled more resources into assisting victims of inequalities, general awareness-raising and education about equality rights.

A different experience is that of the Swedish Ombudsman against Ethnic Discrimination (DO). Upon receiving a complaint, the DO must investigate the case and strict neutrality is kept throughout the investigation. If, however, as a result of the investigation the DO decides it should take the case before the courts on behalf of the alleged victim, the DO recognises that at that point is no longer acting neutrally.

3. Capacity to act independently

The competences and capacity that a specialised equality body has at its disposal are of prime importance for securing its operational independence. Appropriate powers, composition and adequate financial and staffing resources, are key in this regard.

The *powers and duties* of an equality body should of course include the three tasks set out in Article 13(2) of the Racial Equal Treatment Directive. However, these should be supplemented with additional competences, in particular, powers of investigation accompanied by appropriate powers to obtain evidence and information, and powers to monitor legislation and advise on reform. A comprehensive list is provided in ECRI's recommendation (Principle 3). Equality bodies must be allowed to undertake their tasks independently and under no circumstances should any of their outputs be subject to government approval. Whilst respecting confidentiality

rights, equality bodies should have the competence to publish their work as widely as possible, including reports, decisions (parties need not be identified), settlements or other files. Apart from being an important means of promoting equality and awareness-raising, this transparency enables bodies to defend their work in the face of any accusations of lack of independence.

Strong and multiple powers can considerably enhance the autonomy of an equality body's work, but caution must be exercised to avoid compromising the perceived independence of the body. Doubts of a body's independence may be raised if, for example, it is acting as investigator of allegations of discrimination one minute, defending victims the next and adjudicating breaches of legislation after that. Even bodies with the most impartial intentions can be vulnerable to attacks by dissatisfied stakeholders if their mix of different competences leaves them susceptible to accusations of partiality. In some circumstances it may be necessary to have some work undertaken externally.

It is with these concerns in mind that the Dutch Equal Treatment Commission chooses not to exercise its powers of supporting parties in court to enforce its decision in a case it has heard as a quasi-judicial body. It also has concerns around drafting codes of conduct or recommendations, and then being asked to interpret and apply these in a case, thereby acting as both judge and legislator (even if the codes of practice are not legally binding).

The *composition* of the equality body's board (or Commissioners) and key staff should reflect the society it represents,¹⁰ and appointments should be made according to strict terms of reference laid down in law. These should lay down the criteria for appointment and its duration, and should include appropriate safeguards against arbitrary dismissal or the arbitrary non-renewal of an appointment.¹¹ The public must be sure of the integrity and impartiality of board members and staff, as well as of their professionalism. The staff should be composed of highly qualified lawyers and scientists. The actual selection process may involve representatives of civil society, including NGOs, opposition leaders, trade unionists, social workers and journalists. Strong independent leadership and effective staff free from external influences are imperative for an equality body's capacity to act independently. Staffing through civil servants should be avoided. Management must be free to set its own agenda and priorities.

In addition to *sufficient resources in terms of staff members, sufficient budget* to enable an equality body to effectively carry out of its responsibilities is essential. Both are typical areas in which the State may attempt to exert control. According to ECRI, equality bodies should have the 'freedom to appoint their own staff, manage their resources as they think fit and express their views publicly' (Principle 5.2).

¹⁰ Equality bodies may seek to have a board or commissioners that individually do not represent particular 'constituencies', e.g. particular racial groups, but that together represent society as a whole. This avoids loyalties of board members potentially leaving them susceptible to influence, thereby compromising the independence of the college of members or commissioners.

¹¹ Cf. ECRI Recommendation, Principle 5.4.

Conclusion

Guarantees for independence are in many ways a national issue, and the traditions of state agencies in relation to the government and their public perception will to an extent shape how independently an equality body can operate. However, the international and European dimension can assist bodies to assert their independence. Building a network of national equality bodies from across Europe is likely to be highly beneficial for the independence of those bodies.¹² Such European cooperation not only facilitates the exchange of knowledge and experience between equality bodies, but also the developments of a system of self-regulation, perhaps even in the future through a European Charter on Equality Bodies to which individual bodies could subscribe.

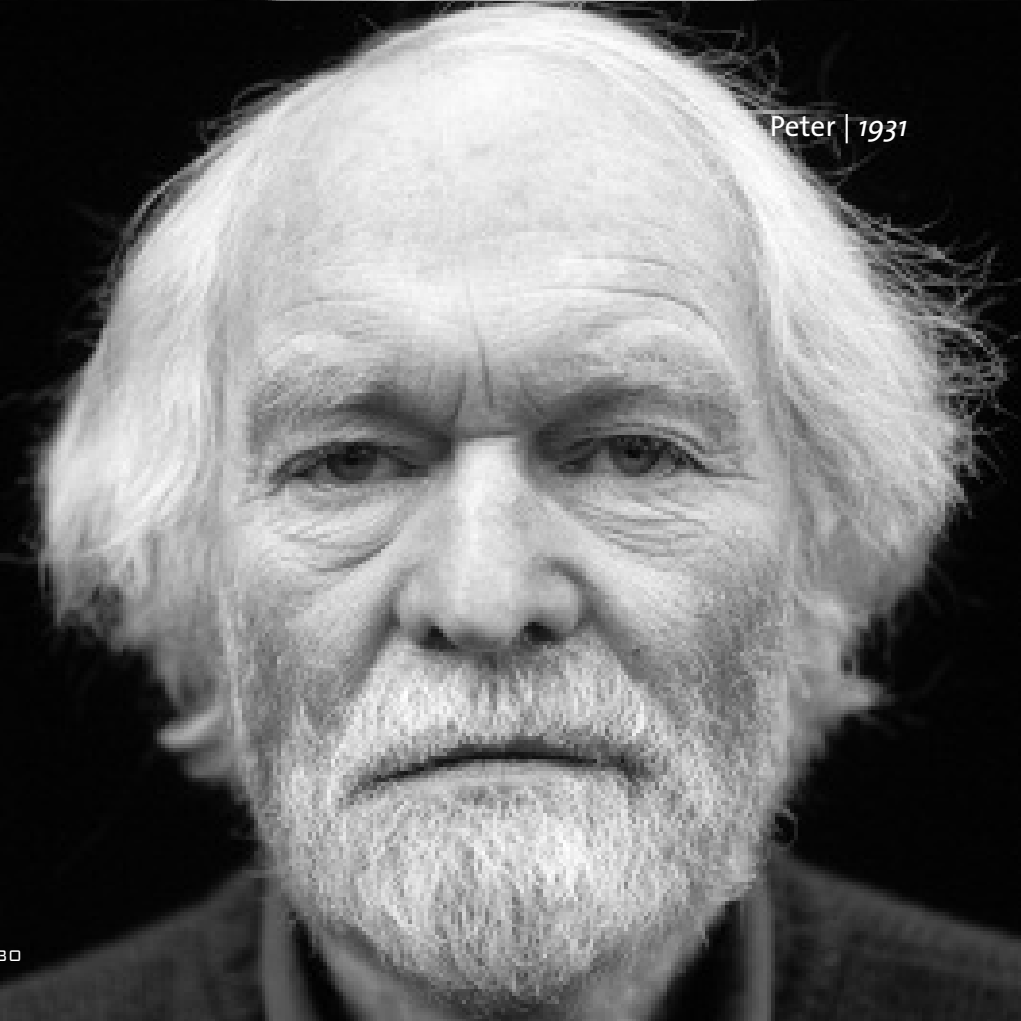
¹² The European Network of Specialised Equality Bodies (EuroNeb) now has members from 23 European countries. The network is led by the Dutch Equal Treatment Commission and supported by the Community Action Programme to Combat Discrimination. The Migration Policy Group serves as its project secretariat. Further information can be found at www.migpolgroup.com.



Sylvia | 1943



Diana | 1961



Peter | 1931

European Policy and Legislative Process Update

1. Infringement procedures for non-transposition of the Racial Equal Treatment Directive and Employment Equal Treatment Directive

In accordance with Article 226 of the EC Treaty, the European Commission has launched infringement proceedings against those 'old' Member States which, by failing to transpose the Racial Equal Treatment Directive by 19 July 2003 or the Employment Equal Treatment Directive by 2 December 2003, it considers to have failed to fulfil its Treaty obligations. The deadline for the ten new Member States was the date of their accession, 1 May 2004.



The Commission has so far only launched proceedings for non-communication of transposition. The second type of infringement proceedings is for non-conformity, where the transposition is incomplete or incorrect. The Commission has embarked upon a detailed check of the compliance of the national laws to this end.

Stage of non-communication infringement proceedings:

Directive 2000/43/EC

With no resolution of the issue through the exchange of letters or the issue of a reasoned opinion by the Commission,¹³ five Member States were referred to the European Court of Justice on 19 July 2004 for failing to pass all necessary legislation to bring national law into line with Directive 2000/43/EC and communicate that to the Commission. These were Austria, Germany, Finland, Greece and Luxembourg.¹⁴ All of the cases are still pending.



Directive 2000/78/EC

While the Employment Equal Treatment Directive had to be implemented by 2 December 2003 for the grounds religion and belief and sexual orientation, with regard to the grounds age and disability Member States were entitled to notify the Commission that they would extend the transposition period for up to three years. With regard to age, Belgium, the UK, Germany, the Netherlands and Sweden notified the Commission they would use the full three-year extension, and Denmark one year extra. For disability, France notified the Commission it would use the three years extra and the UK and Denmark one year extra.

Even taking these extensions into account, few States had transposed Directive 2000/78 by 2 December 2003. After resolving the situation in a number of Member States through the early stages of infringement procedures, on 2 December 2004 the Commission referred Austria, Germany, Finland, Greece and Luxembourg to the Court for failing to transpose the Employment Equal Treatment Directive.¹⁵ At the time of writing case numbers for these have yet to be published.

¹³ The Commission first sends a letter of formal notice and if the Member State does not reply within two months or the Commission is unsatisfied with the reply it can issue a reasoned opinion. Then, if the Member State does not reply to this within two months or it is not satisfied with the response, the Commission can refer the Member State to the European Court of Justice.

¹⁴ C-320/04 *Commission v Luxembourg*, C-326/04 *Commission v Greece*, C-327/04, *Commission v Finland*, C-329/04, *Commission v Germany*, C-335/04 *Commission v Austria*. Further data is provided in the section on ECJ case law.

¹⁵ Commission Press Release IP/04/1512, Brussels, 20 December 2004.

It is the policy of the Commission to initiate proceedings against the new Member States separately from the 'old', firstly because of the later deadline for transposition, and secondly because proceedings will not be taken against single Member States but always against several at the same time in 'packages'. All of the Member States that joined the Union on 1 May 2004 except the Czech Republic have notified the Commission of transposition of both Directive 2000/43/EC and 2000/78/EC.¹⁶ However, this does not exclude non-communication proceedings and there are still significant gaps in the legislation in some countries. In Estonia, certain important areas covered by Directive 2000/43/EC (education, access to goods and services, access to social benefits, etc.) are still lacking detailed anti-discrimination rules. Implementation is so far largely restricted to the employment field in Malta and Poland. And in Latvia and the Czech Republic, anti-discrimination legislation is still awaiting adoption (see country information below).

2. 2005 Report on the application of Directives 2000/43/EC and 2000/78/EC

Under Article 17 of Directive 2000/43 and Article 19 of Directive 2000/78, the Member States must communicate by 19 July 2005 and 2 December 2005 respectively (and every five years thereafter) all information necessary for the Commission to draw up a report to the European Parliament and the Council on the application of the directives. The Commission has stated that it will write to the Member States in early 2005 seeking this information (cf. speech of Barbara Nolan, Head of Unit, Netherlands Presidency Conference, 22-23 November 2004).

3. Adoption of EU Directive implementing the principle of equal treatment between women and men in the access to and supply of goods and services

Having reached political agreement on 4 October, the Council formally adopted *Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between women and men in the access to and supply of goods and services*, based on Art. 13 of the EC Treaty (Official Journal 21.12.2004 L373/37).

4. Consultation on Commission Green Paper 'Equality and non-discrimination in an enlarged European Union'

The Green Paper 'Equality and non-discrimination in an enlarged European Union' adopted by the Commission in May 2004¹⁷ set out the Commission's analysis of progress in the field of combating discrimination since the introduction of Article 13 of the EC Treaty, and explores emerging issues and challenges including those related to enlargement. The Green Paper was the subject of a consultation process from 1 June until 31 August 2004. The Commission received 1443 responses to the questionnaire attached to the Green Paper, as well as over 150 detailed written contributions. The results of the consultation process were presented and discussed at the Dutch Presidency Conference 'Equality in a future Europe' on 22-23 November 2004 in Scheveningen, the Netherlands. The results include the following:

- 88% of respondents think the EU should step up its efforts to combat discrimination following enlargement.
- Further efforts are required with regard to national transposition of the existing Article 13 directives (59.1% of respondents view the fact that national implementing legislation is incomplete as one of the most important obstacles to the effective implementation of European anti-discrimination legislation).
- There are mixed views as to whether current EC legislation provides sufficient protection. Whereas there are strong demands from NGOs and others to align the level of protection against discrimination on the grounds religion/belief, age, disability and sexual orientation with that of protection against racial/ethnic discrimination, most national authorities view this to be too premature.

¹⁶ Commission MEMO/04/189 Brussels, 19 July 2004.

¹⁷ Brussels, 28.05.2004 COM (2004) 379 final.

- There is considerable demand for the EU to stimulate debate on the additional discrimination grounds included in Art. 21 of the EU Charter on Fundamental Rights.
- 81.6% of respondents either agreed or strongly agreed there should be greater links between efforts to combat discrimination on all Art. 13 EC grounds including sex. At the same time the need to maintain a focus on the specificities of the different grounds was stressed.¹⁸

At the Presidency Conference it was announced that the Commission will issue a Communication early in 2005 setting out the broad agenda for following up on the issues brought up in the Green Paper consultation. The Commission also announced its intention to launch preparatory work to feed into a feasibility study in early 2005 to examine possible initiatives to complement the current EU legal framework for tackling discrimination.

5. New Commissioner for Employment, Social Affairs and Equal Opportunities

Czech Commissioner Vladimír Špidla was appointed Commissioner for Employment, Social Affairs and Equal Opportunities within the Barroso Commission, which took office on 22 November 2004. Equality thus features expressly in the mandate of a Commissioner for the first time. The Commission's efforts in the discrimination field will be closely observed following the controversy during the European Parliament hearings and the subsequent pledge by President Barroso that fundamental rights and the fight against discrimination will be essential priorities for the newly-appointed Commission. A group of Commissioners are to be given the responsibility for fundamental rights, anti-discrimination and equal opportunities, and this group should seek to ensure the mainstreaming of equal opportunities in all EU policy areas. Within Mr Špidla's cabinet, Jan Jařab, formerly the Czech Government Commissioner for Human Rights, is responsible, inter alia, for issues related to the Group on Fundamental Rights, Non-Discrimination, Free Movement of Workers, Civil Society, Integration of people with disabilities and Liberty, Security and Justice (ex- Justice and Home Affairs).

6. Public consultation on the creation of an EU Fundamental Rights Agency

In October 2004 the European Commission launched a public consultation on the creation of an EU Fundamental Rights Agency.¹⁹ The decision to convert the Vienna-based European Union Monitoring Centre on Racism and Xenophobia into a Fundamental Rights Agency was taken by the European Council on 12-13 December 2003. Responses to the public consultation document were to be submitted by 17 December 2004. A hearing on the issue took place on 25 January 2005. A proposal for a regulation to establish a 'Fundamental Rights Agency of the European Union' is expected to be presented by the Commission in the course of 2005. Like all Community agencies, it will be a European public law entity separate from the EU institutions with its own legal personality. Its task will be to provide support for the institutions, the Member States, members of civil society and individuals.

Issues raised in the consultation document include the legal basis (taking into account the limited powers of the EC in the area of fundamental rights), the financial resources it will be given, its field of action (should it cover only areas covered by Community or Union law or should it cover the scope of Article 7 TEU?), mission and tasks, and the adaptation from the existing EUMC to a new agency. The Commission views national institutions for the protection and promotion of human rights as a source of inspiration when establishing the Agency. It is

¹⁸ European Commission, 'Equality and non-discrimination in an enlarged European Union, Discussion Paper', 15 November 2004.

¹⁹ Communication from the Commission, The Fundamental Rights Agency, Public Consultation Document, Brussels, 25.10.2004 COM (2004) 693 final.

suggested the Agency should have consultative, information and monitoring functions, but not deal with complaints or petitions. Plans for the Agency will take into account the European Council decision of 17-18 June 2004 to create a European Institute for equality between men and women.

7. Entry into force of Protocol 12 to the European Convention on Human Rights

The ten required ratifications for entry into force of Protocol 12 to the ECHR were reached on 17 December 2004 with ratification by Finland and Armenia. The Protocol will enter into force on 1 April 2005. The other 9 Council of Europe member states upon which the Protocol will be binding are Albania, Bosnia and Herzegovina, Croatia, Cyprus, Georgia, the Netherlands, San Marino, Serbia and Montenegro, and the former Yugoslav Republic of Macedonia.²³ Further states have signed the protocol without ratifying it. Included in that list are the EU Member States Austria, Belgium, the Czech Republic, Estonia, Germany, Greece, Hungary, Ireland, Italy, Latvia, Luxembourg, Portugal, Slovakia and Slovenia. The Protocol contains a general prohibition of discrimination on an open list of grounds ('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') (Art. 1), and provides that no one shall be discriminated against by any public authority on any ground such as those listed (Art.2).

European Court of Justice Case Law Update

Pending cases

Requests for preliminary ruling:

C-144/04 *Mangold*

Official Journal: 29.5.2004/C 146/01

Reference by the Arbeitsgericht München (Munich Labour Court), of 26 February 2004, received at the Court Registry on 17 March 2004, for a preliminary ruling in the case of Werner Mangold against Rüdiger Helm on 3 questions, including:

'2. Is Article 6 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation to be interpreted as precluding a provision of national law under which – like under the provision at issue in this case – fixed-term employment contracts may be concluded, without any objective reason, with workers aged 52 and over, thus running counter to the principle of justification on objective grounds?'

Note: C-261/04 *Schmidt*, which asked the same question relating to Article 6 of Directive 2000/78/EC as in *Mangold*, has been removed from the register of the Court of Justice.

C-328/04 *Vajnai Attila*

Official Journal: 23.10.2004/C 262/27

Reference by Fővárosi Bíróság, Hungary, of 24 June 2004, received at the Court Registry on 30 July 2004, for a preliminary ruling in the criminal proceedings against Attila Vajnai on the following questions:

'Is Article 269/B, first paragraph, of the Hungarian Criminal Code, which provides that a person who uses or displays, in public, the symbol consisting of a five-pointed red star commits – where the conduct does not amount to a more serious criminal offence – a minor offence, compatible with the Community law principle of non-discrimination? Do Article 6 TEU, according to which the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, Directive 2000/43/EC, which also refers to fundamental freedoms, and Articles 10, 11 and 12 of the Charter of Fundamental Rights, allow a person who wishes to express his political convictions through a symbol representing them to do so in any Member State?'

Infringement procedures:

C-320/04 *Commission v Luxembourg*

Official Journal: 11.9.2004/C 228/69

C-326/04 *Commission v Greece*

Official Journal: 25.9.2004/C 239/11

C-327/04 *Commission v Finland*

Official Journal: 25.9.2004/C 239/12



C-329/04 *Commission v Germany*
Official Journal: 25.9.2004/C 239/13

C-335/04 *Commission v Austria*
Official Journal: 25.9.2004/C 239/15



In all of the above, the Commission claims that the Court should declare that, by failing to adopt the laws, regulations and administrative provisions necessary fully to comply with Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, or to notify the Commission of any such provisions, the Member State has failed to fulfil its obligation under that directive, and that the Member State should be ordered to pay the costs of the proceedings.

European Court of Human Rights (ECHR) Case Law Update

Judgments

Woditschka and Wilfling v Austria, 21 October 2004 (no. 69756/01 and 6306/02)

The Court awarded compensation to applicants for non-pecuniary damage suffered as a result of the failure of Austria to adequately amend a law that had already been found to be in violation of Arts. 8 and 14. (Although section 209 of the Austrian Criminal Code, which criminalised sexual acts of men over 18 with consenting males between the ages of 14 and 18, was repealed following the ECHR judgment *L. and V. v Austria*, cases 39392/98 and 39829/98, 9 January 2003, it did not affect the legal situation of men already convicted in the past, i.e. their criminal convictions were not reversed and they received no compensation for the earlier prosecution, including any periods of detention).

Kjartan Ásmundsson v. Iceland, 12 October 2004 (no. 60669/00)

The Court found that the applicant, whose disability benefits had been withdrawn following a reassessment of his degree of disability from 100% to 25%, was made to bear an excessive and disproportionate burden which could not be justified by the legitimate community interests relied on by the authorities. The Court held, unanimously, that there had been a violation of Art. 1 of Protocol No. 1 and that no separate issue arose under Art. 14. Case accepted for referral to the Grand Chamber.

Balogh v Hungary, 20 July 2004 (no. 47940/99)

The Court held by 4 votes to 3 that there had been a violation of Art. 3; the authorities had not provided any plausible explanation for the cause of injury suffered by the applicant, allegedly as a result of police ill-treatment. The Court held unanimously that there had been no violation of Arts. 13, 6 or 14 (the Court found the applicant's allegations of discrimination on account of his Roma origin to be unsubstantiated and expressly distinguished the case from *Nachova and Others v. Bulgaria*).

Referral to the Grand Chamber

Leyla Sahin v. Turkey (no. 44774/98)

Judgment of 29 June 2004: Court found no violation of Art. 9. Having regard to the margin of appreciation, the Court held that restrictions placed by Istanbul University on the right to wear the Islamic headscarf at university, whilst constituting an interference with the applicant's right to manifest her religion, were justified in principle and proportionate to the aims pursued and, therefore, could be regarded as "necessary in a democratic society".

Nachova and Others v. Bulgaria (nos. 43577/98 and 43579/98)

Judgment of 26 February 2004: Court found two violations of Art. 2 concerning the shooting of the applicants' relatives by a military policeman and the lack of effective investigation into their deaths; also violations of Article 14, taken together with Art. 2 in relation to both of these.

Admissible

Bekos and Koutropoulos v Greece (no. 15250/02), Decision 23.11.2004

Admissible under Arts. 3, 13 and 14: the applicants allege ill-treatment by the police, no effective domestic remedy for the harm suffered while in police custody, and discrimination due to their Roma ethnic origin.

sexual
orientation

disability

racial
or ethnic
origin

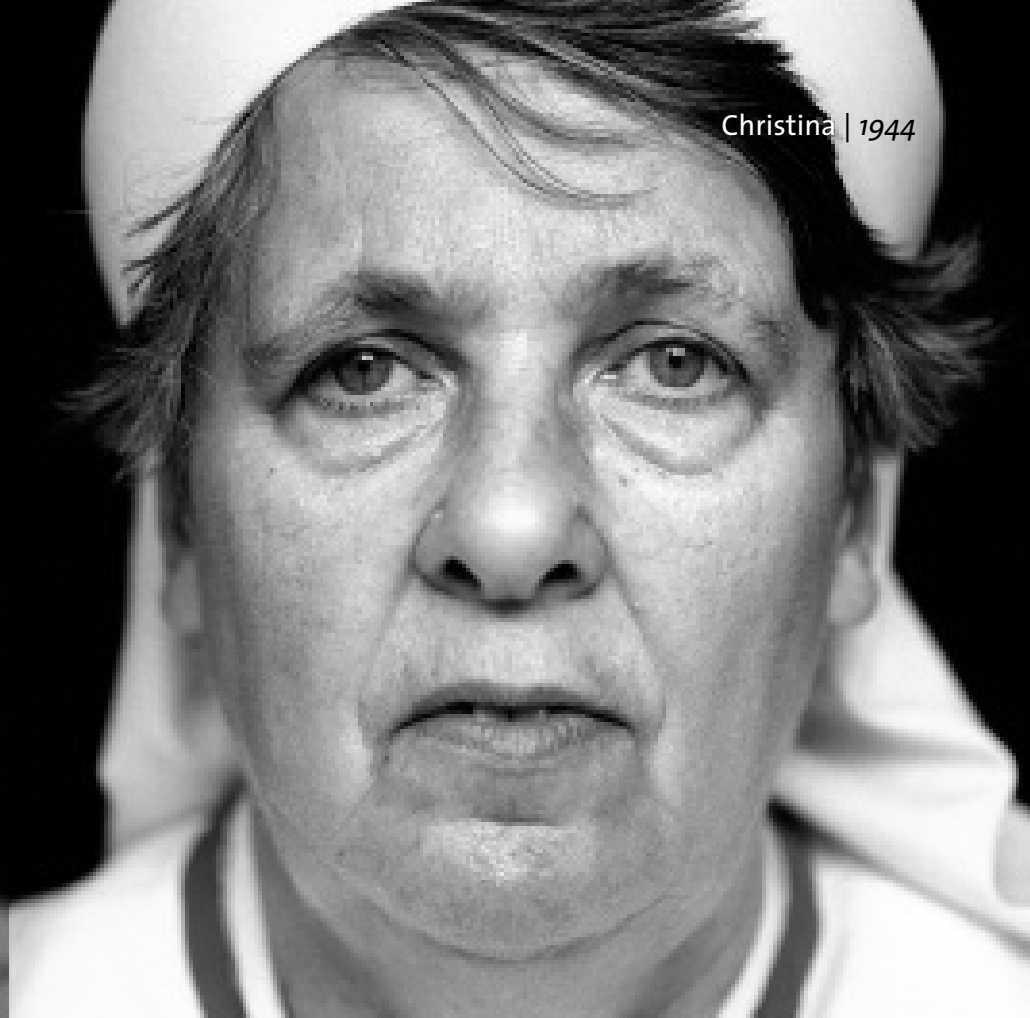
religion
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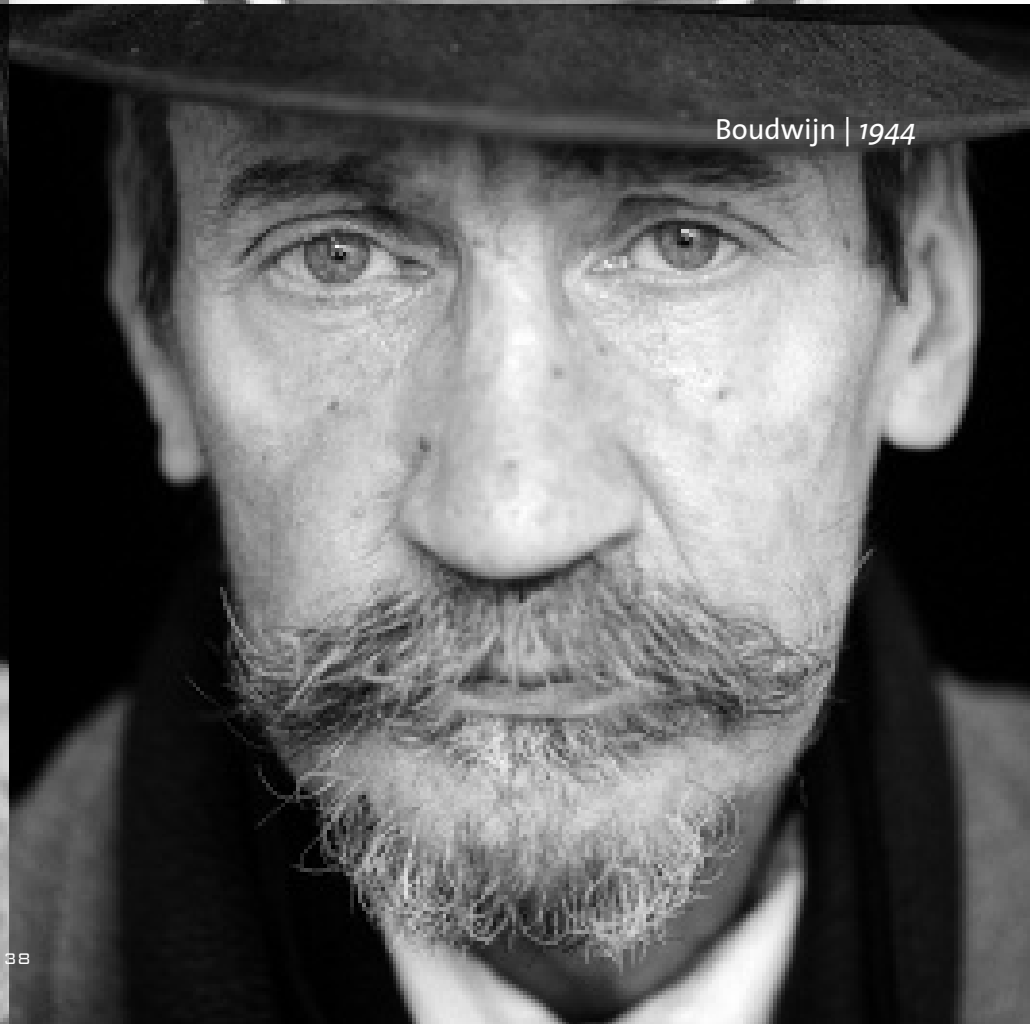
Lazar



Christina | 1944



Kamila | 1944



Boudwijn | 1944

News from the EU Member States

Austria

Legislative developments

Draft legislation against discrimination in the Federal Province of Vorarlberg

On 20 October 2004 the Provincial Government of Vorarlberg announced its new draft law on anti-discrimination. The draft Act on the Prohibition of Discrimination of 19 October 2004 contains regulations on the prohibition of discrimination on the grounds of ethnic origin, religion or belief, disability, age, sexual orientation and gender. Disability is thereby included in Austrian anti-discrimination legislation for the first time. The draft is worded similarly to the EC directives. An assessment period, during which all citizens were invited to give their comments, ended on 23 November 2004. <http://www.vorarlberg.at/doc/antidisk.doc>

Alongside Vorarlberg, implementing legislation is still to be adopted in the provinces of Burgenland, Salzburg, Tirol and Oberösterreich. Already in force at the provincial level are the Styrian Equal Treatment Act (since 01.11.04), the Viennese Service Order (since 11.09.04), the Viennese Anti-Discrimination Act (since 09.11.04), and the Lower Austrian Equal Treatment Act (since 18.09.04). The Carinthian Anti-Discrimination Act was adopted on 21 October. The federal level Equal Treatment Act (which covers private employment and areas outside the employment field), the amendments to the Federal Act on Equal Treatment (which covers employment in public sector at federal level), and the Act on the Equal Treatment Commission and the Office for Equal treatment entered into force on 1 July 2004.

Belgium

Legislative developments

Publication and entry into force of German-speaking Community decree on the guarantee of equal treatment on the labour market

This Decree, adopted by the German-speaking Community on 17 May 2004 but published on 13 August 2004 in the *Moniteur belge* (official journal) with immediate effect, is the most recent of a series of legislative instruments adopted in Belgium to implement Directives 2000/43/EC and 2000/78/EC, and also implements Directive 2002/73/EC of the European Parliament and of the Council of 23.09.02 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. The three directives are transposed with respect only to the bodies or persons who fall under the powers of the German-speaking Community. Therefore, *ratione personae*, the Decree applies to the administration of that Community, to the personnel of the educational system of the Community, to the intermediaries with respect to the services they offer, as well as to employers with respect to the provision of the reasonable accommodation persons with disabilities prescribed by Article 13 of the Decree (Article 3). Article 4 of the Decree defines its scope of application *ratione materiae*. The Decree is to apply in particular to vocational guidance, professional counselling, vocational training and retraining. In addition to the Article 13 EC grounds, the decree covers ascendancy, national origin, civil status (married/non-married), birth, wealth/income, actual or future state of health, and physical characteristics.

Case law

Public prosecutor and Centre for Equal Opportunities and Opposition to Racism v. H. Neuville, Judgment of 7 December 2004, First Instance Tribunal of Antwerp (criminal section), (ref. 4918 – AN56.99.441-03)



This judgment convicts the defendant for having refused to rent his apartment to a Belgian couple of Congolese origin proposed by the rental agency despite the fact that the couple had sufficient revenues (both were in fixed employment) and proposed to show references as proof of their reliability as tenants. The conviction is based on Article 2 al. 1 of the Law of 30 July 1981 criminalising certain acts inspired by racism or xenophobia, as amended by the Laws of 12 April 1994, of 7 May 1999, and of 20 January 2003. The tribunal considered that these provisions imply a restriction to the freedom of contract, which is not unlimited, but which, when it leads to a refusal to contract, must have an objective and reasonable justification. The Centre for Equal Opportunities and the Opposition to Racism welcomed the judgment, noting that such convictions are extremely rare due to the difficulties faced by victims in proving discrimination in the housing market. While there are only two such precedents, the Centre receives on average 55 complaints per year about such alleged discrimination, representing 7% of the complaints for racial discrimination submitted to them.

Constitutional Court judgment on Federal law transposing EC Directives

Judgment n° 157/2004 of the Court of Arbitration of 6 October 2004 was delivered on two actions of annulment lodged by members of the Parliament from the extreme-right “Vlaams Blok” party, and by Mr Storme, who professes sympathies for this party, against the Law of 25 February 2003 combating discrimination and modifying the Law of 15 February 1993 creating a Centre for Equal Opportunities and Opposition to Racism. The latter is the main instrument adopted in Belgium to implement Directives 2000/43/EC and 2000/78/EC. The Court of Arbitration (Constitutional Court) annulled three provisions of the Law and certain words in five other provisions, and it gave a restrictive interpretation of six other provisions of the Law of 25 February 2003, using the technique of “*interprétation conforme*”. Essentially, the judgment limits the scope of the criminal provisions of the Law of 25 February 2003, but extends the scope of its civil provisions in order to cover a broader range of discriminatory acts, beyond the list of grounds originally contained in the Law.

The *annulled* provisions are Article 6 §1, Article 2 §4, al. 5 and Article 6 §2 (criminal law provisions). The Court *modified* Article 2 §1 (direct discrimination) and 2 §2 (indirect discrimination) to make the law applicable to all forms of discrimination, thereby removing the original exhaustive list of grounds from the law (sex, race, colour, ascendancy, national or ethnic origin, sexual orientation, civil status, birth, wealth, age, religious or philosophical conviction, current or future state of health, disability or a physical characteristic). The Court held that there is no reasonable justification for excluding the applicability of the civil provisions of the law to discrimination on other grounds, in particular language or political opinion. This decision also has repercussions for instruction to discriminate and positive action. Finally, the Court of Arbitration rejected a large number of arguments invoked by the applicants, who sought to annul larger portions of the Law. In denying these challenges however, the Court provided its *interpretation of the contested provisions*, sometimes narrowing their scope – without changing their wording – in order to avoid any problem of constitutionality (in particular positive action). <http://www.arbitrage.be/public/f/2004/2004-157f.pdf>



Cyprus

Legislative developments

Bill to amend law which lays down age limit as a pre-condition for employment

On 19 October 2004, the Cyprus Labour Institute INEK-PEO filed a complaint with the Commissioner of Administration (Ombudsman), who acts as the anti-discrimination body under the law transposing EC Directives 2000/78 and 2000/43. The complaint referred to Article 4(4)(c) of the Law on Public Education Service 1969-2004, which fixed a maximum age limit of 60 for members of the Commission for Public Education, claiming that this provision constitutes direct discrimination on the ground of age. The complaint also stated that there is no age restriction for the employment of members of the Commission for Public Service, even though the two Commissions have similar job descriptions and carry out similar tasks. The Commissioner examined the complaint and issued a decision on 08 November 2004 that the said provision does indeed constitute discrimination, which is not justified objectively and logically by a legitimate aim. The reasoning of the decision was based on the fact that, since the competencies of the two Commissions, that of Public Service and that of the Public Education Service, are the same, the only difference being in the object, there was no justification for an age restriction applying for only one of the two Commissions. As such, Article 4(4) (c) of the Law on Public Education Service 1969-2004 constituted direct discrimination on account of age, which was contrary to the provision of the Law on Equal Treatment in Occupation and Work of 2004, introduced on 30 April 2004 to transpose EC Directive 2000/78, which prohibited such discrimination. Article 16(1) of the Law on Equal Treatment in Occupation and Work of 2004 provides that any existing law or regulation contrary to the provisions of the said law shall be abolished to the extent that it contains discrimination. In her report, the Commissioner recommends that, in order to avoid any doubt as to whether the discriminatory provision was abolished or not, the provision complained of be formally abolished as well.

As a result of the Commissioner's recommendation, a bill was proposed in the House of Parliament by a Democratic Party (DIKO) MP abolishing the age restriction provided in Article 4(4) (c) of the Law on Public Education Service 1969-2004. It is expected that the bill will be approved.

Comment: The laws transposing EC Directives 2000/78 and 2000/43 were introduced in Cyprus on the eve of accession to the EU. This is the first instance brought before the Commissioner as well as before the House indicating that a legal provision contravenes the new anti-discrimination legislation. Given the Commissioner's decision to recommend formal annulment of the discriminatory legal provision, as opposed to treating it as abolished under Article 16(1) of the Law on Equal Treatment in Occupation and Work of 2004, a precedent may be created whereby discriminatory legal provisions may not be regarded as abolished until formally abolished by an Act of Parliament.

Czech Republic

Legislative developments

Czech government approves draft anti-discrimination law

On 1 December 2004, the draft legislation implementing Directives 2000/43/EC and 2000/78/EC through a single anti-discrimination law was approved by the government and submitted to the Parliament. The draft covers all of

the Article 13 EC grounds except gender. It proposes to provide protection against discrimination going beyond the minimum requirements of the EU directives, by making the material scope and level of protection the same for all discrimination grounds.

The draft provides associations with the independent right to demand discrimination to be stopped and its consequences to be removed where the rights of an uncertain number of people might be affected by discriminatory action. The NGOs would then have the possibility to take alleged discriminators to court on the basis of an independent group action, in addition to the already existing right to representation.

The draft anti-discrimination law had been submitted to the government in variants. The government chose to give the competencies foreseen in Art. 13 Directive 2000/43/EC to the existing Public Defender of Rights (Ombudsman). This contrasts with the reasoned opinion of the Legislative Council of the Czech Government (an advisory body), issued on 9 August 2004, which, in supporting the approval of the Czech anti-discrimination law by the government, favoured the option of establishing a new single equality body.

If this law is adopted, Czech legislation should be in line with Directives 2000/43/EC and 200/78/EC. At the moment legislation is still lacking in relation to self-employment, occupation, education, access to goods or services, access to social advantages and social security. There are however implementing provisions in the area of employment and labour relations: the Labour Law (65/1965 Coll.) contains definitions of discrimination and non-discrimination clauses with regard to training, promotion, pay and working conditions for *persons already in employment*; and the Law on Employment (435/2004 Coll.), in force since 1 October 2004, contains equal treatment provisions for the grounds racial or ethnic origin, religion, age, sexual orientation, and disability, covering relationships *prior to the conclusion of employment contract*, i.e. all relationships relating to the labour market, including re-training, activities of state and commercial job agencies, activities connected with recruiting for jobs and positive action in the job market. The Law on Employment includes definitions of discrimination, general rules for positive action in the labour market, provisions on the duty of employers to promote equal treatment and a prohibition of discriminatory job offers and interviews.

If the anti-discrimination law is adopted, it will abolish the general anti-discrimination provisions in the Law on Employment (non-discrimination clause, definitions of discrimination) and replace these by its own general provisions in order to prevent duplications in the legislation. The provisions particular to the Law on Employment (i.e. positive action for job-seekers, prohibition of discriminatory job offers etc.) will remain in place. This legislative arrangement should contribute to more clarity as regards anti-discrimination provisions. http://web.mvcr.cz/rs_atlantic/ftp/sbirka/2004/sb143-04.pdf

Case law

Supreme Court reversal of Regional Court finding of discrimination in goods and services, 1 Co 321/2003-196, 17 August 2004

In this case sec.133a of the Civil Procedure on the shift in the burden of proof was applied for the first time, leading the Regional court in H. to find that the Roma plaintiffs had been discriminated against when denied service in the Sport restaurant in N. The plaintiffs had been consistently ignored and when they inquired, the waiter told them that they were not going to be served and after about 20 minutes a “reserved” sign was placed on their table. The defendant objected that the whole issue was a misunderstanding, not discrimination. At the given time, there was a reservation – first the defendant mentioned that it was for the football players,



but later he and his employees gave several, in many respects inconsistent stories about the reservation. The regional court in H. as the court of first instance, in applying sec. 133a of the Civil Procedure Code, ascertained that the plaintiffs were exposed to different treatment. According to the regional court, the defendant was not successful in proving that this was not discrimination. The reservation, intended as the justification for the failure to provide the service, was not proved with certainty beyond doubt. The regional court ordered the defendant to pay 20 000 CZK (640 EUR) to each of three plaintiffs. The defendant appealed the decision. The Supreme Court dismissed the plaintiff's claim, reversing the regional court's decision. The court admitted that there was some confusion in the reservations, but in its opinion the incident was caused by improperly made reservations only. It also referred to some inconsistency in the testimonies of plaintiffs and witnesses brought by them, and concluded that the defendant proved beyond doubt that the reservation was a reason for denial of services. The decision of Supreme Court cannot be appealed. Appellate review to the High Court is the only possible remedy.

Applicable legislative provisions: Protection of personality provisions, Sec.11 of the Civil Code (No. 40/1964 Coll.), sec.133a of the Civil Procedure Code (No. 99/1963 Coll).

Denmark

Legislative developments

Adoption of Act no. 1417 of 22 December 2004 on the prohibition of direct and indirect discrimination on the grounds of age and disability

Following consultation of the age and disabilities equality NGOs, social partners etc., on 16 December 2004 the Parliament adopted Act no. 1417 on the prohibition against direct and indirect discrimination due to age and disability. The Act was signed on 22 December and entered into force on 28 December. It amends the 1996 Act prohibiting discrimination in the labour market on grounds of race, ethnic origin etc. This Act had already been amended in spring 2004 to transpose parts of Directives 2000/43/EC and 2000/78/EC.

For the first time, Danish legislation now directly prohibits discrimination on the grounds of age and disability. Prior to the adoption of Act no. 1417, only the public sector acting as employer was prohibited from discriminating on the grounds of age and disability. Private sector employers were free to discriminate, and by way of example, job advertisements demanding manpower between the ages of 25 and 35 are common. Act no. 1417 prohibits direct and indirect unequal treatment with respect to hiring, promotion, salary etc. Advertising in a way that prevents persons of a certain age or with disabilities from applying for a vacant post is also prohibited. Genuine occupational qualifications requirements may be permitted, depending on the specific kind of job, e.g. the armed forces can ask the Ministry for permission to exclude applicants of a certain age or with disabilities from specific positions.

Case law

First statement by the Danish specialised body's Complaints Committee in favour of the claimant

This case concerns education at a technical school, during which trainees may work in a private enterprise for a short period of time. During a meeting at the school, the complainant noticed a piece of paper stating that an employer did not want "P". When he asked the teacher about the meaning of this, the teacher confirmed that the private employer had instructed the school not to send a "Perker" (Danish slang for "Pakistani/Turkish") for



training in that firm. The complainant was then assisted by the Documentation and Advisory Centre on Racial Discrimination (DACoRD) free legal aid service. During a telephone conversation between DACoRD and the headmaster of the Technical School, it was confirmed that some employers demand Danish manpower etc. and in order to assist as many trainees as possible, this demand was sometimes approved. When the school refused to give the name of the employer who gave the discriminatory instruction, a petition against the Technical School was filed in November 2003 to the Complaints Committee, the Committee established as part of the Danish Institute for Human Rights, the specialised body in Denmark in accordance with Article 13 of the Racial Equal Treatment Directive. The petition also included a complaint about victimisation because of the treatment he received after filing the complaint. The Complaints Committee can hear cases and recommend that free legal aid be awarded for bringing the case to court (it does not have the mandate to make binding decisions).

Statement of the Complaints Committee: On 1 September 2004 the Committee stated that this episode was covered by the Act on Equal Treatment irrespective of Ethnic Origin (which covers education) and not by the Act on the Prohibition of Differential treatment on the Labour Market. Secondly it was stated that the school employee that followed the discriminatory instruction had violated section 3 of the Act on Equal Treatment irrespective of Ethnic Origin. It was, however, decided that section 3 was not violated by the school as such. Finally the Committee decided that section 8 of the Act (victimisation) was not violated.

Reasoning of the Complaints Committee: It was not disputed that the employee made a note about unwanted "Perkere" and this employee was thus, in the Committee's opinion, directly discriminating against the complainant. That this was also a general practice of the school was disputed by the headmaster. The Complaints Committee consequently decided that this was up to the Danish Courts to decide as it was a matter of proof. Similar reasoning was given in relation to the victimisation complaint. The Committee thus recommended free legal aid for a court case.

Following the Statement by the Committee in September, the case was forwarded to the Danish authority (Civilretsdirektoratet) in charge of making decisions as to whether or not the claimant is to receive free legal aid. By the end of 2004, no answer had been received, and consequently, the court case has not yet started. If, however, his application for free legal aid had been filed directly with the Civilretsdirektoratet in November 2003, the decision as to whether or not he is entitled to free legal aid would have been made no later than summer 2004. In this case, the Committee's examination from November 2003 until September 2004 has only delayed the case. Other claimants may instead want to go directly to the Civilretsdirektoratet, and then go to court without delay.

It seems to be a problem that the Committee's "statements/recommendations" may in fact only delay the progress of a case, instead of facilitating the process. Another general problem seems to be related to the burden of proof. The Committee started its work on 1 July 2003 but until now no other case than the case mentioned above has been "decided" in favour of the claimant. If facts are being disputed, it is the viewpoint of the Committee that it is up to the Danish Courts to assess these facts. Consequently such petitions are rejected. According to the homepage of the Complaints Committee, "statements" were made on 12 May 2004 (rejected), 2 June 2004 (rejected), 1 September 2004 (the present case) and 20 October 2004 (rejected). The total number of complaints filed with the Committee is higher (20 – 30), but not yet published.



Estonia

Legislative developments

Attempt to abolish maximum age requirement for university rector candidates

On 22 September 2004 a group of Estonian MPs (members of the parliamentary opposition) submitted draft law no. 456 SE. The goal of the draft is to abolish the maximum age requirement for rector candidates of public funded universities. This requirement ('younger than 60 years old') is stipulated in Article 18 of the Law on Universities. In the explanatory note attached to the draft, the MPs claimed that this age requirement is neither proportionate nor justified.

The authors of the draft used terminology of the relevant anti-discrimination provisions of the Law on Labour Contracts (adopted on the basis of the Racial Equal Treatment Directive and Employment Equal Treatment Directive). However, the explanatory note claimed absence of any relationship between the proposed amendment and the *acquis*.

It should be noted that on 29 January 2003 the parliament abolished the same age limits for rector candidates of public funded 'applied higher education institutions' (institutions that provide higher education below university degree level).

On 21 October 2004 at its regular meeting the Government of the Republic decided not to support draft law no. 456 SE, with reference to the opinion of the Ministry of Education and Research. The main arguments against abolishing the age requirement were the following: the age requirement for university rector candidates is not a unique age-related limitation in the Estonian legal system and it should be preserved to promote younger representatives of the academic world. Under present circumstances, the chances of the draft law being adopted by the parliament without governmental support are slim.

Finland

Legislative developments

Finland Ratifies Protocol 12 to the ECHR and Protocol 12 to enter into force

Finland ratified Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms on 17 December 2004, having signed it on 4 March 2000. The Parliament had accepted the ratification on 23 November 2004 and at the same time adopted a so-called *blanco law*, a law with two paragraphs stipulating that the provisions of the Protocol are in force in Finland at the level of a statutory law. The blanco law itself does not reiterate the substantive provisions of the Protocol. As the pre-existing legislation was deemed to be in conformity with the Protocol, no amendments to the existing legislation, including that transposing the Article 13 Directives, were deemed necessary. The Protocol will now enter into force. Armenia ratified it on the same day, bringing the ratifications to 11.

Case law

Vaasa Administrative Court finds in favour of claimant in case dealing with sexual orientation discrimination in the Church, 27.8.2004, Ref. No. 04/0253/3

This case considered whether the Evangelical Lutheran Church could refuse to appoint as a chaplain (assistant vicar) a person who publicly lives in a same-sex relationship. The decision gave rise to considerable debate both in the



national media as well as the Church itself. The Cathedral Chapter of the Evangelical Lutheran Church had decided that the applicant could not be appointed as a chaplain as she publicly lives in a same-sex relationship and has announced that she will officially register the said relationship. The prevailing policy of the Church is that a gay person may be appointed as a chaplain, but he or she must act in a manner compatible with the traditionally held doctrines of the Church, essentially meaning that a gay person may not “publicly manifest” her/his sexual orientation.

The Vaasa Administrative Court annulled the decision of the Cathedral Chapter, as it was found to be against the law because of its discriminatory nature. The Constitution (section 6) and the Non-discrimination Act (section 6(1)), the main instrument used to transpose the two directives, provide for equality before the law and prohibit discrimination on the grounds of, *inter alia*, sexual orientation and “other reasons related to a person”. A same-sex relationship was found to constitute such “other reason related to a person”, on the basis of which it was thus not possible to discriminate. Furthermore, the right of same-sex couples to register their relationship is provided for by the Act on registered partnerships (section 1). The decision of the Cathedral Chapter might have been justified had there been an applicable legal basis for it in the form of an exception to the non-discrimination norms. No such exception was however provided e.g. by the Church Order (which lays down rules for appointing vicars and chaplains) or the Church Act.

Comment: 1. The Non-discrimination Act has a provision on genuine occupational requirements, but the Court did not consider this in its decision. During the transposition, no new legislation was adopted pursuant to Article 4(2) of the Employment Equal Treatment Directive (apparently the general provision on genuine occupational requirements was considered to be sufficient). 2. In the light of the decision of the Vaasa Administrative Court, the Church now has two options for the future: a) accept that its gay employees have the right to publicly live in accordance with their sexual orientation, or b) amend national law. It could either demand and lobby for an amendment of e.g. the Non-discrimination Act, or it could itself prepare an amendment to the Church Act. The Church Act is a special type of national law, the amendment of which requires a legislative proposal from the Synod of the Church. To become law, the proposal has to be approved by the Parliament and the President of the Republic, who may approve or reject the proposal but not make any changes to the substance of the proposal. 3. From the point of view of legal interpretation, it would be interesting to speculate on whether or not “public manifestation” of sexual orientation, by way of cohabiting/registration of partnership, is so essentially related to sexual orientation that it make cases such as this a prime example of sexual orientation discrimination *per se*.

France

FR

Legislative developments

Law 2004-1486 of 30 December 2004 creating the High Authority against Discrimination and for Equality

The law creating a specialised body to assist victims of discrimination and promote equality and completing transposition of Directive 2000/43 was adopted on 21 December 2004 and published on 31 December 2004. It will enter into force on 1 February 2005.

The law provides for the creation of an independent administrative body – the High Authority against Discrimination and for Equality - with competence for all forms of discrimination that are forbidden by the laws of the Republic. It is thus readily adaptable to any future legal evolution. It will cover discrimination by reason of real or imputed race or origin, sex, disability, age, health, religion, sexual orientation, opinions, appearance, and union activities in all domains regulated by law.



Ikàr | 1967

The High Authority will ensure the promotion of equal treatment, have the power to make recommendations on all issues relating to discrimination, identify and promote good professional practices and coordinate and conduct studies and research. It will also be competent to investigate individual and collective complaints, whether the investigation is initiated of its own accord or by written demand of the claimant. Its investigative powers should allow it to request information from any public or private person, including the communication of documents and the hearing of relevant witnesses. In cases of non-compliance, the law proposes that it be in a position to request a court order. It may also ask that all required investigations be carried out by any service of the state and the High Authority may conduct visits to all non-private premises after due notice and consent of the "interested persons".

Upon receiving criminal complaints, it will transmit the claim to the penal courts. In other cases, it may offer mediation to the parties or complete the investigation, in which case it will issue its conclusions and recommendations to the parties who will have a certain amount of time to comply. In cases of non-compliance, the High Authority will have the power to call public attention to its recommendations. In addition, it may alert the relevant authorities in cases that require disciplinary sanctions against the respondent.

The High Authority has also been conceived as an 'auxiliary of Justice': the law creates the possibility for the criminal, civil and administrative courts to seek its observations in cases under adjudication. In addition, the High Authority will have the power to seek permission to submit its observations in criminal matters.

The Law HALDE completes implementation of Directive 2000/43 by creating in Article 19 a general principle prohibiting direct and indirect discrimination on the basis of "race" and origin. It provides for the shift in the burden of proof in civil and administrative cases as regards salaried workers, public agents, independent and non-salaried workers, and covering social protection, health, social benefits, education, access to goods and services, membership of, and involvement in, an organisation of workers, professionals or employers, working conditions and access to employment.

Official text: www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=SOCX0400130L

Senate second reading of the law reforming the law of 1975 concerning the disabled and transposing Directive 2000/78, on 21 October 2004

The bill reforming the Law of 1975 concerning the disabled was voted on at second reading by the Senate on 21 October 2004 after the first reading of the National assembly on 15 June 2004. The Senate's first reading took place on 1 March 2004.

This vast reform aims at revisiting all aspects of the State's policy and approach to disability in France. It modifies the definition of "disability" by articulating the rights of the disabled around the principles of non-discrimination, accessibility to the city and integration in society. It proposes a timetable for the implementation of all necessary measures to ensure access to school and superior education (Article 6), access to public buildings and housing (Article 21), access to public transport and urban mobility (Article 24). It also requires adaptation in order to facilitate access to new technology of information, vote and television (Article 32 and subs.).

Article 32 quinquies adds Article L 312-9-1 to the Code of education in order to recognise officially the French sign language for persons with impaired hearing and Article 32 sixties recognises a right of persons with impaired hearing to an interpreter in sign language before the civil and penal courts, and the right of the visually impaired to the reading aloud of civil and penal court records, all these measures being ensured at the cost of the State.



Amongst other measures, a home for the disabled will be created in each *département* (Article 27) in order to simplify administrative procedures for the disabled to a one-stop desk. Each of these Departmental homes will identify a referee who will be designated to support the disabled person in the case of litigation with any counterpart, whether public or private (Article 27 section 3).

The bill covers as much research as prevention (Article 1 ff.), financial and institutional support and the transposition of Directive 2000/78. It modifies all relevant aspects of labour law on the basis of the principle of reasonable accommodation (Article 9 ff.).

Many aspects of this reform generate considerable debate by reason of the magnitude of the costs involved and the timetable to achieve accessibility. Hence, the Senators substantially amended the text adopted at first reading and it will have to be presented and debated again before the National Assembly.

www.assemblee-nat.fr/12/dossiers/handicapes.asp



Application of the law on secularity in public schools

2 September 2004 marked the beginning of the school year in France for the 11.2 million public school students, and the first day of effective enforcement of the French law on the principle of secularity in public schools (Law of 15 March 2004 no. 2004-228). It forbids "...in public elementary, secondary and high schools, the wearing of signs or clothes by which a student ostensibly manifests his or her religious beliefs". Discreet religious signs remain authorised. The law further instructs each school to adopt in-house regulations for the school year 2004-2005 in order to put in place a procedure of enforcement by disciplinary decision preceded by a mediation and dialogue process with the student. In view of the debates raised by this new law, the text itself foresees an evaluation of the results of its enforcement in September 2005. The law was followed by administrative instructions on the conditions of enforcement of the law (Circulaire N°2004-084 of 18.05.04).

Whereas in 2003, 1200 girls came to school on the first day wearing the Islamic veil according to the ministry's statistics, the Minister of Education declared on 3 September 2004 that, excluding girls who obeyed the law and removed their veil before entering the school, 240 cases of girls arriving at school with their veil on had been registered this year. After discussions, 170 girls agreed to remove their veil to enter the school premises and 70 were still in a process of dialogue with their school's directors.



Bill no. 1700 for the repression of homophobic and sexist language

The Bill for the repression of homophobic and sexist language was registered at the National Assembly on 23 July 2004, and public consultations preceding its discussion before Parliament began on 15 September. The bill completes a series of reforms completing the legislative apparatus integrating sexual orientation into the penal protection against violation to human dignity (cf. Act of 16 November 2001 transposing Directive 2000/78 in the Labour Code and adding sexual orientation as a prohibited ground of discrimination to the Labour and Penal Codes; Acts of 3 February 2003, 18 March 2003 and 9 March 2004, which created aggravating circumstances for common law crimes on the basis of racist and homophobic motives). This Bill proposes to complete the Law on the Press of 1881, which regulates freedom of speech, by introducing prohibitions of various public expressions of homophobia and, to a lesser extent, sexism, into the sections providing for their penal repression when they are an expression of racism and anti-Semitism. It will be the first text to officially condemn public manifestations of homophobia and sexism. It will cover day to day as well as official manifestations of intolerance, whether in public, in private or in the work place.

Associations regret that the act does not expressly address offences committed against transsexuals because of the reference to the term “Homophobia”. With regard to rights of standing for associations, the Bill complements existing rules by providing for the intervention of associations combating violence and discrimination based on sexual orientation (Article 5 of the bill referring to art. 48-4 of the Law) or sex (Article 5 of the bill referring to Art. 48-5). www.assemblee-nationale.fr/12/dossiers/lutte_discrimination.asp

Case law

Hamida and Audrey Hamida, Grenoble Criminal Court, 14 September 2004

In this case the court convicted a landowner of racial discrimination based on Article 225-2 of the Penal Code for refusing to sell a piece of land on grounds of race. After having accepted an offer for the sale of a piece of land, the owner refused to complete the transaction, arguing that she was afraid of provoking problems with neighbours because the buyer was “Arab”. After requesting a copy of the buyer’s marriage certificate in order to verify his “good behaviour”, photographs of the wedding to evaluate his demeanour, and asking for a higher price and reducing the surface to be sold, she still refused to complete the transaction, raising technical problems and estate and property law problems preventing the completion of the sale.



The court imposed considerable penalties on the owner, marking a turning point in the penal treatment of discrimination. The landowner was fined 10 000 EUR fine, given a four months suspended prison sentence, and ordered to pay 1500 EUR in damages to the buyer and 500 EUR to his wife. The court also ordered the publication of the conviction in the professional bulletin of the federation of real estate brokers and awarded 1500 EUR in damages to the two NGOs supporting the victim, MRAP and SOS Racism.

Court of Cassation convicts Mayor of provocation to racially discriminate by calling for a boycott of Israeli products

As a protest against the policy of the Government of Ariel Sharon towards the Palestinian population, at a city council meeting on 3 October 2002, the communist Mayor of Seclin (Nord) called for a boycott of Israeli fruit juice in school cafeterias, which are financed by the City, despite the fact the City had never before purchased such products. The President of the Jewish Association of Lille and a private citizen filed complaints for public provocation to racially discriminate. The Mayor was prosecuted by the State before the criminal court of Lille but was acquitted on 26 March 2003 on the basis that he had merely exercised his freedom of speech.



This decision was appealed by the prosecution further to specific instructions from the Minister of Justice and on 11 September 2003, the 6th Criminal Chamber of the Court of Appeal of Douai condemned the Mayor of Seclin to a 1000 EUR fine for public provocation to racially discriminate in breach of Art. 24 paragraph 5 of the Law on the Press of 1881. The Court held that the Mayor had called for the disruption of the economic activities of manufacturers on the sole basis of their belonging to the Israeli people and had therefore intended to provoke discriminatory behaviour.

On 28 September 2004, further to the appeal by the Mayor, the Court of Cassation upheld the decision of the Court of Appeal of Douai, affirming that the latter had properly justified its decision in facts and in law and refusing to quash the decision on the basis of freedom of speech.

High Administrative Court (Conseil d’État) orders interruption of diffusion on cable of AL Manar TV for broadcasting openly anti-Semitic programmes

On 13 December 2004, the High Court granted an injunction against EUTELSAT ordering the interruption of the



diffusion of the television network of the Lebanese Hezbollah AL MANAR in France on the basis of the openly anti-Semitic character of its programmes. The reasoning of the High Court is that despite the warnings of the Superior National Council of Radio and Television, which regulates the broadcasting industry and diffusion authorisations in France, the network persisted in broadcasting programmes encouraging violence and hatred for reasons of religion or citizenship.

http://www.conseil-etat.fr/ce/jurispd/index_ac_ld0460.shtml

Germany

Legislative developments

At the end of 2004, the governing political parties, the Social Democrats (SPD) and the Greens (Bündnis 90/GRÜNE), submitted their Draft Law to Implement the European Anti-discrimination Directives to the Federal Parliament, where it was debated on 21 January 2005 (German Bundestag Drucksache 15/626 Deutscher Bundestag 15. Wahlperiode), www.spdfraktion.de/rs_datei/0,4395,00.pdf). The Draft has been referred to expert hearings which will take place in March, and second and third readings are expected in April, in order that it can enter into force in August. The Draft covers race or ethnic origin, gender, religion or belief, disability, age and sexual identity and has three parts. The first part (article 1) presents an “anti-discrimination law”, which states the goal, grounds, and types of discrimination generally. Section 2, §§ 6-19, covers employment; section 3, §§ 20-22, covers contracts, section 4, §§ 23, 24, covers burden of proof and litigation; section 5 declares the law to be applicable to public employees and civil servants; and section 6, §§ 26-31, establishes an independent body. The second part of the Draft (article 2) contains anti-discrimination rules applicable to the military. The third part (article 3) presents amendments to existing law, in particular the law of procedure in the labour courts and social courts, the laws on collective representation at the workplace, the laws on the selection of civil servants and soldiers, and the laws on social security.

The Bundesländer (states of the federation) must also enact legislation for their fields of competences, but have been waiting for the Federal Parliament to act first.

State Bavarian law on religious symbols in schools

The Federal Constitutional Court decision in the Ludin case of 24 September 2003 (BVerfGE 108, 282) delegated the power to legislate on the issue of presence of religious symbols in public educational institutes to the Federal States (they could either demand strict adherence to the principle of state neutrality, thus banning all religious clothing from schools, treating all religions equally, or conclude that it is advisable to integrate social and cultural pluralism in school and thus allow for religious symbols or clothing). Bavaria is the most recent state to have passed such legislation. The regulation of 11 November 2004 amends Art. 59 of the Bavarian Law on Education and Schooling, adding a new second clause. It provides that external symbols and pieces of clothing which articulate religious or other convictions may not be worn by teachers in class, in so far as these symbols or pieces of clothing could be understood by pupils or parents as the expression of a position which is incompatible with constitutional basic values and the constitution’s goal of education and culture, including western-Christian values of education and culture. Those teaching as part of their training are exempt from this rule (as otherwise the law would violate the constitutional right of access to employment in of the Art. 12 Basic Law).

The legislature explicitly cites the “headscarf prohibition” as the reason to legislate, yet emphasises that religious symbols are not prohibited per se. The law refers to the principles of the Bavarian constitution of (inter alia)



respect before God, respect of religious convictions, human dignity, equality of men and women, and the preparation of pupils to equally exercise their rights and fulfil their obligations in family, state and society. The legislature seeks to prohibit teachers from contradicting these values through their clothing. The reasons for wearing such clothing are irrelevant; it is their interpretation which counts. In such cases, the public peace in school would be endangered. Because of this, the “wearing of the headscarf would be not allowed, because at least some of those who endorse it do connect it with an inferior position of women ... or with a fundamentalist position in favour of a theocratic regime...” (reasoning of the legislature, on § 1 Nr. 1 par b, third par.)

Case law

Publication of Federal Administrative Court’s reasoning in its decision on the Baden-Wuerttemberg law on religious symbols

The reasoning of the Federal Administrative Court (FAC) in its decision of 24 June 2004 (BVerwG 2 C 45.03) on the legality of the Baden-Wuerttemberg law on religious symbols in education was published in October (www.bverwg.de).



The FAC upheld the validity of the amendments to the Baden-Wuerttemberg law on schools, which followed the Ludin Constitutional Court decision referred to above. §38 of the Baden-Wuerttemberg law was amended to expressly ban teachers “from making any political, religious or ideological manifestations that may either question or infringe the principle of neutrality of the state or disturb the peaceful coexistence in political, religious and ideological matters in school”. However, “the display of educational or cultural values or traditions of Christianity and the Western world” was exempt from the ban. The FAC upheld the law on the grounds that the prohibition may apply to all kinds of religious symbols regardless of their particular meaning or effect, because it addresses abstract dangers inherent in religious manifestations of any kind. An exception from the prohibition of religious symbols for Christian and Western values may be justified, and does not violate the principle of equal treatment of all religions, which is “strict” and “unexceptional”, because it simply describes “a world of universal values” which originate in the tradition of Western and Christian culture, but which also form the very basis of fundamental rights as enshrined in the German constitution, like dignity (Art. 1), freedom of personality (Art. 2), equality (Art. 3) and freedom of religion (Art. 4). These values can be “shared by everyone” regardless of his or her religion. Therefore, there shall be no general exemption in favour of Christian or Jewish symbols or clothing, but only a reference to such values.

Greece

EL

Legislative developments

Bill transposing Directives 2000/43/EC and 2000/78/EC

On 30 November 2004, the Greek Government published a new Bill on the Application of the Principle of Equal treatment regardless of racial or ethnic origin, religious or other beliefs, disability, age, or sexual orientation. The bill largely reflects the texts of the two Directives. Articles 2 and 3 of the Bill cover the definition of both the principle of equal treatment and discrimination in accordance with the directives.

The material scope of the bill reflects that of the two Directives, maintaining the distinctions between the grounds. There is an exemption reflecting Article 3.2 of the respective directives, and one reflecting Article 3.3 of Directive 2000/78 (social security etc.). Furthermore, discrimination on the grounds of age and disability is permitted in the armed forces in so far as age or disability affects the duties of such forces. The Bill also allows exemptions to the

application of the principle of equal treatment as far as professional requirements in various contexts are concerned. More specifically it is mentioned in Articles 5, 9 and 11 that a differentiated treatment based on a characteristic related to racial or ethnic origin, religious or other beliefs, age or sexual orientation shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement provided that the objective is legitimate. In Articles 9 and 11 there are special provisions for professions related to churches and special references to differences of treatment on the ground of age on occupational issues including social security matters, dismissals, pay etc. Positive action measures are permitted, as are measures aimed at creating or maintaining provisions or facilities for the protection of safety and health in the working environment or for the promotion of integration into occupation and employment.

Article 10 of the Bill deals with reasonable accommodation in the same terms as Article 5 of Directive 2000/78. Article 14 transposes the Directives' provision on the burden of proof. Article 13 concerns the defence of rights and provides that "legal entities which have a legitimate interest in ensuring that the principle of equal treatment is applied regardless of racial or ethnic origin, religious or other beliefs, disability, age or sexual orientation, can represent the person wronged before any court and any administrative authority with the written consent of the person wronged." Protection against victimization is provided in Article 15. The only sanction provided for is a fine between 1000 EUR and 5000 EUR which the employer, in the case of failure to apply the equal treatment principle, shall pay to the state and not to the victim.

Article 18 of the Bill entrusts the *Economic and Social Committee* with tasks such as drafting an annual report on the developments with regard to the application of the Principle of Equal Treatment, making suggestions to the Government and to Social Partners on promoting equal treatment and non-discrimination, and encouraging dialogue with NGOs and representative Unions that have a legitimate interest in combating discrimination on the grounds of ethnic or racial origin, religion or beliefs, sexual orientation and disability.

Four Specialised Administrative Bodies are charged with the promotion of the Principle of Equal Treatment: 1) the "*Ombudsperson*" becomes competent with regard to the promotion of the Equal Treatment Principle in the public sector with the power to draft reports and investigate discrimination complaints in any field; 2) an *Equal Treatment Committee* is established by the Bill and placed under the Minister of Justice. Its competence would cover the private sector (not the public sector) and fields *outside* employment and occupation. It would examine discrimination complaints in its field of competence and attempt to conciliate conflicting parties. The Committee would have no authority to inflict sanctions of any kind; 3) the *Work Inspectorate*, a governmental Body, would be active only in the private sector and in the field of employment and occupation, acting as conciliator between employer and employee and able to impose fines (payable to the State and not to the Employee) in cases of violations of the Equal Treatment Principle;²⁰ 4) the *Equal Treatment Service* is another governmental Body that would be established in the Ministry of Justice and entitled to examine complaints of violations of the principle of equal treatment, act as a conciliator, draw up and submit a report to the Equal Treatment Committee where conciliation attempts have failed, and finally be of secretarial and scientific assistance to the aforementioned Equal Treatment Committee.

²⁰ The fine can then be challenged before an administrative court. But the litigation is not between employer and employee but between employer and the Government.

Case law

First instance court decision on declaration promoting exclusion of homosexuals from theological education at Calvinist university

On 8 October 2004 the Metropolitan City Court rejected the first *actio popularis* claim brought under the new Equal Treatment Act (EqTA) by the gay and lesbian rights protection organization “Háttér Társaság a Melegekért” against the Károli Gáspár Calvinist University, a university maintained by the church but also receiving state funding. The University’s Theology Faculty had dismissed a theology student who had confessed his homosexuality to one of his professors; the university went on to publish a general declaration on 10 October 2003, claiming that “the church may not approve of [...] the education, recruitment and employment of pastors and teachers of religion who conduct or promote a homosexual way of life.” “Háttér Társaság a Melegekért” requested the court to declare that the defendant had violated the right of homosexuals as a social group to equal treatment, to oblige the defendant to put an end to the infringement and to withdraw its declaration as well as pay punitive damages.



The Court established some very important principles: it claimed that homosexuality is an inherent feature of one’s personality (which is a precondition of an *actio popularis* claim) and that the future possibility of an infringement of rights is sufficient grounds for bringing an *actio popularis* claim. Thus the homosexual association does have legal standing in the case. However, the Court came to the conclusion that the declaration of the Faculty Council is an opinion protected by the freedom of expression and not transgressing the limits of constitutionality. The Court also accepted the defendant’s argument that courts shall not be allowed to judge, interpret or overrule the religious or moral views of a church if these views are not articulated in a way so humiliating or offensive as to infringe one’s inherent right to dignity.

The gay and lesbian organisation appealed the decision, but the Appeal Court fully accepted the first instance court’s reasoning, adding also some new elements. It claimed that the freedom of religion provides a ground for any religious educational institution to lay down its religious views, voice its moral convictions and decide on who is suitable to become a pastor. According to the Appeal Court, these issues belong to the scope of the university’s “religious activity”. The Appeal Court also referred to the Constitutional Court’s decisions claiming that the separation of state and church entails that the state may not interfere with religious matters and may not take a stance on religious truths. Furthermore, it quoted the Act on Public Education, which claims that the denominational universities may conduct theological education, and in this case the contents of religious subjects may not be examined. Finally, it referred to Article 28 of the EqTA, which claims that for the purposes of religious education separated groups and/or classes may be organised on a voluntary basis.

Short analysis: Although the first instance court’s decision was questionable, it had its own internal logic. The same cannot be said about the decision of the Appeal Court. It seems that the body tried to gather all the legal references that may in a way substantiate the rejection of the decision without actually trying to set up a logical framework. The reference to the Public Education Act, for example, seems irrelevant, as the issue in this case is not the context of any religious subject taught at the university, but the exclusion of a certain group. The reference to Article 28 of the EqTA is similarly questionable. This provision creates the possibility for followers of a certain religion to be organized into a separated group or class within an educational institution but may not serve as the basis of

excluding an adherent of that particular religion on the basis of his/her sexual orientation. It is also remarkable that although the Appeals Court deemed the disputed declaration to be a manifestation of the university's "religious activity", it did not examine the possibility of applying Article 6 of the EqTA, which explicitly excludes from the Act's scope all the matters that are related to a denomination's religious activity. The gay and lesbian organisation plans to submit a request for extraordinary review by the Supreme Court.



Case of race discrimination in access to housing referred to European Court of Human Rights

In September 2004, the first application against Hungary for racially-motivated discrimination in housing was submitted to the European Court of Human Rights by the European Roma Rights Centre (ERRC) and the Hungarian NGO Legal Defence Bureau for National and Ethnic Minorities (NEKI) in a joint application. <http://www.errc.org/cikk.php?cikk=327&archiv=1>

IE

Ireland

Legislative developments

Adoption of Equality Act 2004

The Equality Act 2004 became law on the 19 July 2004. The Act of 2004 seeks to implement the employment and non-employment aspects of Directives 2000/43/EC, 2000/78/EC and 2002/73/EC. The Equality Act 2004 deals with employment, education, access to goods and services. The grounds protected are gender, marital status, family status, sexual orientation, religion, age, disability, race and membership of the traveller community.

The Act amends the Employment Equality Act 1998 and the Equal Status Act 2000.

The main amendments to the Employment Equality Act, 1998 are:

- Extension of the scope of the Act to self-employed persons.
- Extension of positive action provisions to all nine grounds covered by the Act.
- Extension of the age provisions of the Act to persons under the age of 18 but over the minimum school leaving age and over 65. Employers will still be allowed to set minimum recruitment ages of 18 or under and to set retirement ages.
- Narrowing of the exclusion from the provisions of the Act of 1998 in respect of employment in private households.
- Provision for the requirement on employers to provide reasonable accommodation for persons with disabilities to be, in future, subject to it not imposing a disproportionate burden rather than nominal cost.
- Provision for the transfer of jurisdiction for discriminatory dismissal cases from the Labour Court to the Equality Tribunal.

The main amendments to the Equal Status Act, 2000 are:

- Provision for the shifting of the burden of proof from the complainant to the respondent once the complainant has established a prima facie case.
- Allowing claimants and respondents to choose any person, including an organisation, to represent them before the Equality Tribunal.
- Providing a means of redress for drivers under the age of 18 years who have been discriminated against in motor insurance.

<http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2004/0104/default.htm>

*Legislative developments***Launch of new office against racial and ethnic discrimination**

The new National Office against Racial Discrimination (*Ufficio Nazionale Antidiscriminazioni Razziali* - UNAR) was presented to the public at a round table on anti-discrimination issues in Rome on 16 November 2004. The office was established by Article 7 of the legislative decree of 9 July 2003, n. 215, which transposed Directive 2000/43 (published in *Gazzetta ufficiale* n. 186 del 12 agosto 2003). Its internal structure was defined by a further short decree of 11 December 2003. The office was created within the Department for Equal Opportunities of the Presidency of the Council of Ministers and has competence only for racial and ethnic discrimination. Its staff of experts has mostly been taken from the staff of other public administrations.



The decree on the structure and competences of the new office gives it a wide set of competences, ranging from study, research and awareness-raising activities to legal assistance to victims of discrimination. What the actual priorities of the new office will be will become clear only after monitoring its first period of activity. In presenting the new office, the Minister for Equal Opportunities, Stefania Prestigiacomo, stressed the importance of assistance - including in litigation - to victims of discrimination. This assistance will be provided through a contact centre administered by ACLI (*Associazioni Cristiane Lavoratori Italiani*), a federation of - mainly Catholic - NGOs located across the country. The contact centre's toll-free number with service in several languages (Italian, English, French, Spanish, Arabic, Russian, Rumanian, Chinese), started operating on 10 December 2004. As the government presents it, the contact centre will have the only task of receiving and "filtering" requests for assistance from victims of discrimination, while decisions on action will be taken by the staff of the UNAR.

On the occasion of the presentation of the new office, some NGOs expressed concerns about their inclusion or absence in the list of the organisations that have standing to litigate in anti-discrimination cases. This list is kept by the Department of Equal Opportunities, and so far 65 organisations have applied for inclusion therein. It is not clear what the discretionary powers of the government are in relation to admitting organisations onto the list.

Tuscany enacts regional statute against discrimination on ground of sexual orientation and "gender identity"

On 15 November 2004, the Regional Council of Tuscany approved an act against discrimination on the ground of sexual orientation (Act no. 63, Official Bulletin no. 46 of 24.11.04). Sexual orientation discrimination is not explicitly defined in the Constitution as a regional competence (whereas gender discrimination is to a certain extent), but since the recent constitutional reform regions have had a residual competence which empowers them to legislate in all fields that are not assigned to exclusive state competence.



The statute (art. 1.3) binds the Region to respect equal treatment irrespective of sexual orientation and gender identity (it applies also to transsexual and transgender persons) in all the fields that are within its competence, and foresees the implementation of different positive action measures in the field of employment and health care. It promotes the training of its staff with regard to the respect of sexual orientation and gender identity.

Article 16 prohibits discrimination by persons selling goods and services to the public, including tourist and commercial activities. Such persons cannot refuse to sell their goods or services, nor sell them at worse conditions, without a "legitimate reason" and "in particular, among other things, for reasons related to sexual



Nataly | 1991

orientation or gender identity". The wording of the provision thus seems to allow its application to other grounds of discrimination as well. Violations of this prohibition are sanctioned by a fine of 516 EUR - 3098 EUR. The implementation of the prohibition is to be monitored by the local authorities (*comuni*).

Case law

'Hate speech' conviction in case brought against leaders of an anti-gypsy campaign

On 2 December 2004 six elected representatives of the political party *Lega Nord* (part of the national governing coalition) who started a campaign against the members of the local Sinti community in September 2001, were convicted of racial hate speech by the first instance court of Verona. The convictions were based on Art. 3 of Act 645/1975 as modified by legislative decree 205/1993, the so-called "legge Mancino". This provision establishes that it is a criminal offence "to spread, in whatever way, ideas based on racial or ethnic superiority or hate, or to incite to commit or to commit acts of discrimination on racial, ethnic, national or religious grounds".



The sentence was six months imprisonment, 45 000 EUR damages, and a three year prohibition from taking part in electoral campaigns (a sanction expressly laid down in "legge Mancino"). The court also recognised the standing to litigate of *Opera Nomadi*, a major Italian organisation dealing with the conditions of Roma.

The application of the rules against racial hate speech is rare, and this is probably the first case that recognises the existence of an individual's prejudice, and not only an infringement of the general interest of peaceful coexistence between ethnic groups. The fact that the defendants are active members of a major political party caused immediate reaction. Solidarity with the defendants has been expressed in oral declarations by the Minister of Justice, Mr. Castelli, also from *Lega Nord*. This decision has given new fuel to a position already voiced by representatives of *Lega Nord* (as well as by different right-wing groups), and by the same Minister of Justice, i.e. the abolition of the rules on hate speech contained in the "Legge Mancino".

Luxembourg

LU

Legislative developments

Opinion of the State's Council on draft legislation transposing Directives 2000/43/EC and 2000/78/EC
(<http://www.ce.etat.lu/publicitind.htm>)

In Luxembourg, the Parliament is made up of one single Chamber, the *Chambre des Députés* (Lower Chamber). As no Upper Chamber exists as such, the *Conseil d'Etat*, or State's Council, must, for all draft bills, be consulted by the Lower Chamber. The opinion of the State's Council may provoke a second reading of the bill if it issues its *opposition formelle* (formal opposition). It may also approve the proposal as it is, thereby saving the Parliament a second reading.

The opinion of the State's Council of 7 December 2004 is very critical of Bills 5248 and 5249, which seek to transpose the two EC anti-discrimination directives. It issues several warnings to the Parliament and formally opposes the adoption of these documents on several issues. The State's Council considers that the proposed texts do not constitute correct transposition of Directives 2000/43/EC and 2000/78/EC.

The criticism of the State's Council is blatant with regard to many items, of which the following may be highlighted:

- It considers that it would have been wiser to have a single bill rather than two bills. The scope of the two bills is criticised as being legally unacceptable, as mainly the draft bill transposing Directive 2000/78/EC refers to

several other bills. Also the scope is not the same as that laid down in the two Directives, leaving out the public sector as well as self-employment. There is a clear warning about the possible responsibility of the State, should the transposition be inadequate (expressly referring to the *Francovich* case).

- As far as definitions are concerned, the State's Council is critical of the use of the word "race" (in French). It advises using the solution already adopted in the penal code, namely to insert, before the words "race" and "ethnic origin", the words "their real or supposed belonging or non-belonging to a"
- The body also criticises the wording of the exception relating to genuine and determining occupational requirements for Churches, as it could be interpreted as introducing new restrictions to religious freedom and to the freedom of expression.
- Though the State's Council finds that the age criteria is indeed included, it firmly condemns the fact that in the public sector an age requirement is still applicable, while it would be prohibited in the private sector.
- It does not agree with the absence of a special mechanism to ensure the defence of rights, disagreeing with the Government about the efficiency of existing legal possibilities in this field.
- The same can be said for victimisation, as only the draft bill on the employment area (Directive 2000/78) has included new legal remedies.
- The State's Council also stresses that, as far as sanctions are concerned, there should be no new definition of discrimination, the existing one being included in the penal code, and disapproves the creation of new, competing penal sanctions.
- Finally, the State's Council formally opposes the absence of the independent body for the promotion of equal treatment, stressing that such a body could be set up according to the recommendations issued by the Council of Europe's European Commission on Racism and Intolerance.

Malta

Legislative developments

Equal Treatment in Employment Regulations, 2004 (Legal Notice 461 of 2004), Government Gazette of Malta No. 17,672 - 05.11.2004

Issued on 5 November 2004 by virtue of the Employment and Industrial Relations Act 2002 (EIRA), these regulations give effect to those provisions of Council Directives 2000/78/EC and 2000/43/EC that the EIRA itself did not transpose in 2002. This includes prohibiting discrimination on the basis of age and sexual orientation for the first time in Maltese legislation. 'The purpose of these regulations is to put into effect the principle of equal treatment in relation to employment by laying down minimum requirements to combat discriminatory treatment on the grounds of religion or religious belief, disability, age, sexual orientation, and racial or ethnic origin' (Regulation 1(3)).

The Regulations introduce the concepts of direct and indirect discrimination into employment legislation, using the same definitions as the Directives. Until now, the only legislation in Malta specifically referring to direct and indirect discrimination was the Equality between Men and Women Act (these were simply implicit in the EIRA). Protection against harassment – until now only outlawed by the EIRA on the grounds of sex – has also been extended to all the Directives' grounds. Harassment is defined as a form of discriminatory treatment where it has purpose of effect of violating the dignity of the person who is being harassed or where it has the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the person who is so subjected. Unlike the Directives, it is sufficient that one of the two clauses is met. Furthermore, an employer shall be deemed to have discriminated against another if the former neglects his obligation to suppress any form

of harassment at their place of work or within their organisation. A person shall also be deemed to have discriminated against another if he instructs any person to discriminate against such another person.

The Regulations by and large reflect the material scope of Council Directive 2000/78/EC.

They shall not apply to the armed forces with regards to discriminatory treatment on the grounds of disability and age. Neither will they apply to any differences in treatment based on nationality, and they are without prejudice to laws and conditions relating to the entry into and residence of third country nationals and stateless persons and to any treatment that arises from the legal status of these individuals. Specific exceptions to age discrimination reflect Article 6 of Directive 2000/78/EC.

Exceptions for genuine and determining occupational requirements are permitted. It is further stated that when an employer has an ethos based on religion or religious belief, and the nature of the employment or the context in which it is carried out constitutes a sufficiently genuine and legitimate justification for the employer to require that such work be carried out by a person of a particular religion or religious belief, any difference in treatment based on a person's religion or religious belief shall not constitute discriminatory treatment, provided that it is proportionate to apply that requirement in that particular case. This does not seem to meet the directives' requirements, as it refers to the employer having an ethos based on religion rather than the ethos of the occupational activities within religious institutions and other public or private organisations. Positive action is permitted, as are special measures for disabled persons at the workplace in the spirit of Article 7(2) of Directive 2000/78/EC.

Victims of discrimination in employment may, within four months of the alleged discrimination, refer the matter to the Industrial Tribunal for redress. Also, a person who alleges that any other person has committed in his/her regard any unlawful act under the regulations may within four months bring an action before the competent court of civil jurisdiction, requesting the court to order the defendant to desist from the unlawful act and in certain cases, order the payment of compensation for any damages suffered. In this case the burden of proof falls on the defendant to prove that such treatment was justified. Article 7(2) of Directive 2000/43/EC and Article 9(2) of Directive 2000/78/EC (engagement of interested legal entities in proceedings) is reflected in the Regulations.

Employers are placed under a duty to use appropriate means to bring the provisions of these regulations, as well as any measure taken to further the aim of these regulations, to the attention of his employees, or any other persons who may be affected by the actions of the employer. Any provisions contrary to the principle of equal treatment in individual or collective contracts or agreements, internal rules of undertakings, or rules governing any registered organisation in terms of the EIRA, are, from the date of the entry into force of these regulations, null and void. If a person contravenes the provisions of these regulations he/she shall be guilty of an offence and shall, on conviction, be liable to a fine (multa) not exceeding one thousand liri or to imprisonment for a period not exceeding six months, or to both such fine and imprisonment.

Netherlands

Case law

Equal Treatment Commission case on religious discrimination in the area of service provision, Case no. 2004/112 of 8 September 2004

In this case the Dutch Equal Treatment Commission (the quasi-judicial specialised body, whose judgments are



not legally binding) held that the respondents' policy for entry into their restaurant constituted indirect religious discrimination in breach of Article 1 of the Dutch Equal Treatment Act (which *inter alia* prohibits direct and indirect discrimination) in conjunction with Article 7(1) 'a' (discrimination in goods and services). The policy read, *inter alia*, "Correct clothing is mandatory. Sport shoes and headgear, which, in combination with the remainder of clothing, does not correspond to the restaurant's dress code, are prohibited. The ultimate assessment of this rule remains with the host". Anyone wearing headgear or scarves was requested to take it off, and if they refused to do so they were denied entry. The rationale for the policy was to attract a sophisticated and slightly older public to the restaurant. The policy had been a reaction to badly dressed youngsters coming to the restaurant. The four applicants in this case are Muslim girls who by reason of their belief wear a headscarf. They had all been refused entry to the restaurant by reason of their refusal to take off their scarves.

The Equal Treatment Commission repeated that the right not to be discriminated against on the ground of religion incorporates both the right to have a religion or belief and, the right to behave in accordance with that religion and belief. As the restaurant's policy is not specifically directed at Muslim women wearing a headscarf but to all persons wearing headgear, the policy was held not to constitute direct discrimination on the ground of religion, but as the contested rules disproportionately affect Muslim girls, it does constitute indirect religious discrimination. The Commission subsequently analysed the "objective justification" defence. It concluded that the restaurant's aim was *legitimate*: the objective of attracting older, smartly dressed people reflected a real need and was not in itself discriminatory. However, the means used to reach this objective were neither *appropriate* nor *necessary*. They were not appropriate given that the contested rules also excluded people who were indeed neatly dressed (such as the applicants). The rules were not necessary, given that *alternative, non-discriminatory means* could be used to reach the same objective. The policy rules could easily specify those items of clothing which the respondent deemed inappropriate. This decision is in line with the ETC's earlier case law on the wearing of headscarves by Muslim women. All opinions of the ETC can be found on www.cgb.nl.

Equal Treatment Commission case on age discrimination in employment, Case no. 2004/150 of 15 November 2004



In this case the employer asked the Equal Treatment Commission (ETC) whether workforce regulations he set were in line with the Act on Equal Treatment on the Grounds of Age, which came into force on 1 May 2004. These concerned: a gradual reduction of working hours to employees of 57.5 or older; a requirement that workers have been employed continuously by the employer for 10 years in order to qualify for this reduction; and the allocation of extra days of holidays to older workers.

Distinction on the ground of age with regard to employment conditions is prohibited by Article 1(1) in conjunction with Article 3e) of the Act. Distinctions may be "objectively justified by a legitimate aim where the means used to achieve that aim are appropriate and necessary" on the basis of Article 7(1)c) of the Act. The employer submitted that the reduced working hours arrangement for older employees enabled them to gradually step back from the labour market and prepare for retirement. He also maintained that without the length of service requirement in particular, it would be economically disadvantageous for him to recruit older employees where young employees are also available.

With reference to the *travaux préparatoires*, the ETC held that employment conditions such as seniority leave and age-related holiday arrangements are permitted only where they are objectively justified. The reduced working time arrangement was held to make a distinction between people over and under the age of 57.5

and was thus a distinction on the ground of age. In the ETC's view, the arrangement was not objectively justified. The objective justification test implies that the contested measure: *i)* serves a *legitimate aim*, i.e. it must serve a real need and must be free from discrimination; *ii)* must be an *appropriate* measure to reach the objective pursued; and *iii)* must be a *necessary* measure i.e., it must be established that no alternative non-discriminatory measures could be used to reach the same objective. While the ETC considered the rationale for the arrangement to be a *legitimate aim*, it was not *appropriate*, as older employees who do not meet the length of service requirement might have as much a need to be prepared for withdrawal from the labour market as those employees who do meet this requirement. Furthermore, the length of service requirement was not *necessary*, as a special preparatory course could form an alternative and less discriminatory means. Moreover, there was no proportionate relationship between the means used and the objective sought: those over 57.5 were eligible but in the ETC's view a person would not need 7.5 years (until the statutory pension age of 65) to prepare for pensionable age.

The ETC indicated with reference to the *travaux préparatoires* that a length of service requirement such as the one in question may constitute unlawful "indirect age distinction," as older workers fulfil such a requirement more easily than younger workers. However, since the 10 years of service requirement was made in addition to the requirement that an employee must be over 57.5, there was no distinction between younger and older workers, but between workers over 57.5 who do meet the 10 years requirement and those who do not. In the Commission's view this does not in itself constitute a distinction on the ground of age.

Finally, the ETC held that granting extra days of holiday to persons aged 50 or over in order to alleviate the pressure of work on older employees is a distinction on the grounds of age. This distinction was not objectively justified as the employer's reasoning did not constitute a legitimate aim: with reference to the *travaux préparatoires*, the ETC pointed out that the employer's reasoning could in theory constitute a legitimate aim since it could prevent absence due to illness, but on the basis of the patterns of absence due to illness within the company and of an external research report of 2004, the ETC concluded that other factors (e.g. lifestyle, long-term physical burden) have more of an impact upon older employees' availability for work than age.

Poland

Legislative developments

Act on National and Ethnic Minorities and Regional Language

On 4 November 2004, the Parliament passed the Act on National and Ethnic Minorities and Regional Language. This Act will enter into force upon the approval of the Senate and signature by the President. Some amendments by the Senate are expected. The Act will reinforce the role of the Minister of Internal Affairs and Administration –already responsible for religious beliefs and national and ethnic minorities - in implementing governmental policies on ethnic and national minorities. In addition, the Act will create the Joint Committee of the Government and Ethnic and National Minorities as a consultative body of the President of the Council of Ministers (Art. 21).



Portugal



Legislative developments

Adoption of Law nº 38/2004 containing a general legal basis for measures for the rehabilitation and participation of persons with disabilities

Law 38/2004 concerning the rehabilitation and participation of persons with disabilities was published on 18 August 2004. The law is of a programmatic nature only in the sense that it refers to measures to be implemented in the future by Government Decrees but not yet detailed in the provisions of the law. Very broad and vague wording is used.

Art. 6º refers to the principle of non-discrimination as follows: 'A person cannot be discriminated, directly or indirectly, due to his disability through actions or omissions, and must benefit from positive measures in order to correct situations of inequality persisting in Portuguese society.' According to Art. 2º, disabled persons are 'persons who, due to the loss or anomaly of functions or structures of the body, including psychological functions, have specific difficulties susceptible to limiting or hindering activity and participation in conditions of equality with other persons.'

Art. 43º/2 refers to the responsibility of the media to contribute to the elimination of discriminatory practices with regard to disability. The law establishes employment quotas for persons with disabilities of 2% for enterprises and 5% for the public administration. Violations of the rights of disabled persons will be punished by fines to be fixed by Decree-law. The proceeds of such fines will go to a special fund for the disabled. A public body will be established to coordinate this policy but nothing concrete is said about its composition. At this stage the law is practically inoperative and no time frame has been set for the adoption of the necessary complementary regulations.

Case law

Convictions for racially motivated murder, Criminal Court of Fundão

On 21 December 2004 the Criminal Court of Fundão sentenced the moral author (instigator) of a racially motivated murder to 22 years of imprisonment. The Court considered it proven that he acted determined by racial hate, with perversity and premeditation. The victim, who was black, was the owner of a coffee shop in the town and was killed by two Brazilian citizens who were hired and instructed by the moral author. They were also sentenced to 22 years of imprisonment. Two other men accused of complicity were acquitted and another man was fined for selling the illegal gun used in the crime.

The Court applied Article 132 (2) (e) of the Criminal Code on homicide, under which the motive of racial hatred is an aggravating circumstance. The penalty is fixed at 12 - 25 years. The moral author is appealing the sentence. This conviction is important because the Courts are normally very demanding with regard to evidence of such racist motivation and have frequently considered it unproven.



Slovakia

Legislative developments

Slovak Government petition to the Constitutional Court challenging the constitutionality of the positive action provision in the Anti-discrimination Act

Act No.365/2004 Coll. on Equal Treatment in Certain Areas and Protection against Discrimination, amending and

supplementing certain other laws (Anti-discrimination Act) was adopted by the Slovak Parliament on 20 May 2004 and entered into force on 1 July 2004. Section 8 par. 8 provides that “With a view to ensuring full equality in practice and compliance with the principle of equal treatment, specific positive actions (*literally ‘balancing measures’ – author’s note*) to prevent disadvantages linked to racial or ethnic origin may be adopted.” Less than four months after the adoption of the Act, the Minister of Justice presented a proposal for launching proceedings before the Constitutional Court, claiming that the positive action provision violates the Constitution.



The basic legal arguments of the Ministry of Justice are based on the alleged obscurity and vagueness of the positive action provision, causing legal uncertainty and contradicting the principle of the rule of law. The Minister of Justice points to the lack of legal definition of the conditions under which the special balancing measures can be adopted and the lack of a legal definition of ‘equality in practice’. Another objection of the Ministry is the lack of definition of addressees, i.e. persons or bodies empowered to adopt specific positive action measures. Beside this, the Minister claims that positive action on the ground of racial or ethnic origin is discriminatory in essence, as none of the grounds can constitute a reason for different or favourable treatment. Only the Constitution includes special treatment provisions for special groups like women, youngsters and people with disabilities. According to the Ministry, as the positive action provision sets no limits, it would endanger the application of the principle of equal treatment in general.

On 6 October 2004 the Slovak Government approved the proposal of the Minister of Justice. Through Resolution No. 941/2004, the Slovak Government authorised the Minister of Justice to submit a petition on non-compliance of Section 8 par. 8 of the Anti-discrimination Act, thereby starting the proceedings before the Constitutional Court. The Minister of Justice was commissioned to represent the Slovak Government before the Constitutional Court. On 16 November 2004 the plenary session of the Constitutional Court accepted the government’s proposal for proceedings without suspension of the provision at stake.

[http://www.rokovania.sk/appl/material.nsf/0/62B933DA2E613BA1C1256F27003074A1/\\$FILE/Zdroj.html](http://www.rokovania.sk/appl/material.nsf/0/62B933DA2E613BA1C1256F27003074A1/$FILE/Zdroj.html)

Slovenia

SI

Legislative developments

National Council Recommendation on the Government policy regarding Roma

In its 27th regular session on 17 November 2004, the National Council of the Republic of Slovenia discussed the issue of economic and social integration of the Roma people in Slovenia. The National Council is the representative body for social, economic, professional and local interests, which could be regarded as the upper house of the parliament (with National Assembly as the lower house), but with rather weak powers. These include proposing to the National Assembly the passing of laws, conveying its opinion on all matters within the competence of the National Assembly, and requiring inquiries on matters of public importance.



The Council issued an order recommending the Government of Slovenia to prepare, on the basis of the analysis of the Institute for Ethnic Studies of “the situation and status of Roma in Slovenia”, a proposition for possible changes to the legislation aimed at speeding up the process of resolving the Roma issue, and a new programme of measures for each Ministry with bearers and concrete deadlines for performance. These should be presented to the Council and the National Assembly. At the same time the councillors agreed that there should be a special working body in the government for coordinating the programmes of measures between

individual Ministries, local communities and Roma society and for supervising the implementation of the programmes. The Council also suggested that the funding for resolving the Roma issues should be arranged similarly to those relating to the Italian and Hungarian minorities, in particular, the necessary funds should be assured through the annual national budget and the budgets of local communities. The National Council agreed that for local communities with larger numbers of Roma living in very poor living conditions, additional funding should be provided in the annual national budget for the year 2005. The report is available at <http://www.ds-rs.si/novice>

Spain

Legislative developments

Royal Decree 1865/2004 of 6 September regulating the National Disability Council

Law 51/2003 of 2 December on equal opportunities, non-discrimination and universal accessibility for disabled people, required the Government to provide regulations for a National Disability Council. Royal Decree 1865/2004 of 6 September regulates this Council, which replaces the State Council for People with Disabilities and has wider functions in the field of equal opportunities and non-discrimination. The new Council is an inter-ministerial collegiate advisory body that institutionalises the collaboration of associations of disabled people, their families and national government with a view to defining and coordinating a policy of integral care for the disabled. It is attached to the Ministry of Labour and Social Affairs (Department of Social Services, Families and Disability).

In addition to the chairman (the Minister of Labour) and two vice-chairmen, the Council has 15 members representing various bodies within national government, 15 members representing associations of disabled people of various kinds, and four expert advisors. The body will have a Special Permanent Bureau responsible for promoting equal opportunities, non-discrimination and universal accessibility for disabled people. Its functions include the issuing of reports on draft regulations affecting equal opportunities, non-discrimination and universal accessibility.

<http://www.boe.es/boe/dias/2004-09-07/pdfs/A30612-30616.pdf>

Bill amending the Civil Code with regard to the right to contract matrimony

The Spanish Parliament is currently discussing a bill which if adopted would amend the Civil Code so as to recognise the right of homosexual couples to get married under the same conditions and with exactly the same rights currently enjoyed by heterosexual couples (custody of children, adoption, inheritance, etc.). Proposed is the amendment of art. 44 of the Civil Code, which currently states that "Men and women are entitled to contract matrimony pursuant to the provisions of this Code," and the addition of a new paragraph stating that "Both parties being of the same sex shall neither prevent them from contracting matrimony nor diminish the effects thereof". A further 13 articles are also to be amended, replacing the terms "men/women" (*hombre/mujer*) with "spouses" (*cónyuges*). These articles refer to the rights and duties of spouses, the custody of children, donations and economic provisions.

Bill on clauses in collective agreements concerning employees reaching the ordinary retirement age

Until 2001, the tenth additional provision of the Spanish Workers' Statute authorised the establishment in collective agreements of clauses for the termination of employment contracts when workers reached retirement



age (65), without prejudice to what is provided in the Social Security regulations. In 2001 this provision was repealed because, as was argued in the preamble of the law repealing it, it “was based on demographic and labour-market realities different from those of today.” Some collective agreements continued to include these clauses, however, and two judgements of the Supreme Court of 9 March 2004 (both referring to the collective agreement of AENA, the enterprise responsible for managing Spanish major civil airports and air navigation system), declared these clauses illegal.

On 3 December 2004 the trade unions and employers’ organisations signed an agreement with the Government to reintroduce that provision into the Workers’ Statute and thereby enable the social partners to include clauses in collective agreements on the termination of contracts when employees reach the ordinary retirement age, provided that certain conditions are met. These will require the measure “to be linked to objectives consistent with the employment policy expressed in the collective agreement, such as improvement of stability in employment, conversion of temporary contracts into indefinite ones, maintenance of employment, recruitment of new workers, or any other objectives aimed at enhancing the quality of employment.” In addition, a clause is introduced stating that “a worker whose employment contract is terminated must have covered the minimum contribution period, or a longer one if so provided in the collective agreement, and must meet the other prerequisites specified by Social Security legislation for entitlement to a contributory retirement pension.”

At its meeting on 30 December, the Spanish government adopted a bill containing the literal text of this agreement. This seeks to resolve the problems raised by the Supreme Court ruling of 9 March 2004 in that, on one hand, a law will be passed enabling such compulsory retirement clauses to be included in collective agreements, and on the other, they will not be discriminatory because they may be seen as “objectively and reasonably justified”, as they will be linked to “legitimate employment policy, labour market and vocational training objectives”, as stated in Art. 6 of Directive 2000/78/EC.

Sweden

Legislative developments

Government Proposal on protection against discrimination on the grounds of sexual orientation in the field of social security

On 30 September 2004 the Government put forward a bill (Prop. 2004/05:22) proposing that the Prohibition of Discrimination Act (2003:307) be amended so as to include a ban on discrimination on the ground of sexual orientation in the area of social security. It is proposed that sexual orientation be added to the prohibitions in sections 10-13 regarding social assistance, social security and related benefits systems, the unemployment insurance system and the health care system. An exception as regards the ban on discrimination on the grounds of sexual orientation is proposed in relation to the application of the Act on Insemination (1984:1140) and the Act on Artificial Conception (1988:711). The basic ambition behind the bill is to improve protection against sexual orientation discrimination so that it will be at the same level as the protection against discrimination on the grounds of ethnicity and religious belief.



Valerina | 1988



United Kingdom

UK

Legislative developments

Public Consultation on options for a Northern Ireland Single Equality Bill

A consultation process on options for a Single Equality Bill for Northern Ireland took place from 22 June to 12 November 2004, based on a consultation paper by the United Kingdom government on possible models for a new Single Equality Bill. The Bill would seek to harmonise the main pieces of anti-discrimination legislation in Northern Ireland into a single piece of legislation.

Religious discrimination protection to be extended

On 28 September 2004 the Prime Minister announced that the government would introduce new legislation to extend protection against discrimination in Great Britain on grounds of religion or belief to the provision of goods, facilities and services and to the disposal or management of premises. Such protection already exists in Northern Ireland. A Home Office press release (www.homeoffice.gov.uk/n_story.asp?item_id=1084) states that the proposed new measure is intended to “close a loophole” since certain religious groups, namely Sikhs and Jews, that have been recognised by the courts as ethnic groups, already have protection in relation to goods and services under the Race Relations Act 1976 while other religious groups, such as Muslims and Roman Catholics, do not. Protection against discrimination on grounds of religion or belief (and on grounds of sexual orientation) is far narrower than the protection against discrimination on grounds of race, sex or disability under existing legislation.



Disability Discrimination Bill

On 6 December 2004, the Disability Discrimination Bill began its progress through Parliament. The Bill brings transport services within the scope of the disability discrimination legislation. It extends prohibition of discrimination to all functions of public authorities, and imposes a statutory duty on nearly all public authorities to have due regard to the need to eliminate unlawful discrimination and harassment and the need to promote equality of opportunity and to take account of disabled persons' disabilities.



The Bill extends the definition of disability to HIV, multiple sclerosis and cancer from the point of diagnosis and removes the requirement to establish that mental impairment comprises a clinically well-recognised mental illness. The government has not used this bill to apply protection to persons who are perceived to be disabled or associated with a disabled person. The Joint Committee recommended that this change was needed in order to make UK legislation compliant with Directive 2000/78 which requires protection against discrimination “on grounds of disability” rather than, as will remain the case in the UK, protection limited to those individuals who can bring themselves within the statutory definition of “disabled”.

The Bill leaves the law with different forms of reasonable adjustment requirements and different triggers for the duty to make reasonable adjustments depending on the context: employment, access to goods and services or carrying out of public functions. There are concerns that the definition of public authority for purposes of a duty to promote equality lacks certainty and may be difficult to enforce.

The Bill represents an important move away from relying solely on retrospective negative enforcement by individual victims of discrimination to enforceable positive obligations on state institutions. As one of the least

controversial parts of the Government's legislative program for this session of parliament, it is likely to be approved with relatively few amendments.



Announcement of the Government to default retirement age

The UK government announced on 14 December 2004 that legislation outlawing age discrimination will provide for a national default retirement age of 65 (<http://www.dti.gov.uk/er/equality/age.htm>). Employees will have a right to request working beyond 65 but there will be no obligation on employers to agree. Once in place, the impact of the default retirement age will be monitored and formally reviewed after 5 years, when, if evidence suggested it was no longer required, it could be abolished. Draft regulations on age discrimination will be published for consultation in Summer 2005, and final regulations will come into force on 1 October 2006. Currently there is no prohibition of age discrimination in the UK. Employers can impose their own mandatory retirement age; there is no national statutory retirement age. The significance of a statutory "default" retirement age is that while not making retirement compulsory at age 65, a person above 65 would have no statutory protection against unfair dismissal, i.e. dismissal on grounds of age would be lawful. Consultations on age discrimination legislation in 2003 exposed very strong opposing views - with representatives of business and employers supporting a default retirement age, and the Trades Union Congress (TUC), most trade unions, legal organisations and older people's organisations vigorously opposing any fixed age at which employers could compulsorily retire their employees without having to justify their decision by reference to legitimate aims.

It seems unlikely that the brief statement to Parliament explaining the basis for the government's decision would be regarded by the ECJ as sufficient to meet the justification requirement in Article 6 of the Employment Equal Treatment Directive.

Case law

Archibald v Fife Council, 1.07.04, [2004] UKHL 32

This was the first decision of UK House of Lords on the implications of the duty to make reasonable adjustments for existing employees who become disabled and unable to perform their job.



The Applicant (A) had been employed by Respondent (R) as a road sweeper. She became disabled and unable to walk and therefore unable to work as a road sweeper. R offered A retraining for sedentary work and shortlisted her for suitable, low grade sedentary jobs. As sedentary posts all attracted higher rate of pay than road sweeper post, in A's case this was regarded by R as a promotion and therefore required her to submit to competitive interviews, in all of which she was unsuccessful. R dismissed A as a road sweeper on grounds of capability.

The matter at issue in this case was whether R had satisfied their duty to make reasonable adjustments when an employer's arrangements place the disabled person at a substantial disadvantage compared with persons who are not disabled (s.6(1) Disability Discrimination Act, DDA). The DDA makes it unlawful discrimination to fail to do so without justification (s.5(2)). The DDA provides that adjustment to arrangements include "*any term, condition or arrangements on which employment, promotion, a transfer, training or any other benefit is offered or afforded*" (s.6(2)(b)) and includes amongst the examples of steps which an employer may have to take in relation to a disabled person in order to comply with the duty to make reasonable adjustments "*transferring him to fill an existing vacancy*". The nature of A's disability was such that it was not possible for any form of adjustment to be made to enable her to continue to work as a road sweeper. The House of Lords found that when the employment tribunal had considered A's complaint they had failed fully to appreciate that the duty to make reasonable adjustments obliges an employer to treat a disabled person more favourably than others. Amongst the arrangements that affected A's employment was R's procedure for redeployment

and pay scales which had the effect that anyone seeking to transfer from manual to sedentary work would be treated as seeking promotion and required to compete for the new job. The employment tribunal had failed to consider whether the duty to make adjustments in A's case should have obliged R to make adjustments to their redeployment procedure, in order to transfer A into a suitable sedentary job without the need for her to be appointed on the basis of a competitive interview. The House of Lords noted that the obligation on local authorities to appoint staff on merit set out in the Local Government and Housing Act 1989 – to ensure propriety in public appointments – was made subject to sections 5 and 6 of the DDA. The case was remitted to the employment tribunal to consider whether R had fulfilled its duty to take such steps as it was reasonable in all of the circumstances to take.

<http://www.parliament.the-stationeryoffice.co.uk/pa/ld199697/ldjudgmt/ldjudgmt.htm>

R v Immigration Officer at Prague Airport and another ex parte European Roma Rights Centre and others, 9.12.04 [2004] UKHL 55

A pre-clearance operation at Prague airport agreed between the UK and Czech government allowed UK immigration officials to give or refuse leave to enter before passengers could travel to the UK. The object was to stem the tide of asylum seekers. The European Roma Rights Centre observed the operation and produced evidence that, compared to other intending travellers, Roma were subjected to longer, more intensive interviews, required to produce more documents and 400 times more likely to be refused leave. The ERRC and six Czech Roma applied for a declaration that this operation was unlawfully discriminatory on racial grounds, contrary to the Race Relations Act 1976.



This is the first case in the UK to challenge as discriminatory government policies or practices relating to asylum. In 2000, the Race Relations Act 1976 was amended to extend its scope to cover nearly all functions of public authorities. The Act contained a specific exception (section 19D), which permitted discrimination on grounds of nationality, or ethnic or national origin in relation to certain immigration and nationality functions where the act of discrimination was authorised by a Minister. At the relevant time there was a Ministerial authorisation that permitted officials to discriminate against members of specified ethnic groups including Roma, although the government's case was not that this authorisation applied to its Prague Airport operation but that its officials were not discriminating.

The House of Lords held that "UK Immigration Officers operating under the authority of the Home Secretary at Prague Airport discriminated against Roma who were seeking to travel from that airport to the UK by treating them less favourably on racial grounds than they treated others who were seeking to travel from that airport to the UK, contrary to s.1(1)(a) of the Race Relations Act 1976." The Court thereby overturned the decisions of the Court of Appeal and the High Court, both of which had been satisfied that Roma were more likely to be seeking asylum and therefore it was not less favourable treatment to treat their answers with greater scepticism. In her leading judgment, Lady Hale emphasised that for purposes of direct discrimination under the Race Relations Act the reason for less favourable treatment is irrelevant. It is not possible to justify direct discrimination. Even where the assumption underlying less favourable treatment may be true for the racial group involved, each member of that group must be treated as an individual and not assumed to be like other members of that group. Treating an individual on the basis of a stereotype can be discriminatory, regardless of whether the stereotype is accurate or otherwise.

<http://www.parliament.the-stationery-office.co.uk/pa/ld200405/ldjudgmt/jd041209/roma-1.htm>

