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Non-discrimination

Bulgaria

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Country report

Non-discrimination

Bulgaria

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LIST OF ABBREVIATIONS

PADA: Protection Against Discrimination Act (principal, single equality law)

PADC: Protection Against Discrimination Commission (specialized equality body)

IPDA: Integration of Persons with Disabilities Act (additional, ground-specific equality law)

SAC: Supreme Administrative Court (final review instance for PADC decisions)

EXECUTIVE SUMMARY

1. Introduction

Vulnerable groups include the Roma, refugees/ migrants, Muslims, Jews, non-traditional faiths, Macedonians, Turks, people with disabilities, especially mental disabilities, LGBT. The Government rules in coalition with two parties that the European Commission Against Racism and Intolerance termed “ultranationalist/ fascist”: the “National Front for the Salvation of Bulgaria” and “VMRO-BND”^{1,2} Discrimination and hatred, including hate speech, against the Roma, is pervasive, radical and unsanctioned. Very senior public officials engage in overt incitement to hatred and discrimination against the Roma, portraying them as subhuman. In such cases, the Prosecutor’s Office and the equality body, competent under the law for hate speech, take no action.

Roma live in ghettos in dire conditions, often suffering collective arbitrary forced evictions. The European Court of Human Rights (ECtHR) found Bulgaria liable in one such case.³ Roma are plagued by long-term unemployment, with no access to training and jobs. They face discrimination, including harassment, in access to healthcare and services. Children study in segregated, substandard schools, or have no schooling at all. The criminal justice system targets them for disproportionate prosecution, and denies them equal protection by the law, including from hate crime by officials and civilians. They lack representation, and have no access to decision-making at any level.

Refugees/ migrants suffer from a sharp increase in hate speech and hate crime, including by officials. The violence goes unpunished. The ECtHR has found Bulgaria liable in one such case.⁴ Many live in inhuman conditions. Jews, Muslims, non-traditional faiths and Turks suffer from hate manifestations, such as temple desecration and violent demonstrations. The ECtHR found Bulgaria liable in one such case.⁵ Macedonians are denied recognition of their identity (they are considered Bulgarians), and the courts refuse to register their organisations. Local authorities interfere with their peaceful assemblies. The ECtHR has found Bulgaria liable in several such cases.⁶ Bulgaria is under enhanced supervision by the Committee of Ministers of the Council of Europe for failing to implement those judgments.

People with disabilities suffer from exclusion and disadvantage in education, employment, access to services, participation. A significant share of children is excluded from schooling due to inaccessibility. Most are segregated in substandard remedial institutions. Many adults and children are segregated in social institutions where they suffer inhuman/ degrading treatment, and many die – human rights NGOs claim, due to neglect.⁷ Abusers enjoy impunity, the authorities failing to investigate. The ECtHR has found Bulgaria liable for infringing persons with mental disabilities’ rights in two notable cases.⁸ The architectural environment for service provision is commonly inaccessible. For instance, in 2015, the Supreme Administrative Court found an enterprise liable for keeping a dolphinarium inaccessible: the ramps installed did not afford independent access; access was limited and dependent on help; the ramps are immovable and could not be adjusted to different wheelchair types.⁹ LGBT suffer from hate speech and hate crime, as well as discrimination.

¹ Internal Macedonian Revolutionary Organisation - Bulgarian National Movement.

² ECRI, Report on Bulgaria, published 16 September 2014.

³ *Yordanova and Others v. Bulgaria*, judgment of 24 April 2012. Application no. 25446/06.

⁴ *Abdu v. Bulgaria*, judgment of 11 March 2014. Application no. 26827/08.

⁵ After the cut-off date for this report: *Karaahmed v. Bulgaria*, judgment of 24 February 2015. Application no. 30587/13.

⁶ *Inter alia, United Macedonian Organisation Ilinden and Others v. Bulgaria* (No. 2), judgment of 18 October 2011. Application no. 34960/04.

⁷ See, for instance, the application brought against Bulgaria by the Bulgarian Helsinki Committee before the European Court of Human Rights in the name of two such deceased children: [http://hudoc.echr.coe.int/eng#{"appno":\["35653/12"\],"itemid":\["001-156281"\]}](http://hudoc.echr.coe.int/eng#{).

⁸ *Stanev v. Bulgaria*, judgment of 17 January 2012; *Stefan Stankov c. Bulgarie*, judgment of 17 March 2015.

⁹ Supreme Administrative Court, Decision No. 158 of 08.01.2015 in case No. 7092/2014.

In 2014, the Supreme Administrative Court (SAC), the final instance reviewing equality body decisions, made new, restrictive interpretations of equality law.¹⁰ According to SAC, not every breach of equality law is a breach that the equality body could declare, or sanction: only those that constituted administrative breaches under the Administrative Breaches and Sanctions Act. That requires establishing a concrete action/ omission, a concrete perpetrator, a concrete victim, and guilt. Discrimination has to be a concrete fact, and not a hypothetical possibility.¹¹ A discriminator can only be a natural person. Legal persons can be discriminators exceptionally, in cases provided for by law. A public authority cannot be a discriminator – only an individual exercising its authority. A legal provision cannot be discrimination as it is not a concrete action/ omission. The adoption of a legal provision is not a concrete action/ omission either. The equality body cannot declare laws to be discriminatory: a law that was not declared unconstitutional by the Constitutional Court (CC) could not be discriminatory. The equality body cannot declare secondary legislation to be discriminatory: secondary legislation that was not declared unlawful by SAC (under general administrative procedure) could not be discriminatory. Where the equality body finds a legal norm to contradict equality law, it cannot declare a breach of equality law. It cannot order the responsible authority to repeal/ amend that norm. It could only make a recommendation, or take legal action before SAC if secondary legislation is concerned.

In 2015, the SAC and the Supreme Court of Cassation ruled in interpretative proceedings No. 2/2014 before a mixed panel of the two courts in order to resolve the issue of whether the civil or the administrative courts are competent when a person wishes to sue a public body for discrimination.¹² The case law has been contradictory since 2007. The courts held that the administrative, and not the civil courts are competent.

In 2015, the CJEU delivered a preliminary ruling in a case concerning the inaccessibility of electric meters in predominantly Roma residential areas. The service provider installed the meters at an inaccessible height allegedly in order to prevent alleged theft of electricity and damage to the infrastructure. The CJEU held that the measure was discriminatory as in non-Roma areas meters are accessible for consumer viewing.

2. Main legislation

The Protection Against Discrimination Act (PADA) 2004 is the main anti-discrimination law, enacted to transpose the directives.¹³ It is a single equality law universally banning discrimination on a range of grounds, including race/ethnicity, sex, religion/belief, sexual orientation, disability and age, and providing uniform standards of protection and remedies. PADA as a whole complies with the directives, going beyond them in significant aspects: universal material scope, extended, open-ended list of grounds, additional forms of discrimination, extended equality body powers, and special judicial redress. PADA is actively invoked by individuals before the equality body and the courts, and the case law is extensive and growing.

Another equality law is the ground-specific Integration of Persons with Disabilities Act (IPDA),¹⁴ listing positive and reasonable accommodation duties in a number of fields. Other laws, governing specific fields, such as education, employment, public procurement, provide for positive measures on grounds of disability, age, and caring responsibilities.

¹⁰ Supreme Administrative Court, Decision No. 5645 in case No. 15991/2013 and Decision No. 15637 in case No. 1925/2014. This is also reported in Sections 11.1 and 12.2 of this report.

¹¹ Supreme Administrative Court, Decision No. 15637 of 19.12.2014 in case No. 1925/2014. The case concerned the application of an age bar under secondary legislation.

¹² By Order (Разпореждане) of 27.06.2014, available at: http://www.vks.bg/Dela/2014-02-BKC_BAC%20Разпореждане%20за%20образуване.pdf (in BG).

¹³ Закон за защита от дискриминация, adopted September 2003, entered into force January 2004.

¹⁴ Закон за интеграция на хората с увреждания, adopted September 2004, entered into force January 2005.

Older abstract bans of discrimination exist under laws governing specific fields, as well as the Constitution. They lack implementation. Bulgaria is bound by international instruments banning discrimination, including the European Convention on Human Rights (ECHR), the European Social Charter Revised, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Elimination of All Forms of Race Discrimination, the Convention on the Rights of the Child. The Constitution and binding international law are directly applicable by domestic courts, and supersede conflicting legislation. They are enforceable against private parties, as well as public bodies.

3. Main principles and definitions

PADA prohibits and defines direct and indirect discrimination, including discrimination by association and by presumption. PADA defines direct discrimination as treating a person on protected grounds less favourably than another person is treated, has been treated, or would be treated in comparable circumstances. PADA defines "on grounds of" as the actual, present or past, or assumed possession of one or more protected grounds by the person discriminated against, or by another person who is, in fact or presumably, associated with the person discriminated against, where the association is a cause for discrimination. PADA does not permit general justification for direct discrimination.

PADA provides for illustrative bans on specific discriminatory conduct in employment, education, and service provision. It provides for an exhaustive list of specific exceptions for all protected grounds, including for genuine and determining occupational requirements, for employers with a religious ethos, and for maximum and minimum ages for access to employment and education, requiring objective justification. It exempts different treatment of non-nationals provided for under law, and permits unjustified requirements for age and length of service for purposes of retirement. Positive measures aimed for disadvantaged groups are allowed.

PADA defines indirect discrimination as putting a person on protected grounds, through an apparently neutral provision, criterion or practice, at a disadvantage compared with other persons, unless such provision, criterion or practice is objectively justified by a legitimate aim and the means for achieving that aim are appropriate and necessary.

PADA expressly provides that harassment, incitement to discrimination, and victimisation constitute forms of discrimination. It defines harassment as any unwanted conduct related to protected grounds and manifested physically, verbally or in any other way that has the purpose or effect of violating the dignity of a person and of creating a hostile, offensive, or intimidating environment. Protection covers harassment by presumption and association. Incitement to discrimination is defined as direct and intentional encouragement of discrimination, including giving an instruction to discriminate. Victimisation is defined as: a) less favourable treatment of a person who has taken, or is presumed to have taken, or to be taking in future any action against discrimination; b) less favourable treatment of a person where a person associated with them has taken, or is presumed to have taken, or to be taking any action against discrimination; c) less favourable treatment of a person who refused to discriminate. Action for protection against discrimination is defined to include, but is not limited to, bringing proceedings before the equality body or the court, or testifying.

These definitions apply to all grounds. Multiple discrimination is defined as discrimination on more than one protected grounds. PADA places a positive duty on public bodies to take as a priority positive measures for victims of multiple discrimination. Under PADA, the equality body hears cases of multiple discrimination in benches of five rather than three members. The case law has failed to deal with the issues surrounding multiple discrimination.

PADA defines racial segregation, providing that it is a form of discrimination. It provides for reasonable accommodation for persons with disabilities in employment and education. The limit of this duty is when "the costs are unreasonably big and would seriously hinder" the employer or educator. Under IPDA, the Minister of Education has a duty to provide children with disabilities with a supportive environment for integrated education. This is an absolute duty. Under IPDA, the Minister has a duty to create educational opportunities for children with disabilities who are not integrated. This duty, too, is absolute. Higher education institutions, too, have absolute accommodation duties.

Under PADA, authorities, employers and educators have duties to mainstream equality and to take positive measures on all grounds. Liability is provided for abettors of discrimination, as well as vicarious liability for employers and educators who fail to prevent discrimination by third parties at the work- or study place. A shift of the burden of proof is envisaged. In 2015, the provision for shift of the burden of proof was amended to make it clearer that claimant is not required to produce conclusive proof but only to establish prima facie evidence of discrimination. The provision now reads (emphasis added): "In proceedings for protection against discrimination, after the party claiming to have been discriminated against, *produces (presents)* facts from which an *inference* that discrimination is at hand can be made, the respondent party has to prove that the principle of equal treatment was not breached." The former language was: "In proceedings for protection against discrimination, after the party claiming to have been discriminated against, *proves* facts from which a *conclusion* that discrimination is at hand can be made, the respondent party has to prove that the principle of equal treatment was not breached."

4. Material scope

PADA has a universal scope. It is applicable to any field, implicitly including all fields under the directives, as well as any beyond. This universal ban applies to all grounds and to both private and public sectors.

5. Enforcing the law

PADA provides for two alternatives: judicial proceedings before the general courts and specialised quasi-judicial proceedings before the equality body. A victim can choose. The courts can make a declaration of discrimination and award compensation, as well as order respondent to take remedial action, or to abstain from or to terminate particular action/inaction. PADC can make a finding of discrimination, and order preventive or remedial action. It can impose financial sanctions. It cannot award compensation. Both procedures are universally applicable to both the public and private sectors. They are legally binding. The principle of the shifting burden of proof applies to both. Both are used in practice. Both are exempt from fees and costs under the law, but in practice the courts do not respect this provision and order parties to pay.

There have been very few cases where judges have found discrimination based solely on respondent's failure to rebut an inference of discrimination. However, they have consistently taken account of the special evidentiary rule, and some have issued sound *dicta* on it. Judges have inconsistent understanding of the difference between direct and indirect discrimination, resulting in misinterpretation of direct discrimination as justifiable indirect discrimination.

Under PADA, PADC assists victims of discrimination. In practice, complainants are provided with procedural advice on filing their complaints. PADC has standing to take court proceedings, as well as to join proceedings. It has not used these possibilities. NGOs actively litigate discrimination cases. They have standing to represent complainants in court, as well as to intervene in proceedings in their support. NGOs have standing to take public interest court action on their own behalf where the rights of many persons are infringed without authorisation from a victim. They have standing to initiate proceedings

before PADC without identifying any victim. NGOs have brought a range of public interest cases. This has enhanced public attention. Certain strong decisions were rendered, with the potential to bring about social change. Discrimination litigation, especially by NGOs, receives media coverage. NGOs have used situational testing to uncover and document direct discrimination, and have established such cases in court with the help of testing testimony. They have also used statistics in some cases. Under civil procedural law, both statistics and testing evidence are implicitly admissible at the discretion of judges. There has been no discussion on the admissibility of statistics or testing. Testing testimony has been admitted as a matter of course as ordinary witness testimony without reference being made to testing's specific public interest aim. Statistical data, too, has been considered as regular proof by both the equality body and judges. PADC has looked at statistical data of its own motion.

Sanctions for discrimination imposed by PADC include fines (maximum EUR 1 250), and binding instructions for respondents to take particular preventive or remedial action. PADC actively uses its sanctioning powers, often imposing close to maximum fines, and ordering remedies, such as reinstatement, amendment of regulations, etc. It is unclear, however, to what extent these orders are complied with in practice, and how effective official response is in cases where they are not. In such cases, the body has no formal power other than to impose further fines. Court-ordered redress includes compensation with no maximum limit, and orders on respondents to take, or to abstain from specific action. In exceptional cases, awards have reached EUR 5 000 (architectural inaccessibility).

Under labour law, persons with disabilities are entitled to employment quotas and employer subsidies. Younger and older workers, as well as people with caring responsibilities enjoy preferential treatment in employment too. Roma are nominally the beneficiaries of a number of positive programmes in education, housing and other fields, but those measures' impact in practice has been limited.

There is no dialogue or consultation with NGOs or social partners on the part of any national authorities.

6. Equality bodies

The Protection Against Discrimination Commission (PADC) is the national specialised equality body. It was set up under PADA as an independent collegiate semi-judicial authority with adjudicating powers. It started operating in 2005 even though the law required it do so as of the start of 2004. PADC deals with discrimination on all protected grounds. It has a mandate to: hear and investigate complaints by victims and communications by third parties; initiate its own proceedings; find discrimination by legally binding decisions; impose financial sanctions; issue mandatory instructions for remedial or preventative redress; review and give opinions on draft legislation; make recommendations to public authorities, incl. for legislative change; assist victims of discrimination; carry out independent research and publish independent reports. PADC has a vast and growing body of case law, some of it effective. The case law includes rulings by the Sofia City Administrative Court and the Supreme Administrative Court which review PADC decisions.

7. Key issues

The definition of incitement to discrimination, including instructions to discriminate, under PADA expressly requires direct intent. The definition of racial segregation under PADA expressly requires the state of separation to be 'forced'.¹⁵ It implies that segregation may be chosen, i.e. that persons may waive their right not to be discriminated against, including not to be racially segregated. The ECtHR has held in Roma segregation cases that no waiver

¹⁵ PADA, Additional Provision, § 1.6.

of the right to non-discrimination in this context is possible as that would conflict with an important public interest.¹⁶

PADA defines indirect discrimination in a way that misleads judges and PADC conflate it with covert direct discrimination. The language of the definition refers to “on grounds of”, which contradicts the “apparently neutral” part of the wording. A number of court and PADC decisions have read the phrase “on grounds of” as defining a causal link between the apparently neutral rule and the particular protected ground/s. That reading is apparently based on an assumption that “an apparently neutral” act is one that, albeit based on a protected ground, is not openly so but is covert; therefore, they take the provision for indirect discrimination to refer to dissimulated direct discrimination.¹⁷

Parallel to PADA, other, pre-existing abstract prohibitions of discrimination are still in place under other laws governing specific fields, as well as the Constitution. There is no coherence between PADA and those other, older, bans on discrimination, with differences in protected grounds, exceptions, and definitions. There is inconsistency between PADA and other laws governing particular fields that provide for directly or indirectly discriminatory norms, contradicting PADA’s universal ban. Next to no effort has been made to harmonise the legislation so as to ensure that PADA prevails over other conflicting, discriminatory norms.

In 2014, SAC made restrictive requirements for PADA enforcement, contradicting PADA and EU law.¹⁸

SAC has held that, for discrimination to be at hand, a difference of treatment should be based *solely* on a protected ground, excluding „mixed motives” cases where a protected characteristic was one among other reasons for less favourable treatment.¹⁹ At the same time, SAC is inconsistent: in a recent case, it held that „discriminatory treatment is at hand regardless of whether a protected ground is the only, or one of the reasons for less favourable treatment.”²⁰ As mentioned, SAC has applied the justification test only relevant for indirect discrimination to cases of less favourable treatment, i.e. direct discrimination. It has applied the concept of indirect discrimination to a number of cases of direct less favourable treatment. For instance, in 2014, in a case where a Muslim prison inmate complained that his food included pork (denial of reasonable accommodation), SAC held that there was indirect discrimination against this complainant compared to Muslim inmates in another prison who did receive food accommodation.²¹

In some cases, SAC has shown a serious lack of understanding of the concept of a comparator, holding that age requirements for access to employment did not constitute discrimination because they applied to all candidates, and not just the complainant.²² SAC has required intent, often holding expressly that “treatment [must be] carried out *knowingly* on one of the [protected] grounds”.²³ As mentioned, in 2014, SAC held twice

¹⁶ For instance, *D.H. v. Czech Republic*, judgment of 13.11.2007; *Sampanis v. Greece*, judgment of 05.06.2008; *Orsus v. Croatia*, judgment of 16.03.2010 (GC).

¹⁷ For instance: Radnevo District Court, Decision No. 97 of 13.12.2004, case No. 365/2004; Sofia Regional Court, Decision of 12.07.2004, case No. 1184/2004; Sofia District Court, Decision of 19.08.2004, case No. 1262/2004; Sofia District Court, Decision of 19.12.2006, case No. 2756/2006. Decisions of the Supreme Administrative Court: Decision No. 11421 of 19.11.2007, case No. 5604/2007; Decision No. 12117 of 3.12.2007, case No. 8044/2007; Decision No. 4752 of 15.05.2007, case No. 11478/2006; Decision No. 11295 of 16.11.2007, case No. 6407/2007; Decision No. 13393 of 28.12.2007, case No. 8083/2007; Decision No. 7811 of 19.07.2007, case No. 1048/2007.

¹⁸ See p. 2 above.

¹⁹ *Inter alia*, Supreme Administrative Court, Decision No. 8277 of 11.06.2012 in case No. 3852/2012.

²⁰ Supreme Administrative Court, Decision No. 274 of 09.01.2012 in case No. 1319/2011.

²¹ Supreme Administrative Court, Decision No. 2514 of 21.02.2014, case No. 10989/2013.

²² Supreme Administrative Court, Decision No. 7096 of 19.05.2012 in case No. 3686/2012; Decision No. 10734 of 1.09.2014 in case No. 1463/2014.

²³ *Inter alia*, Supreme Administrative Court, Decision No. 8277 of 11.06.2012 in case No. 3852/2012; Decision No. 3645 of 14.03.2014 in case No. 12679/2013 (“conscious” perpetration requirement reiterated twice).

that only conduct that was “guilty” could qualify as a breach under PADA.²⁴ At the same time, its case law is contradictory: on one occasion in 2014, SAC held that “direct discrimination did not require discriminatory intent, therefore, the lack of such is irrelevant for qualifying treatment as discriminatory, including where it was based on an understanding that it was lawful”.²⁵ In a 2014 case, SAC interpreted “sexual orientation” as having to be innate, and not “consciously” chosen, in order to be protected. SAC denied asylum protection to a gay Cameroonian because he “decided”, at age 35, to “choose” a sexuality that was not his “innate” one.²⁶

PADC does not use its powers, including its competence to start *ex officio* proceedings, in any strategic way. It has no priorities. It has failed to target serious issues of discrimination, such as Roma segregation in education, Roma destitution and isolation in housing, people with disabilities’ institutionalization, etc. PADC, as a rule, refuses to consider (on admissibility) or uphold (on the merits) discrimination complaints by persons with disabilities who failed to produce medical proof of their disability.²⁷ PADC, like SAC, often shows a lack of understanding of indirect discrimination, in some cases fusing it with direct discrimination.

²⁴ Supreme Administrative Court, Decision No. 5645 in case No. 15991/2013, Decision No. 15637 in case No. 1925/2014.

²⁵ Supreme Administrative Court, Decision No. 1048 of 27.01.2014 in case No. 8033/2013. The case concerned the application of an age bar under a university’s regulations.

²⁶ Supreme Administrative Court, Decision No. 9467 of 7.07.2014 in case No. 1381/2014.

²⁷ *Inter alia*, PADC, Decision No. 259 of 17.12.2008 in case No. 186/2008.

RÉSUMÉ

1. Introduction

Les groupes vulnérables sont les Roms, les réfugiés/les migrants, les Musulmans, les Juifs, les groupes religieux non traditionnels, les Macédoniens, les Turcs, les personnes handicapées (atteintes de troubles mentaux surtout) et les personnes LGBT. La coalition gouvernementale comprend deux partis que la Commission européenne contre le racisme et l'intolérance qualifie d'«ultranationalistes/fascistes»: le Front national pour le salut de la Bulgarie et le VMRO-BND.^{28,29} La discrimination et la haine (en ce compris le discours haineux) à l'égard des Roms constituent un phénomène largement répandu, radical et impuni. De très hauts fonctionnaires n'hésitent pas à inciter ouvertement à la haine et à la discrimination envers les Roms, qu'ils dépeignent comme des sous-hommes – et ni le ministère public ni l'organisme pour l'égalité, légalement habilité à agir en cas de discours de haine, n'interviennent.

Les Roms vivent en ghettos dans des conditions extrêmement précaires et font souvent l'objet d'expulsions forcées arbitraires et collectives. La Cour européenne des droits de l'homme (CouEDH) a conclu à la responsabilité de la Bulgarie dans le cadre d'une affaire de ce type.³⁰ Les Roms sont durement touchés par le chômage de longue durée et ne peuvent accéder ni à la formation ni à l'emploi. Ils se heurtent à une discrimination, et notamment à un harcèlement, en termes d'accès aux soins de santé et aux services. Les enfants roms étudient dans des écoles séparées qui dispensent un enseignement de qualité médiocre, ou ne sont pas scolarisés du tout. Le système de justice pénale les prend pour cible en les poursuivant de façon disproportionnée et leur refuse l'égalité de protection conférée par la loi, y compris à l'encontre de délits motivés par la haine commis tant par des fonctionnaires que par des civils. Leur représentation n'est pas assurée et ils ne peuvent participer aux processus décisionnels à aucun niveau.

Les discours et crimes de haine à l'encontre des réfugiés/migrants sont en forte progression, y compris de la part de fonctionnaires. Les violences restent impunies. La CouEDH a conclu à la responsabilité de la Bulgarie dans une affaire de ce type.³¹ De nombreux réfugiés/migrants vivent dans des conditions inhumaines. Les Juifs, les Musulmans, les groupes religieux non traditionnels et les Turcs sont visés par des actes de haine tels que la profanation de lieux de culte et des manifestations violentes. La CouEDH a jugé la Bulgarie responsable dans une affaire de ce type.³² Les Macédoniens sont privés de la reconnaissance de leur identité (ils sont considérés comme des Bulgares) et les tribunaux refusent d'enregistrer leurs organisations. Les autorités locales interfèrent dans leurs rassemblements pacifiques. La CouEDH a conclu à la responsabilité de la Bulgarie dans plusieurs affaires de ce type.³³ La Bulgarie est placée sous la surveillance renforcée du Comité des ministres du Conseil de l'Europe pour défaut d'exécution de ces arrêts.

Les personnes handicapées sont victimes d'exclusion et font l'objet d'un traitement défavorisé en matière d'enseignement, d'emploi, d'accès aux services et de participation. Une proportion importante d'enfants handicapés ne sont pas scolarisés en raison de l'inaccessibilité des bâtiments et la plupart d'entre eux sont inscrits dans des établissements séparés qui dispensent un enseignement de rattrapage de piètre qualité. De nombreux adultes et enfants handicapés sont placés dans des foyers sociaux où ils sont souvent victimes de traitements inhumains/dégradants; beaucoup y meurent – par

²⁸ Organisation révolutionnaire macédonienne intérieure – Mouvement national bulgare.

²⁹ ECRI, Rapport sur la Bulgarie, publié le 16 septembre 2014.

³⁰ Affaire *Yordanova et autres contre Bulgarie*, arrêt du 24 avril 2012. Requête n° 25446/06.

³¹ Affaire *Abdu contre Bulgarie*, arrêt du 11 mars 2014. Requête n° 26827/08.

³² Au-delà de la date limite du présent rapport: *Karahmed contre Bulgarie*, arrêt du 24 février 2015. Requête n° 30587/13.

³³ Notamment *Organisation macédonienne unie Ilinden et autres contre Bulgarie* (n° 2), arrêt du 18 octobre 2011. Requête n° 34960/04.

négligence, selon des ONG de défense des droits de l'homme.³⁴ Les auteurs de ces faits bénéficient d'une totale impunité du fait que les autorités ne procèdent à aucune enquête. La CouEDH a déclaré dans deux affaires notoires³⁵ que la Bulgarie n'avait pas respecté les droits des personnes atteintes de troubles mentaux. L'environnement architectural dans lequel des services sont prestés est le plus souvent inaccessible. En 2015, la Cour suprême administrative a jugé une entreprise responsable de l'inaccessibilité d'un delphinarium du fait que les rampes mises en place ne permettaient pas un accès autonome; que l'accès était limité et impossible sans assistance; et que les rampes étaient fixes et ne pouvaient être adaptées à différents types de fauteuils roulants.³⁶ Les personnes LGBT sont victimes de discours et de crimes de haine, ainsi que de discrimination.

En 2014, la Cour suprême administrative – instance statuant en dernier ressort sur les décisions de l'organisme pour l'égalité – a formulé de nouvelles interprétations restrictives de la législation en matière d'égalité.³⁷ Selon elle, un non-respect de cette législation ne constitue pas nécessairement une infraction pouvant être notifiée ou sanctionnée par l'organisme pour l'égalité: il faut qu'il s'agisse d'une infraction administrative en vertu de la loi relative aux infractions et sanctions administratives – ce qui exige d'établir une action/omission réelle, un auteur réel, une victime réelle et une culpabilité. La discrimination doit être un fait concret et non une possibilité hypothétique.³⁸ L'auteur d'une discrimination ne peut être qu'une personne physique – les personnes morales ne pouvant être les auteurs de faits discriminatoires que dans des cas exceptionnels prévus par la loi. Une autorité publique ne peut être l'auteur d'une discrimination: ce dernier ne peut être que la personne exerçant des pouvoirs au nom de la dite autorité. Une disposition légale ne peut être constitutive de discrimination du fait qu'il ne s'agit pas d'une action/omission concrète – l'adoption d'une disposition légale n'étant pas davantage considérée comme une action/omission concrète. L'organisme pour l'égalité ne peut déclarer qu'une loi est discriminatoire car une loi qui n'a pas été déclarée inconstitutionnelle par la Cour constitutionnelle ne peut être discriminatoire. L'organisme pour l'égalité ne peut déclarer qu'une législation dérivée est discriminatoire car une législation dérivée qui n'a pas été déclarée illégale par la Cour suprême administrative (dans le cadre d'une procédure administrative générale) ne peut être discriminatoire. Lorsque l'organisme pour l'égalité constate qu'une disposition juridique est en contradiction avec la législation en matière d'égalité, il ne peut faire valoir un non-respect de cette dernière, ni ordonner à l'autorité compétente d'abroger/de modifier la disposition en cause: il peut uniquement formuler une recommandation ou saisir la Cour suprême administrative s'il s'agit d'une législation dérivée.

En 2015, la Cour suprême administrative et la Cour suprême de cassation se sont prononcées dans le cadre de la procédure interprétative n° 2/2014 devant un collège composé de membres des deux juridictions en vue de résoudre la question de savoir si ce sont les juridictions civiles ou les juridictions administratives qui sont compétentes lorsqu'une personne souhaite poursuivre un organisme public pour discrimination.³⁹ La jurisprudence s'avérait contradictoire depuis 2007. Elles ont conclu à la compétence des juridictions administratives, et non des juridictions civiles.

En 2015, la CJUE a rendu une décision préjudicielle dans une affaire relative à l'inaccessibilité des compteurs électriques dans des quartiers principalement habités par

³⁴ Voir notamment la requête introduite contre la Bulgarie par le Comité Helsinki bulgare devant la Cour européenne des droits de l'homme au nom de deux enfants décédés dans ces conditions: [http://hudoc.echr.coe.int/eng?i=001-156281#{"itemid":\["001-156281"\]}](http://hudoc.echr.coe.int/eng?i=001-156281#{).

³⁵ *Stanev contre Bulgarie*, arrêt du 17 janvier 2012; *Stefan Stankov contre Bulgarie*, arrêt du 17 mars 2015.

³⁶ Cour suprême administrative, décision n° 158 du 8 janvier 2015 dans l'affaire n° 7092/2014.

³⁷ Cour suprême administrative, décision n° 5645 dans l'affaire n° 15991/2013 et décision n° 15637 dans l'affaire n° 1925/2014. Voir également les points 11.1 et 12.2 du rapport ci-après.

³⁸ Cour suprême administrative, décision n° 15637 du 19 décembre 2014 dans l'affaire n° 1925/2014. L'affaire concernait l'application d'une limite d'âge en vertu d'une législation dérivée.

³⁹ Par disposition (Разпореждане) du 27 juin 2014, disponible sur: http://www.vks.bg/Dela/2014-02-BKC_BAC%20Разпореждане%20за%20образуване.pdf (en bulgare).

des Roms. Le prestataire de services a installé les compteurs à une hauteur impossible à atteindre prétendument pour éviter les branchements illicites et les dommages à l'infrastructure. La CJUE a jugé la mesure discriminatoire étant donné que, dans les quartiers non roms, les compteurs sont accessibles et peuvent être consultés par les consommateurs.

2. Législation principale

La loi de 2004 sur la protection contre la discrimination,⁴⁰ adoptée en vue de transposer les directives, constitue l'acte législatif principal de lutte contre la discrimination. Il s'agit d'une loi unique qui interdit universellement toute discrimination fondée sur une série de motifs comprenant la race/l'origine ethnique, le sexe, la religion/les convictions, l'orientation sexuelle, le handicap et l'âge, et qui prescrit des normes uniformes en matière de protection et de recours. La loi sur la protection contre la discrimination est globalement conforme aux directives et va au-delà de celles-ci à certains égards importants: champ d'application matériel universel, liste élargie et ouverte de motifs, formes supplémentaires de discrimination, compétences étendues de l'organisme pour l'égalité, et recours juridictionnel particulier. La loi sur la protection contre la discrimination est activement invoquée par des requérants individuels devant l'organisme pour l'égalité ou les tribunaux, et la jurisprudence est abondante et croissante.

Il existe une autre loi importante concernant l'égalité, en l'occurrence la loi relative à l'intégration des personnes handicapées,⁴¹ qui précise les obligations d'action positive et d'aménagement raisonnable dans un certain nombre de domaines. D'autres lois, régissant des domaines spécifiques tels que l'éducation, l'emploi et les marchés publics prévoient des mesures positives en rapport avec des motifs tels que le handicap, l'âge et les responsabilités de garde et de soins.

D'autres interdictions de discrimination préexistantes et abstraites existent dans des lois régissant des domaines spécifiques ainsi que dans la Constitution. Leur mise en œuvre fait toutefois défaut. La Bulgarie est liée par des instruments internationaux proscrivant la discrimination: la Convention européenne des droits de l'homme (CEDH), la Charte sociale européenne révisée, le Pacte international relatifs aux droits civils et politiques, le Pacte international relatif aux droits économiques, sociaux et culturels, la Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes, la Convention internationale sur l'élimination de toutes les formes de discrimination raciale et la Convention relative aux droits de l'enfant. La Constitution et la législation internationale contraignante sont directement applicables par les juridictions nationales et prévalent sur les dispositions contraires figurant dans l'ordre juridique interne. Elles sont exécutoires à l'encontre de parties privées et à l'encontre d'organismes publics.

3. Principes généraux et définitions

La loi sur la protection contre la discrimination interdit et définit la discrimination directe et indirecte, y compris la discrimination par association et par présomption. Elle définit la discrimination directe comme le fait de traiter, en raison de l'un des motifs protégés, une personne de manière moins favorable qu'une autre ne l'est, ne l'a été ou ne le serait dans une situation comparable. La loi définit «en raison de l'un des motifs» comme l'existence réelle – actuelle ou passée – ou l'existence présumée d'un ou de plusieurs des motifs protégés chez la personne visée par la discrimination, ou chez une autre personne qui est, de façon réelle ou présumée, associée à la personne visée par la discrimination lorsque l'association est une cause de discrimination. La loi sur la protection contre la discrimination n'autorise pas de justification générale de discrimination directe.

⁴⁰ Закон за защита от дискриминация, adoptée en septembre 2003 et entrée en vigueur en janvier 2004.

⁴¹ Закон за интеграция на хората с увреждания, adoptée en septembre 2004 et entrée en vigueur en janvier 2005.

La loi sur la protection contre la discrimination spécifie à titre d'exemples des comportements discriminatoires spécifiquement interdits dans les domaines de l'emploi, de l'éducation et de la fourniture de services. Elle contient une liste exhaustive d'exceptions particulières pour l'ensemble des motifs protégés, y compris pour des exigences professionnelles essentielles et déterminantes, dans le cas d'employeurs ayant une éthique religieuse ainsi qu'en ce qui concerne l'âge maximum et minimum pour l'accès à l'emploi et à l'éducation – une justification objective étant requise. La loi exempte le traitement différencié des non-ressortissants prévu par la loi et autorise des exigences non justifiées en termes d'âge et d'ancienneté pour ce qui concerne la retraite. Les mesures positives en faveur de groupes défavorisés sont autorisées.

La loi sur la protection contre la discrimination définit la discrimination indirecte comme le fait de traiter une personne de manière moins favorable que d'autres personnes, en raison de l'un des motifs protégés et par le biais d'une disposition, d'un critère ou d'une pratique apparemment neutre, à moins que cette disposition, ce critère ou cette pratique ne soit objectivement justifié par un but légitime et que les moyens d'atteindre ce but soient appropriés et nécessaires.

La loi sur la protection contre la discrimination prévoit expressément que le harcèlement, l'incitation à la discrimination et la rétorsion constituent des formes de discrimination. Elle définit le harcèlement comme tout comportement non désiré lié aux motifs protégés, qui se manifeste physiquement, verbalement ou de toute autre manière et qui a pour objet ou pour effet de porter atteinte à la dignité d'une personne et de créer un environnement hostile, offensant ou intimidant. La protection couvre le harcèlement par présomption et par association. L'incitation à la discrimination est définie comme un encouragement direct et intentionnel à discriminer, en ce compris l'injonction de pratiquer une discrimination. La rétorsion est définie comme: a) le fait de traiter moins favorablement une personne qui a entrepris, ou qui est présumée avoir entrepris, ou qui est présumée entreprendre un jour, une action contre une discrimination; b) le fait de traiter moins favorablement une personne lorsqu'une personne qui lui est associée a entrepris, ou est présumée avoir entrepris, ou est présumée entreprendre une action contre une discrimination; c) le fait de traiter moins favorablement une personne qui a refusé de pratiquer un acte discriminatoire. Une action en vue d'une protection contre une discrimination est définie comme incluant, sans s'y limiter, le fait d'entamer des poursuites devant l'organisme pour l'égalité ou un tribunal, ou de témoigner.

Ces définitions s'appliquent à tous les motifs. La discrimination multiple est définie comme une discrimination fondée sur plus d'un des motifs protégés. La loi sur la protection contre la discrimination impose aux organismes publics l'obligation positive de prendre, en priorité, des mesures positives en faveur de victimes de discrimination multiple. Elle dispose que l'organisme pour l'égalité se composera de cinq membres au lieu de trois lorsqu'il est saisi de questions liées à une discrimination multiple.

La loi sur la protection contre la discrimination définit la ségrégation raciale en stipulant qu'il s'agit d'une forme de discrimination. Elle prévoit l'aménagement raisonnable pour les personnes handicapées dans les domaines de l'emploi et de l'éducation tout en limitant cette obligation si le coût devait en être excessif au point de préjudicier l'employeur ou l'éducateur. En vertu de la loi sur l'intégration des personnes handicapées, le ministre de l'Éducation a l'obligation de fournir aux enfants handicapés un environnement propice à leur intégration éducative. Il s'agit d'une obligation absolue. En vertu de la même loi, le ministre de l'Éducation est tenu de créer des possibilités d'enseignement pour les enfants handicapés qui ne sont pas intégrés, et cette obligation est également absolue. Les établissements d'enseignement supérieur ont, eux aussi, des obligations absolues en matière d'aménagement.

La loi sur la protection contre la discrimination impose aux autorités, aux employeurs et aux éducateurs l'obligation de généraliser l'égalité et de prendre des mesures positives en

rapport avec l'ensemble des motifs. La responsabilité des complices de discrimination, de même que la responsabilité du fait d'autrui pour les employeurs et les éducateurs qui ne prennent pas de dispositions destinées à prévenir la discrimination commise par des tiers sur le lieu de travail ou d'étude, est inscrite dans la loi. Un renversement de la charge de la preuve y est envisagé. En 2015, la disposition relative au renversement de la charge de la preuve a été modifiée afin de préciser que la partie requérante n'est pas tenue de fournir une preuve définitive: elle doit uniquement apporter un commencement de preuve de discrimination. La disposition est désormais libellée comme suit (italiques ajoutées): Dans le cadre d'une procédure de protection contre une discrimination, après que la partie alléguant avoir fait l'objet d'une discrimination *produit (présente)* des faits permettant de *présumer* l'existence d'une discrimination, la partie défenderesse doit prouver qu'il n'y a pas eu violation du principe de l'égalité de traitement. La dite disposition était antérieurement libellée comme suit: Dans le cadre d'une procédure de protection contre une discrimination, après que la partie alléguant avoir fait l'objet d'une discrimination *prouve* des faits permettant de *conclure* à l'existence d'une discrimination, la partie défenderesse doit prouver qu'il n'y a pas eu violation du principe de l'égalité de traitement.

4. Champ d'application matériel

La loi sur la protection contre la discrimination a un champ d'application matériel universel. Il s'applique à tous les domaines, ce qui signifie qu'il couvre implicitement tous les domaines visés par les directives ainsi que tout autre domaine qui ne serait pas couvert par celles-ci. Cette interdiction universelle s'applique à tous les motifs et tant au secteur privé qu'au secteur public.

5. Mise en application de la loi

La loi sur la protection contre la discrimination prévoit deux possibilités: la procédure judiciaire devant les juridictions ordinaires et la procédure quasi-judiciaire spécialisée devant l'organisme pour l'égalité. La victime a le choix entre ces deux voies de recours. Les tribunaux peuvent établir l'existence d'une discrimination et accorder une indemnisation, et ordonner à la partie défenderesse de prendre des mesures correctives ou de s'abstenir d'une action ou inaction particulière ou d'y mettre fin. La commission pour la protection contre la discrimination peut elle aussi constater l'existence d'une discrimination et ordonner une mesure préventive ou corrective. Il peut imposer des sanctions financières, mais ne peut accorder d'indemnisation. Les deux procédures s'appliquent universellement tant au secteur public qu'au secteur privé. Elles sont juridiquement contraignantes. Le principe du renversement de la charge de la preuve s'applique dans les deux cas. Les deux procédures sont effectivement utilisées et exemptes l'une et l'autre de frais et dépens; dans la pratique toutefois, les tribunaux ne respectent pas cette disposition et ordonnent aux parties de payer.

Rares ont été les affaires dans lesquelles les juges ont établi l'existence d'une discrimination en se basant uniquement sur l'incapacité de la partie défenderesse de réfuter les présomptions de discrimination. Ils ont toutefois systématiquement tenu compte de cette règle de preuve spéciale et certains ont émis des observations avisées sur ses conséquences quant à l'établissement des faits. Les juges ont une vision peu cohérente de la différence entre discrimination directe et indirecte – ce qui a donné lieu à de nombreuses reprises à une interprétation erronée faisant de cas de discrimination directe des cas de discrimination indirecte justifiable.

La loi prévoit que l'organisme pour l'égalité assiste les victimes de discrimination. Dans la pratique, les plaignants reçoivent des conseils de procédure sur la manière d'introduire leurs plaintes. La commission pour la protection contre la discrimination est habilitée à ester en justice ainsi qu'à s'associer à des actions intentées par d'autres, mais elle n'a guère fait usage de ces possibilités. Des ONG s'occupent activement d'affaires de discrimination: elles sont habilitées à représenter les plaignants devant les tribunaux et à

intervenir en leur faveur dans le cadre de poursuites. Les ONG ont le droit d'intenter en leur propre nom, sans devoir obtenir l'autorisation d'une victime particulière, des actions en justice dans l'intérêt public lorsque les droits de nombreuses personnes ont été bafoués. Elles sont habilitées à saisir la commission pour la protection contre la discrimination sans identifier de victime particulière. Les ONG ont engagé toute une série de poursuites d'intérêt public, ce qui a mobilisé davantage l'attention du public. Plusieurs décisions fermes ont été rendues et pourraient susciter un certain changement social. Les procédures contentieuses bénéficient, surtout lorsqu'elles sont engagées par des ONG, d'une large couverture médiatique. Des ONG ont fait appel au test de situation pour dévoiler et étayer des cas de discrimination directe, et ont établi les cas en question en justice en utilisant ce type de preuve testimoniale. Elles ont également recouru aux statistiques dans quelques affaires. En vertu du droit procédural en matière civile, tant les statistiques que les tests de situation sont des éléments de preuve implicitement recevables laissés à l'appréciation des juges. Il n'y a eu aucun débat sur cette recevabilité. Le test de situation en tant que preuve testimoniale a été admis comme allant de soi, étant assimilé à une déposition de témoin ordinaire sans qu'il soit fait référence à son but spécifique d'intérêt public. Les données statistiques ont été elles aussi considérées comme des preuves ordinaires tant par les juges que par la commission pour la protection contre la discrimination. Cette dernière s'est penchée de sa propre initiative sur des données statistiques.

Les sanctions infligées par la commission pour la protection contre la discrimination comprennent des amendes (plafonnées à 1 250 euros) et des injonctions contraignant la partie défenderesse à prendre des mesures préventives ou correctives particulières. La commission exerce activement ses pouvoirs disciplinaires en imposant souvent le versement d'amendes proches du montant maximum et en ordonnant une réparation sous la forme d'une réintégration, de la modification de la réglementation, etc. Il s'avère difficile toutefois de déterminer dans quelle mesure ces injonctions sont suivies d'exécution et dans quelle mesure la réponse des autorités est efficace lorsque ce n'est pas le cas. L'organisme pour l'égalité ne dispose dans cette éventualité d'aucun autre pouvoir formel que celui d'infliger de nouvelles amendes. La réparation ordonnée par un tribunal comprend pour sa part une indemnisation non plafonnée et une injonction adressée à la partie défenderesse pour qu'elle prenne des mesures spécifiques ou qu'elle s'abstienne d'une action particulière. Les indemnisations ont atteint, à titre exceptionnel, un montant de 5 000 euros (inaccessibilité de l'environnement architectural).

Le droit du travail prévoit des quotas d'emploi pour les personnes handicapées et des subventions à l'intention de leurs employeurs. Un traitement préférentiel en matière d'emploi est également accordé aux travailleurs jeunes et âgés ainsi qu'aux personnes assumant des responsabilités de garde et de soins. Les Roms sont théoriquement bénéficiaires d'une série de programmes d'action positive dans les domaines de l'éducation, du logement et autres, mais l'impact de ces mesures reste, dans la pratique, très limité.

Il n'existe aucun processus de dialogue ni de consultation avec des ONG ou des partenaires sociaux de la part d'une quelconque autorité nationale.

6. Organismes de promotion de l'égalité de traitement

La commission pour la protection contre la discrimination est l'organisme national bulgare spécialisé en charge des questions d'égalité. Elle a été instituée en vertu de la loi sur la protection contre la discrimination en tant qu'autorité collégiale semi-judiciaire dotée de pouvoirs de décision. Elle est entrée en fonction en 2005, bien que la loi prévoyait le démarrage de son activité dès le début 2004. La commission pour la protection contre la discrimination traite de la discrimination fondée sur tous les motifs protégés. Elle est mandatée pour entendre et instruire les plaintes déposées par des victimes et des signalements émanant de tiers; engager ses propres poursuites; établir l'existence d'une discrimination par des décisions juridiquement contraignantes; infliger des sanctions financières; formuler des instructions obligatoires en vue de mesures correctives ou

préventives; examiner et donner un avis sur les projets de loi; adresser des recommandations aux autorités publiques, y compris en vue d'amendements législatifs; assister les victimes de discrimination; procéder à des études indépendantes et publier des rapports indépendants. La commission pour la protection contre la discrimination développe rapidement une jurisprudence abondante, suivie d'effet dans un certain nombre de cas. La jurisprudence comprend des décisions du tribunal municipal administratif de Sofia et de la Cour suprême administrative, qui contrôlent les décisions de la commission pour la protection contre la discrimination.

7. Points essentiels

La définition de l'incitation à discriminer, y compris les injonctions de pratiquer une discrimination, figurant dans la loi sur la protection contre la discrimination requiert expressément une intention directe. Dans cette même loi, la définition de la ségrégation raciale exige que la situation de séparation soit «forcée»⁴² – ce qui implique que la ségrégation pourrait être délibérément choisie, autrement dit que des personnes renoncent à leur droit de ne pas faire l'objet d'une discrimination, et notamment de ne pas faire l'objet d'une ségrégation raciale. La CouEDH a considéré dans le cadre d'affaires de ségrégation des Roms qu'un renoncement au droit à la non-discrimination n'est pas possible dans ce contexte car la démarche irait à l'encontre d'un intérêt public majeur.⁴³

La loi sur la protection contre la discrimination définit la discrimination indirecte d'une manière qui induit les juges et la commission pour la protection contre la discrimination en erreur et les conduit à l'assimiler à une discrimination directe déguisée. Les termes «en raison de l'un des motifs» utilisés dans la définition contredisent la partie «apparemment neutre» du libellé. Plusieurs décisions émanant de tribunaux et de la commission pour la protection contre la discrimination ont interprété l'expression «en raison de l'un des motifs» comme établissant un lien de causalité entre la règle apparemment neutre et le(s) motif(s) protégé(s) en cause – une interprétation qui semble se baser sur une hypothèse selon laquelle un acte «apparemment neutre» est un acte qui se fonde effectivement sur un motif protégé mais de façon cachée, et non ouverte; les juges et la commission estiment donc que la disposition relative à la discrimination indirecte désigne une discrimination directe dissimulée.⁴⁴

Des interdictions de discrimination abstraites figurant dans des lois préexistantes régissant des domaines spécifiques ainsi que dans la Constitution restent en vigueur parallèlement à la loi sur la protection contre la discrimination. On constate une absence totale de cohérence entre cette dernière et ces interdictions plus anciennes avec des disparités en termes de motifs protégés, d'exceptions et de définitions. Cette incohérence entre la loi sur la protection contre la discrimination et d'autres lois régissant des domaines particuliers se traduit par l'existence de dispositions directement ou indirectement discriminatoires incompatibles avec l'interdiction universelle établie par la première. Aucun effort ou presque n'a été déployé pour harmoniser la législation de façon à garantir que la loi sur la protection contre la discrimination prévale sur toute autre disposition discriminatoire divergente.

⁴² Loi sur la protection contre la discrimination, disposition additionnelle sous 1.6.

⁴³ Par exemple, *D.H. contre République tchèque*, arrêt du 13 novembre 2007; *Sampanis contre Grèce*, arrêt du 5 juin 2008; *Orsus c. Croatie*, arrêt du 16 mars 2010 (GC).

⁴⁴ Par exemple: tribunal de district de Radnevo, décision n° 97 du 13 décembre 2004, affaire n° 365/2004; tribunal régional de Sofia, décision du 12 juillet 2004, affaire n° 1184/2004; tribunal de district de Sofia, décision du 19 août 2004, affaire n° 1262/2004; tribunal de district de Sofia, décision du 19 décembre 2006, affaire n° 2756/2006. Décisions de la Cour suprême administrative: décision n° 11421 du 19 novembre 2007, affaire n° 5604/2007; décision n° 12117 du 3 décembre 2007, affaire n° 8044/2007; décision n° 4752 du 15 mai 2007, affaire n° 11478/2006; décision n° 11295 du 16 novembre 2007, affaire n° 6407/2007; décision n° 13393 du 28 décembre 2007, affaire n° 8083/2007; décision n° 7811 du 19 juillet 2007, affaire n° 1048/2007.

En 2014, la Cour suprême administrative a établi des exigences restrictives en rapport avec l'application de la loi sur la protection contre la discrimination, lesquelles vont à l'encontre de la dite loi et du droit de l'UE.⁴⁵

La Cour suprême administrative a considéré qu'il fallait, pour qu'il y ait discrimination, que la différence de traitement se fonde *exclusivement* sur un motif protégé, à l'exclusion de cas de «motifs divers», à savoir des situations dans lesquelles une caractéristique protégée constitue une raison parmi d'autres du traitement moins favorable.⁴⁶ La Cour suprême administrative manque cependant de cohérence dans la mesure où elle a dit pour droit dans une affaire récente qu'il y a traitement discriminatoire indépendamment du fait qu'un motif protégé soit la raison unique d'un traitement moins favorable ou qu'il en soit une raison parmi d'autres.⁴⁷ Comme déjà signalé, la Cour suprême administrative a recouru dans des cas de traitement moins favorable, autrement dit des cas de discrimination directe, à une justification uniquement applicable à la discrimination indirecte. Elle a appliqué le concept de discrimination indirecte à une série de cas de traitement défavorable direct: en 2014, elle a considéré par exemple, dans le cadre d'une affaire où un détenu musulman se plaignait que son régime alimentaire comprenait de la viande de porc (refus d'aménagement raisonnable), qu'il s'agissait d'une discrimination indirecte envers le plaignant par rapport aux détenus musulmans d'une autre prison dont le régime alimentaire était adapté.⁴⁸

La Cour suprême administrative a fait preuve dans quelques affaires d'une grave méconnaissance du concept de comparateur, considérant que les exigences relatives à l'âge en matière d'accès à l'emploi ne sont pas constitutives de discrimination du fait qu'elles s'appliquent à tous les candidats, et pas uniquement à la partie plaignante.⁴⁹ Elle a requis une intention, établissant souvent de manière expresse que le traitement doit être commis *consciemment* sur la base de l'un des motifs protégés.⁵⁰ Comme déjà indiqué, la Cour suprême administrative a estimé à deux reprises en 2014 que seul un comportement «coupable» peut être considéré comme une infraction en vertu de la loi sur la protection contre la discrimination.⁵¹ Sa jurisprudence n'en est pas moins contradictoire: en 2014 également, elle a déclaré dans une affaire que la discrimination directe ne requiert pas d'intention discriminatoire et que, par conséquent, l'absence d'intention est non pertinente pour considérer qu'un traitement est discriminatoire, y compris lorsque son auteur pense qu'il est légitime.⁵² Dans une affaire traitée en 2014, la Cour suprême administrative a interprété que, pour constituer un motif protégé, «l'orientation sexuelle» devait être innée, et non «consciemment» choisie: elle a refusé le droit d'asile à un homosexuel camerounais parce qu'il avait «décidé» à l'âge de 35 ans de «choisir» une sexualité qui n'était pas sa sexualité «innée».⁵³

La commission pour la protection contre la discrimination n'utilise pas ses compétences, et notamment celle lui permettant d'engager des poursuites d'office, de manière stratégique. Elle ne s'est fixé aucune priorité. Elle n'a ciblé aucune des grandes problématiques relevant d'une discrimination, telles que la ségrégation des Roms dans l'enseignement, leur indigence et leur isolement en termes de logement, le placement en institutions des personnes handicapées, etc. Elle refuse en règle générale d'examiner (en termes de

⁴⁵ Voir p. 2 ci-dessus.

⁴⁶ Cour suprême administrative, décision n° 8277 du 11 juin 2012 dans l'affaire n° 3852/2012 notamment.

⁴⁷ Cour suprême administrative, décision n° 274 du 9 janvier 2012 dans l'affaire n° 1319/2011.

⁴⁸ Cour suprême administrative, décision n° 2514 du 21 février 2014, affaire n° 10989/2013.

⁴⁹ Cour suprême administrative, décision n° 7096 du 19 mai 2012 dans l'affaire n° 3686/2012; décision n° 10734 du 1^{er} septembre 2014 dans l'affaire n° 1463/2014.

⁵⁰ Cour suprême administrative, décision n° 8277 du 11 juin 2012 dans l'affaire 3852/2012; décision n° 3645 du 14 mars 2014 dans l'affaire n° 12679/2013 (exigence d'une perpétration «consciente», réitérée à deux reprises) notamment.

⁵¹ Cour suprême administrative, décision n° 5645 dans l'affaire n° 15991/2013, décision n° 15637 dans l'affaire n° 1925/2014.

⁵² Cour suprême administrative, décision n° 1048 du 27 janvier 2014 dans l'affaire n° 8033/2013. L'affaire concernait l'application d'une limite d'âge dans le cadre du règlement d'une université.

⁵³ Cour suprême administrative, décision n° 9467 du 7 juillet 2014 dans l'affaire n° 1381/2014.

recevabilité) ou d'accueillir (en termes de bien-fondé) des plaintes pour discrimination déposées par des personnes handicapées qui n'ont pas présenté d'attestation médicale de leur handicap.⁵⁴ Comme la Cour suprême administrative, la commission pour la protection contre la discrimination manifeste souvent une méconnaissance du concept de discrimination indirecte, qu'elle assimile parfois à une discrimination directe.

⁵⁴ Commission pour la protection contre la discrimination, décision n° 259 du 17 décembre 2008 dans l'affaire n° 186/2008, notamment.

ZUSAMMENFASSUNG

1. Einleitung

Zu den besonders benachteiligten Gruppen in Bulgarien gehören die Roma, Flüchtlinge bzw. Migrant*innen, Muslime, Juden, Angehörige nicht-orthodoxer Religionsgemeinschaften, Mazedonier, Türken, Menschen mit Behinderungen, insbesondere geistigen Behinderungen, und LGBT-Personen. Der Regierungskoalition gehören zwei Parteien an, die von der Europäischen Kommission gegen Rassismus und Intoleranz als „ultranationalistisch/faschistisch“ eingestuft werden: die „Nationale Front für die Rettung Bulgariens“ und „VMRO-BND“^{55, 56}. Diskriminierung und Hass, insbesondere Hassrede, gegen Roma ist allgegenwärtig, radikal und praktisch straflos. Sehr hohe Beamte hetzen offen zu Hass und Diskriminierung gegen die Roma und stellen sie als Untermenschen dar. Die Staatsanwaltschaft und die Gleichbehandlungsstelle, die gesetzlich für die Verfolgung von Hassrede zuständig sind, verfolgen derartige Fälle nicht.

Roma leben in Ghettos unter elenden Bedingungen und werden häufig Opfer von Zwangsräumungen. Der Europäische Gerichtshof für Menschenrechte (EGMR) hat Bulgarien in einem derartigen Fall zur Zahlung von Schadensersatz verurteilt.⁵⁷ Roma leiden unter Langzeitarbeitslosigkeit und haben keinen Zugang zur beruflichen Bildung und zum Arbeitsmarkt. Auch beim Zugang zum Gesundheitswesen und anderen Dienstleistungen werden sie diskriminiert und belästigt. Ihre Kinder werden in segregierten minderwertigen Schulen oder auch überhaupt nicht unterrichtet. Das Strafrechtssystem verfolgt sie überproportional stark und verweigert ihnen einen gleichberechtigten Rechtsschutz, z. B. vor Hassverbrechen durch Beamte und Bürger. Sie sind nirgends repräsentiert und haben auf keiner politischen Ebene Zugang zu Entscheidungsprozessen.

Auch Hassreden und Hassverbrechen gegen Flüchtlinge bzw. Migrant*innen, sogar von Beamten, nehmen in letzter Zeit stark zu. Diese Gewalt bleibt straflos. Der EGMR hat Bulgarien in einem derartigen Fall verurteilt.⁵⁸ Viele Menschen leben unter unwürdigen Bedingungen. Der Hass gegen Juden, Muslime, nicht-orthodoxe Religionsgemeinschaften und Türken kommt unter anderem in der Schändung von Tempeln und in gewalttätigen Demonstrationen zum Ausdruck. Der EGMR hat Bulgarien auch in einem derartigen Fall verurteilt.⁵⁹ Die nationale Identität von Mazedoniern wird nicht anerkannt (sie gelten als Bulgaren) und Gerichte lehnen es ab, mazedonische Organisationen als Vereine einzutragen. Örtliche Behörden stören ihre friedlichen Zusammenkünfte. Der EGMR hat Bulgarien in mehreren derartigen Fällen verurteilt.⁶⁰ Bulgarien hat diese Urteile nicht umgesetzt und steht aus diesem Grund unter der verschärften Beobachtung des Ministerkomitees des Europarates.

Menschen mit Behinderung werden in den Bereichen Bildung und Beschäftigung, beim Zugang zu Dienstleistungen und bei der politischen Partizipation ausgegrenzt und benachteiligt. Viele Kinder mit Behinderungen können keine Schule besuchen, weil keine Barrierefreiheit gegeben ist. Die meisten sind in minderwertigen Förderschulen segregiert. Viele Erwachsene und Kinder werden in segregierten Institutionen betreut, wo sie einer menschenunwürdigen Behandlung ausgesetzt sind und früh sterben – nach Ansicht von Menschenrechtsorganisationen aufgrund von Vernachlässigung.⁶¹ Täter genießen

⁵⁵ Innere Mazedonische Revolutionäre Organisation – Bulgarische Nationalbewegung.

⁵⁶ ECRI, Länderbericht Bulgarien vom 16. September 2014.

⁵⁷ *Yordanova and Others v. Bulgaria*, Urteil vom 24. April 2012. Beschwerde Nr. 25446/06.

⁵⁸ *Abdu v. Bulgaria*, Urteil vom 11. März 2014. Beschwerde Nr. 26827/08.

⁵⁹ Nach dem Stichtag für diesen Bericht: *Karaahmed v. Bulgaria*, Urteil vom 24. Februar 2015. Beschwerde Nr. 30587/13.

⁶⁰ Unter anderem: *United Macedonian Organisation Ilinden and Others v. Bulgaria* (Nr. 2), Urteil vom 18. Oktober 2011. Beschwerde Nr. 34960/04.

⁶¹ Siehe z. B. die Beschwerde, die das bulgarische Helsinki-Komitee im Namen von zwei der verstorbenen Kinder beim Europäischen Gerichtshof für Menschenrechte gegen Bulgarien eingereicht hat: [http://hudoc.echr.coe.int/eng#{"appno":\["35653/12"\], "itemid":\["001-156281"\]}](http://hudoc.echr.coe.int/eng#{).

Straflosigkeit, die Behörden ermitteln in solchen Fällen nicht. Der EGMR hat Bulgarien in zwei wichtigen Fällen für die Verletzung der Rechte von Menschen mit Behinderungen verurteilt.⁶² Die architektonische Umgebung von Dienstleistungsangeboten ist in der Regel unzugänglich. 2015 wurde zum Beispiel ein Unternehmen vom Obersten Verwaltungsgericht verurteilt, weil es ein Delfinarium nicht zugänglich gemacht hatte: Die installierten Rampen ließen keinen unabhängigen Zugang zu; der Zugang war beschränkt und nur mit Hilfe möglich; die Rampen waren unbeweglich und konnten nicht an verschiedene Rollstuhltypen angepasst werden.⁶³ LGBT-Personen sind Hassreden, Hassverbrechen und Diskriminierung ausgesetzt.

Im Jahr 2014 gab das Oberste Verwaltungsgericht (OVG), die letzte Instanz, die die Entscheidungen der Gleichbehandlungsstelle überprüft, eine neue und restriktive Auslegung des Gleichbehandlungsrechts vor.⁶⁴ Nach dem OVG kann die Gleichbehandlungsstelle nicht jeden Verstoß gegen das Gleichbehandlungsrecht ahnden, sondern nur solche Verstöße, die Ordnungswidrigkeiten nach dem Gesetz über Ordnungswidrigkeiten und Ordnungsstrafen darstellen. Dazu muss eine konkrete Handlung bzw. Unterlassung, ein konkreter Täter, ein konkretes Opfer und die Schuld des Täters nachgewiesen werden. Diskriminierung muss eine konkrete Tatsache sein, keine hypothetische Möglichkeit.⁶⁵ Diskriminierungen können nur von natürlichen Personen begangen werden. Juristische Personen können in gesetzlich geregelten Ausnahmefällen ebenfalls Diskriminierungen begehen. Öffentliche Behörden können nicht diskriminieren – nur einzelne Mitarbeiter, die im Namen der Behörde handeln. Rechtliche Bestimmungen sind keine konkreten Handlungen bzw. Unterlassungen und können damit auch keine Diskriminierung darstellen. Auch die Anwendung einer rechtlichen Bestimmung ist keine konkrete Handlung bzw. Unterlassung. Die Gleichbehandlungsstelle kann Gesetze nicht für diskriminierend erklären: ein Gesetz, das vom Verfassungsgericht (VG) nicht für verfassungswidrig erklärt wurde, kann nicht diskriminierend sein. Die Gleichbehandlungsstelle kann Sekundärrecht nicht für diskriminierend erklären: Sekundärrecht, das vom Obersten Verwaltungsgericht (OVG) nicht für rechtswidrig erklärt wurde, kann nicht diskriminierend sein. Wenn die Gleichbehandlungsstelle der Ansicht ist, dass eine Rechtsnorm gegen das Gleichbehandlungsrecht verstößt, kann sie dennoch keinen Verstoß gegen das Gleichbehandlungsrecht geltend machen. Sie kann die zuständige Stelle nicht zur Aufhebung oder Änderung der Norm verpflichten. Sie kann nur eine Empfehlung aussprechen oder vor dem OVG gegen das betreffende Sekundärrecht klagen.

2015 prüften das OVG und der Oberste Kassationshof in dem Auslegungsverfahren Nr. 2/2014 vor einem gemischten Senat aus Mitgliedern beider Gerichtshöfe die Frage, welches der beiden Gerichte für Diskriminierungsklagen natürlicher Personen gegen öffentliche Behörden zuständig ist.⁶⁶ Das Fallrecht ist seit 2007 widersprüchlich. Die Gerichte kamen zu dem Ergebnis, dass nicht die Zivil-, sondern die Verwaltungsgerichte zuständig sind.

2015 entschied der EuGH im Wege einer Vorabentscheidung über einen Fall, in dem es um die Unzugänglichkeit von Stromzählern in überwiegend von Roma bewohnten Stadtteilen ging. Das Dienstleistungsunternehmen hatte die Stromzähler in einer unzugänglichen Höhe angebracht, um angeblichen Stromdiebstahl und eine Beschädigung der Apparate zu verhindern. Der EuGH erklärte die Maßnahme für diskriminierend, da die Stromzähler in anderen, nicht von Roma bewohnten Stadtteilen so angebracht seien, dass sie für die Verbraucher zugänglich seien, um sie zu prüfen.

⁶² *Stanev v. Bulgaria*, Urteil vom 17. Januar 2012, *Stefan Stankov v. Bulgaria*, Urteil vom 17. März 2015.

⁶³ Oberstes Verwaltungsgericht, Urteil Nr. 158 vom 08.01.2015 in der Rechtssache 7092/2014.

⁶⁴ Oberstes Verwaltungsgericht, Urteil Nr. 5645 in der Rechtssache 15991/2013 und Urteil Nr. 15637 in der Rechtssache 1925/2014. Dieses Problem wird in Abschnitt 11.1 und 12.2 dieses Berichts näher behandelt.

⁶⁵ Oberstes Verwaltungsgericht, Urteil Nr. 15637 vom 19.12.2014 in der Rechtssache 1925/2014. Der Fall betraf die Anwendung einer Altersgrenze nach Sekundärrecht.

⁶⁶ Mit Beschluss (Разпореждане) vom 27.06.2014, verfügbar unter http://www.vks.bg/Dela/2014-02-BKC_BAC%20Разпореждане%20за%20образуване.pdf (in bulgarischer Sprache).

2. Wichtigste Gesetze

Das Gesetz zum Schutz gegen Diskriminierung (GSD) von 2004 ist das wichtigste Antidiskriminierungsgesetz und wurde zur Umsetzung der Richtlinien verabschiedet.⁶⁷ Es ist ein allgemeines Gleichbehandlungsgesetz, das Diskriminierung aus zahlreichen Gründen, einschließlich von Rasse oder ethnischer Zugehörigkeit, Geschlecht, Religion oder Weltanschauung, sexueller Ausrichtung, Behinderung und Alter, verbietet und einheitliche Schutzstandards und Rechtsmittel bereitstellt. Das GSD als Ganzes entspricht den Richtlinien und geht in wichtigen Aspekten über deren Vorgaben hinaus: allgemeiner Geltungsbereich, erweiterte und nicht abgeschlossene Liste von Diskriminierungsgründen, zusätzliche Formen von Diskriminierung, erweiterte Zuständigkeit der Gleichbehandlungsstelle und spezielle Rechtsbehelfe. Diskriminierungsopfer machen das GSD aktiv vor der Gleichbehandlungsstelle und den Gerichten geltend und es gibt bereits einschlägiges Fallrecht, das ständig zunimmt.

Ein weiteres Gleichbehandlungsgesetz ist das Gesetz zur Integration von Menschen mit Behinderungen (MBIG),⁶⁸ das in vielen Bereichen positive Maßnahmen und die Pflicht zu angemessenen Vorkehrungen einführt. Andere Gesetze für bestimmte Lebensbereiche, wie Bildung, Beschäftigung oder öffentliche Beschaffung, sehen positive Maßnahmen aufgrund von Behinderung, Alter und Betreuungsverpflichtungen vor.

In Einzelgesetzen und in der Verfassung findet sich ebenfalls ein abstraktes Diskriminierungsverbot, dieses wird aber nicht umgesetzt. Bulgarien hat sich zur Einhaltung internationaler Rechtsinstrumente verpflichtet, die Diskriminierung verbieten, dazu gehören die Europäische Menschenrechtskonvention (EMRK), die Europäische Sozialcharta (revidiert), der Internationale Pakt über bürgerliche und politische Rechte, der Internationale Pakt über wirtschaftliche, soziale und kulturelle Rechte, das Übereinkommen zur Beseitigung jeder Form von Diskriminierung der Frau, das Internationale Übereinkommen zur Beseitigung jeder Form von Rassendiskriminierung und das Übereinkommen über die Rechte des Kindes. Die Verfassung und verbindliches internationales Recht sind von bulgarischen Gerichten direkt anwendbar und haben dabei Vorrang vor abweichenden Rechtsvorschriften. Sie können gegen privatrechtliche Personen und gegen öffentliche Stellen geltend gemacht werden.

3. Wichtigste Grundsätze und Begriffe

Das GSD schützt vor und definiert unmittelbare und mittelbare Diskriminierung, einschließlich von Diskriminierung durch Assoziierung und aufgrund mutmaßlicher Eigenschaften. Das GSD definiert unmittelbare Diskriminierung als Situation, in der eine Person wegen eines geschützten Diskriminierungsgrundes eine weniger günstige Behandlung erfährt als eine andere Person in vergleichbaren Umständen erfährt, erfahren hat oder erfahren würde. Das GSD definiert „wegen“ als tatsächlicher, in der Gegenwart oder Vergangenheit, oder mutmaßlicher Besitz eines oder mehrerer geschützter Diskriminierungsgründe durch die diskriminierte Person selbst oder eine andere Person, die, tatsächlich oder mutmaßlich, mit der diskriminierten Person assoziiert ist, wobei die Assoziierung der Grund für die Diskriminierung darstellt. Das GSD enthält keine allgemeinen Ausnahmen für unmittelbare Diskriminierung.

Das Gesetz enthält beispielhafte Verbote bestimmter diskriminierender Verhaltensweisen in den Bereichen Beschäftigung und Bildung und bei der Bereitstellung von Dienstleistungen. Außerdem enthält es eine geschlossene Liste spezieller Ausnahmen für alle geschützten Gründe, zum Beispiel für wesentliche und entscheidende berufliche Anforderungen, für Arbeitgeber mit einem religiösen Ethos und für Höchst- und Mindestalter beim Zugang zu Beschäftigung und Bildung, die jedoch objektiv gerechtfertigt

⁶⁷ Закон за защита от дискриминация, verabschiedet im September 2003, in Kraft seit Januar 2004.

⁶⁸ Закон за интеграция на хората с увреждания, verabschiedet im September 2004, in Kraft seit Januar 2005.

sein müssen. Es erlaubt die Ungleichbehandlung von Nicht-Staatsbürgern, wenn diese durch andere Rechtsvorschriften geregelt ist, und nicht gerechtfertigte Alters- und Dienstaltersgrenzen bei Rentenregelungen. Positive Maßnahmen zugunsten benachteiligter Gruppen sind zulässig.

Nach dem GSD liegt eine mittelbare Diskriminierung vor, wenn dem Anschein nach neutrale Vorschriften, Kriterien oder Verfahren Personen wegen eines geschützten Grundes gegenüber anderen Personen benachteiligen können, es sei denn diese Vorschriften, Kriterien oder Verfahren sind durch ein rechtmäßiges Ziel sachlich gerechtfertigt und die Mittel sind zur Erreichung dieses Ziels angemessen und erforderlich.

Das GSD benennt Belästigung, Anstiftung zur Diskriminierung und Viktimisierung als Formen von Diskriminierung. Es definiert Belästigung als unerwünschte Verhaltensweisen, die mit einem der geschützten Gründe in Zusammenhang stehen, sich körperlich, verbal oder in anderer Weise äußern und bezwecken oder bewirken, dass die Würde der betreffenden Person verletzt und ein von Anfeindungen, Beleidigungen oder Einschüchterungen gekennzeichnetes Umfeld geschaffen wird. Der Schutz gilt auch für Belästigung aufgrund von mutmaßlicher Eigenschaften oder Assoziierung. Anstiftung zur Diskriminierung ist definiert als unmittelbare und absichtliche Ermutigung von Diskriminierung, was auch die Anweisung zur Diskriminierung umfasst. Viktimisierung ist wie folgt definiert: a) weniger günstige Behandlung einer Person, die, tatsächlich oder mutmaßlich, Maßnahmen gegen Diskriminierung getroffen hat oder treffen wird, b) weniger günstige Behandlung einer Person wegen einer mit ihr assoziierten Person, die, tatsächlich oder mutmaßlich, Maßnahmen gegen Diskriminierung getroffen hat oder treffen wird, c) weniger günstige Behandlung einer Person wegen der Weigerung, eine Anweisung zur Diskriminierung auszuführen. Maßnahmen zum Schutz vor Diskriminierung sind unter anderem die Einleitung eines Verfahrens vor der Gleichbehandlungsstelle oder einem Gericht und eine Zeugenaussage.

Diese Definitionen gelten für alle Diskriminierungsgründe. Mehrfachdiskriminierung ist definiert als Diskriminierung wegen mehr als einem der geschützten Diskriminierungsgründe. Das GSD verpflichtet öffentliche Stellen, Opfer von Mehrfachdiskriminierung durch positive Maßnahmen vorrangig zu unterstützen. Gemäß dem GSD behandelt die Gleichbehandlungsstelle Fälle von Mehrfachdiskriminierung in Senaten mit fünf Mitgliedern, anstelle des üblichen Senats mit drei Mitgliedern. In der Rechtsprechung wurde das Thema Mehrfachdiskriminierung jedoch bisher nicht angemessen behandelt.

Das GSD definiert Rassentrennung und verbietet sie als Form von Diskriminierung. Es schreibt angemessene Vorkehrungen für Menschen mit Behinderungen in Beschäftigung und Bildung vor. Diese Pflicht endet, wenn „die Kosten unangemessen hoch sind und eine schwere Belastung für den Arbeitgeber oder Bildungsträger darstellen“. Gemäß dem MBIG ist der Bildungsminister verpflichtet, Kindern mit Behinderungen ein günstiges Umfeld für integriertes Lernen bereitzustellen. Dies ist eine absolute Pflicht. Nach dem MBIG hat der Minister die Pflicht, auch nicht integrierten Kindern mit Behinderung eine Bildungsmöglichkeit zu bieten. Auch diese Pflicht ist absolut. Höhere Bildungseinrichtungen haben ebenfalls die absolute Pflicht, angemessene Vorkehrungen zu treffen.

Nach dem GSD sind Behörden, Arbeitgeber und Bildungsträger verpflichtet, die Gleichbehandlung in allen Bereichen zu berücksichtigen und für alle Diskriminierungsgründe positive Maßnahmen zu treffen. Eine Haftung ist vorgesehen für Mittäter diskriminierender Handlungen und eine Mithaftung für Arbeitgeber und Bildungsträger, die Diskriminierung am Arbeitsplatz bzw. im Bildungsinstitut durch Dritte nicht verhindern. Auch eine Umkehrung der Beweislast ist vorgesehen. 2015 wurde die Vorschrift zur Beweislastverlagerung geändert, um deutlicher zu machen, dass eine diskriminierte Person keinen eindeutigen Beweis für ihre Benachteiligung vorlegen, sondern diese nur glaubhaft machen muss. Die Vorschrift lautet nun wie folgt

(Hervorhebungen hinzugefügt): „Wenn in einem Verfahren zum Schutz vor Diskriminierung die Partei, die behauptet, diskriminiert worden zu sein, Fakten *anführt (vorlegt)*, aus denen *gefolgert* werden kann, dass eine Diskriminierung vorliegt, muss die beklagte Partei beweisen, dass nicht gegen den Grundsatz der Gleichbehandlung verstoßen wurde.“ Die frühere Fassung lautete: „Wenn in einem Verfahren zum Schutz vor Diskriminierung die Partei, die behauptet, diskriminiert worden zu sein, Fakten *belegt*, aus denen die *Schlussfolgerung* gezogen werden kann, dass eine Diskriminierung vorliegt, muss die beklagte Partei beweisen, dass nicht gegen den Grundsatz der Gleichbehandlung verstoßen wurde.“

4. Sachlicher Anwendungsbereich

Das GSD hat einen unbegrenzten Anwendungsbereich. Es gilt für alle Lebensbereiche, einschließlich der von den Richtlinien abgedeckten Bereiche. Dieses generelle Diskriminierungsverbot gilt für alle Diskriminierungsgründe und sowohl für den privaten als auch für den öffentlichen Sektor.

5. Rechtsdurchsetzung

Das GSD bietet zwei Möglichkeiten: Klage vor einem ordentlichen Gericht und ein spezielles außergerichtliches Verfahren vor der Gleichbehandlungsstelle. Die Wahl liegt beim Opfer. Gerichte können eine Diskriminierung feststellen, Schadensersatz zusprechen und den Täter zu Ausgleichsmaßnahmen oder zur Beendigung der betreffenden Handlung bzw. Unterlassung verurteilen. Die Kommission zum Schutz gegen Diskriminierung (SGDK) kann ebenfalls eine Diskriminierung feststellen und Präventions- bzw. Abhilfemaßnahmen anordnen. Sie kann finanzielle Sanktionen verhängen, jedoch keinen Schadensersatz zusprechen. Beide Verfahren sind uneingeschränkt für den öffentlichen und den privaten Sektor anwendbar. Sie sind rechtsverbindlich. In beiden gilt der Grundsatz der umgekehrten Beweislast. Beide Verfahren werden in der Praxis genutzt. Beide sind gesetzlich von Gebühren und sonstigen Kosten befreit, wobei die Gerichte diese Bestimmung in der Praxis nicht umsetzen und die Zahlung von Gebühren anordnen.

Es gab nur sehr wenige Fälle, in denen der Beklagte nur aus dem Grund wegen Diskriminierung verurteilt wurde, weil er nicht beweisen konnte, dass eine mutmaßliche Diskriminierung nicht vorgelegen hat. Allerdings berücksichtigen die Gerichte die spezielle Regel zur Beweislast und gründen teilweise ihre Urteile auf dieser Regel. Der Unterschied zwischen unmittelbarer und mittelbarer Diskriminierung wird jedoch nicht immer verstanden, wodurch unmittelbare Diskriminierung in manchen Fällen als gerechtfertigte mittelbare Diskriminierung ausgelegt wird.

Gemäß dem GSD muss die SGDK Opfer von Diskriminierung unterstützen. In der Praxis erhalten Kläger rechtliche Ratschläge zur Einreichung von Klagen vor Gericht. Die SGDK kann Verfahren einleiten und sich an laufenden Verfahren beteiligen. Diese Möglichkeiten hat die Kommission jedoch noch nie genutzt. Dagegen reichen NRO aktiv Klage gegen Diskriminierungsfälle ein. Sie sind berechtigt, Kläger vor Gericht zu vertreten und sich zur Unterstützung des Klägers am Verfahren zu beteiligen. NRO sind außerdem berechtigt, in eigenem Namen Klagen im öffentlichen Interesse einzureichen, wenn die Rechte vieler Menschen verletzt wurden. Dazu benötigen sie nicht die Einwilligung eines konkreten Opfers. Auch Beschwerde bei der SGDK können sie ohne Nennung eines konkreten Opfers einlegen. NRO haben zahlreiche Klagen im öffentlichen Interesse geführt. Dies hat das Thema in den Fokus der Öffentlichkeit gerückt. Inzwischen sind mehrere klare Urteile ergangen, die das Potenzial haben, einen gewissen gesellschaftlichen Wandel anzustoßen. Auch die Medien berichten über Diskriminierungsklagen, insbesondere Klagen von NRO. Zum Nachweis von Diskriminierung haben NRO auch Situationstests genutzt und vor Gericht als gültige Beweismittel eingeführt. In einigen Fällen haben sie auch statistische Daten vorgelegt. Nach der Zivilprozessordnung liegt es im Ermessen des Richters, statistische Daten und Situationstests als Beweise zuzulassen. Die Zulässigkeit dieser

Formen der Beweisführung wurde bisher nicht diskutiert. Die im Situationstest gewonnenen Erkenntnisse wurden als übliche Zeugenaussagen zugelassen, ohne dass die gemeinnützigen Ziele von Situationstests thematisiert worden wären. Auch statistische Daten werden von der Gleichbehandlungsstelle und Richtern als reguläre Beweise akzeptiert. Die SGDK hat aus eigenem Antrieb statistische Daten erhoben.

Zu den Sanktionsmöglichkeiten der SGDK bei Diskriminierungsfällen gehören Geldbußen (maximal 1250 Euro) und verbindliche Verpflichtungen der Beklagten zu bestimmten Präventions- oder Abhilfemaßnahmen. Die SGDK nutzt ihre Sanktionsmöglichkeiten voll aus, wobei die verhängten Geldbußen meist in der Nähe des Höchstbetrags liegen. Zu den angeordneten Maßnahmen gehören unter anderem Wiedereinstellungen und die Änderung von Vorschriften. Allerdings ist nicht klar, wie häufig diese Anordnungen in der Praxis tatsächlich umgesetzt werden, bzw. wie wirksam die Mittel der Kommission zu deren Durchsetzung sind. Sofern die Anordnungen nicht umgesetzt werden, kann die Kommission nur neue Geldbußen verhängen. In Gerichtsverfahren kann ein nach oben offener Schadensersatz zugesprochen werden und der Beklagte kann dazu verurteilt werden, bestimmte Handlungen vorzunehmen oder zu unterlassen. In Ausnahmefällen lagen die Schadensersatzsummen bei bis zu 5000 Euro (fehlende architektonische Barrierefreiheit).

Nach dem Arbeitsgesetz gibt es Beschäftigungsquoten für Menschen mit Behinderung und entsprechende Fördermittel für Arbeitgeber. Jüngere und ältere Arbeitnehmer und Menschen mit Betreuungspflichten genießen im Bereich Beschäftigung eine gewisse Vorzugsbehandlung. Es gibt zahlreiche Förderprogramme in Bereichen wie Bildung und Wohnraum, die nominell die Roma begünstigen, wobei die praktische Wirksamkeit dieser Programme bisher eher gering ist.

Die bulgarischen Behörden haben keine Verfahren für den Dialog mit bzw. die Anhörung von NRO und den Sozialpartnern.

6. Gleichbehandlungsstellen

Die Kommission zum Schutz gegen Diskriminierung (SGDK) ist die spezialisierte nationale Gleichbehandlungsstelle in Bulgarien. Sie wurde durch das GSD als unabhängige außergerichtliche Stelle mit gerichtlichen Befugnissen eingerichtet. Obwohl sie nach dem Gesetz bereits Anfang 2004 ihre Arbeit aufnehmen sollte, war die Kommission erst 2005 voll einsatzbereit. Die SGDK ist für Diskriminierung wegen sämtlicher Diskriminierungsgründe zuständig. Außerdem hat sie die folgenden Aufgaben: Untersuchung der Beschwerden von Opfern und Anzeigen Dritter, Initiierung eigener Untersuchungsverfahren, Feststellung von Diskriminierung in rechtsverbindlichen Entscheidungen, Verhängung von Geldbußen, Anordnung von Abhilfe- oder Präventionsmaßnahmen, Erstellung von Gutachten zu Gesetzesentwürfen, Empfehlung an staatliche Stellen, insbesondere zu Gesetzesänderungen, Unterstützung von Diskriminierungsopfern, Durchführung unabhängiger Studien und Veröffentlichung unabhängiger Berichte. Die SGDK hat eine umfassende Rechtsprechung veröffentlicht, die teilweise bereits Wirkung zeigt. Zum Fallrecht gehören auch die Urteile des Verwaltungsgerichts Sofia und des Obersten Verwaltungsgerichts, bei denen Beschwerde gegen die Entscheidungen der SGDK eingelegt werden kann.

7. Wichtige Punkte

Nach der Definition des GSD liegt nur dann Anstiftung, d. h. auch Anweisung zur Diskriminierung vor, wenn eine unmittelbare Absicht gegeben ist. Die Definition von Rassentrennung nach dem GSD verlangt ausdrücklich, dass die Trennung „erzwungen“ sein muss.⁶⁹ Dies unterstellt, dass die Trennung freiwillig erfolgt sein könnte, d. h. dass Menschen auf ihr Recht auf Gleichbehandlung, also auch auf ihr Recht, nicht aufgrund der

⁶⁹ GSD, Zusätzliche Bestimmung, § 1.6.

Rasse segregiert zu werden, verzichten könnten. Der EGMR ist in Bezug auf die Segregation von Roma zu dem Schluss gekommen, dass ein Verzicht auf das Gleichbehandlungsrecht in diesem Zusammenhang nicht möglich ist, weil ein solcher Verzicht wichtige öffentliche Interessen verletzen würde.⁷⁰

Die Definition von mittelbarer Diskriminierung im GSD ist unklar und führt dazu, dass Gerichte und die SGDK sie mit unmittelbarer Diskriminierung verwechseln. Die Formulierung „wegen eines geschützten Grundes“ widerspricht der Formulierung „dem Anschein nach neutral“. Von einigen Gerichten und der SGDK wird dies in manchen Fällen so ausgelegt, dass „wegen eines geschützten Grundes“ eine kausale Verbindung zwischen der dem Anschein nach neutralen Regel und den geschützten Gründen erfordert. Diese Auslegung beruht auf der Annahme, dass eine „dem Anschein nach neutrale“ Handlung eine Handlung ist, die zwar aufgrund eines geschützten Grundes diskriminiert, dies jedoch nicht offen tut. Daher wird mittelbare Diskriminierung als verdeckte unmittelbare Diskriminierung verstanden.⁷¹

Parallel zum GSD sind weiterhin ältere abstrakte Diskriminierungsverbote in anderen Einzelgesetzen und in der Verfassung in Kraft. Das GSD wurde nicht mit diesen älteren Diskriminierungsverboten vereinheitlicht, die unterschiedliche Schutzgründe, Ausnahmen und Definitionen enthalten. Die Widersprüche zwischen dem GSD und anderen Einzelgesetzen, die in bestimmten Bereichen unmittelbar und mittelbar diskriminierende Bestimmungen enthalten, schwächen das allgemeine Diskriminierungsverbot des GSD. Es wurden so gut wie keine Anstrengungen unternommen, die Rechtsvorschriften zu harmonisieren und zu gewährleisten, dass das GSD vor abweichenden und diskriminierenden Rechtsvorschriften Vorrang genießt.

Im Jahr 2014 hat das OVG Einschränkungen für die Durchsetzung des GSD eingeführt, die sowohl gegen das GSD selbst als auch gegen europäisches Recht verstoßen.⁷²

Nach Ansicht des OVG liegt nur dann eine Diskriminierung vor, wenn die ungleiche Behandlung *ausschließlich* wegen eines geschützten Grundes erfolgt, wodurch Fälle mit „gemischten Motiven“, bei denen ein geschützter Diskriminierungsgrund nur einer der Gründe für eine Ungleichbehandlung ist, nicht als Diskriminierung gelten.⁷³ Allerdings hält auch das OVG diese Auslegung nicht konsequent durch. In einem aktuellen Fall kam es zu dem Schluss, dass „eine diskriminierende Behandlung nicht davon abhängt, ob ein geschützter Grund der einzige oder einer von mehreren Gründen für eine Benachteiligung ist.“⁷⁴ Wie bereits erwähnt, hat das OVG auch bei Fällen unmittelbarer Diskriminierung geprüft, ob die Ungleichbehandlung gerechtfertigt ist, obwohl das GSD eine Ausnahme für gerechtfertigte Ungleichbehandlung nur für Fälle von mittelbarer Diskriminierung erlaubt. Das Gericht hat den Begriff der mittelbaren Diskriminierung auf zahlreiche Fälle angewandt, in denen es um eine unmittelbare weniger günstige Behandlung geht. Beispielsweise kam das OVG 2014 in einem Fall, in dem ein muslimischer Gefangener geklagt hatte, weil seine Mahlzeiten Schweinefleisch enthielten (keine angemessenen Vorkehrungen), zu dem Urteil, dass es sich um eine mittelbare Diskriminierung gegen diesen Kläger im Vergleich zu muslimischen Häftlingen in anderen Haftanstalten handelt, bei denen auf die besonderen Nahrungsvorschriften Rücksicht genommen wurde.⁷⁵

⁷⁰ Z. B. *D.H. v. Czech Republic*, Urteil vom 13.11.2007, *Sampanis v. Greece*, Urteil vom 05.06.2008, *Orsus v. Croatia*, Urteil vom 16.03.2010 (GC).

⁷¹ Z. B.: Bezirksgericht Radnevo, Urteil Nr. 97 vom 13.12.2004, Rechtssache 365/2004; Kreisgericht Sofia, Urteil vom 12.07.2004, Rechtssache 1184/2004; Bezirksgericht Sofia, Urteil vom 19.08.2004, Rechtssache 1262/2004; Bezirksgericht Sofia, Urteil vom 19.12.2006, Rechtssache 2756/2006. Urteile des Obersten Verwaltungsgerichts: Urteil Nr. 11421 vom 19.11.2007, Rechtssache 5604/2007, Urteil Nr. 12117 vom 3.12.2007, Rechtssache 8044/2007, Urteil Nr. 4752 vom 15.05.2007, Rechtssache 11478/2006, Urteil Nr. 11295 vom 16.11.2007, Rechtssache 6407/2007, Urteil Nr. 13393 vom 28.12.2007, Rechtssache 8083/2007, Urteil Nr. 7811 vom 19.07.2007, Rechtssache 1048/2007.

⁷² Siehe oben auf Seite 2.

⁷³ Z. B. Oberstes Verwaltungsgericht, Urteil Nr. 8277 vom 11.06.2012 in der Rechtssache 3852/2012.

⁷⁴ Oberstes Verwaltungsgericht, Urteil Nr. 274 vom 9.01.2012 in der Rechtssache 1319/2011.

⁷⁵ Oberstes Verwaltungsgericht, Urteil Nr. 2514 vom 21.02.2014 in der Rechtssache 10989/2013.

In einigen Fällen bewies das OVG ein mangelndes Verständnis für das Konzept einer Vergleichsperson, indem es argumentiert, dass Altersgrenzen für den Zugang zu Beschäftigung keine Diskriminierung darstellen, weil sie für alle Bewerber gelten und nicht nur für den Kläger.⁷⁶ Das OVG macht eine Diskriminierung in manchen Fällen von einem Vorsatz abhängig, indem es ausdrücklich verlangt, dass die „Behandlung *bewusst* aufgrund eines geschützten Grundes erfolgen muss“. ⁷⁷ Wie bereits erwähnt, kam das OVG im Jahr 2014 zweimal zu dem Schluss, dass nur „schuldhafte“ Handlungen eine Verletzung des GSD darstellen können.⁷⁸ Gleichzeitig ist seine Rechtsprechung widersprüchlich: in einem Fall aus dem Jahr 2014 kam das OVG zu der Entscheidung, dass „unmittelbare Diskriminierung keine diskriminierende Absicht erfordert und es daher für die Bewertung der Handlung als Diskriminierung nicht relevant ist, ob eine entsprechende Absicht vorlag oder ob sich der Täter der Rechtswidrigkeit seiner Handlung bewusst war“. ⁷⁹ In einem Fall von 2014 legte das OVG den Begriff „sexuelle Ausrichtung“ so aus, dass nur eine angeborene sexuelle Orientierung geschützt ist, nicht jedoch eine „absichtlich“ gewählte. Das OVG lehnte den Asylantrag eines homosexuellen Kameruners ab, weil dieser sich mit 35 Jahren für eine andere als seine „angeborene“ Sexualität „entschieden“ habe.⁸⁰

Die SGDK nutzt ihre Befugnisse, insbesondere das Recht zur Einleitung von Untersuchungen *von Amts wegen*, nicht strategisch. Sie setzt sich keine Prioritäten. Der Kommission ist es nicht gelungen, gegen schwere Fälle von Diskriminierung vorzugehen, beispielsweise gegen die Segregation der Roma im Bildungswesen, gegen die Armut und die Ausgrenzung der Roma im Wohnungswesen, gegen die Institutionalisierung von Menschen mit Behinderung usw. Die SGDK lehnt es aus Prinzip ab, Diskriminierungsklagen von Personen anzunehmen (Prüfung der Zulässigkeit) oder zu untersuchen (sachliche Prüfung), die ihre Behinderung nicht durch ein medizinisches Attest nachweisen können.⁸¹ Die SGDK zeigt wie das OVG häufig ein mangelhaftes Verständnis von mittelbarer Diskriminierung und verwechselt diese in manchen Fällen mit unmittelbarer Diskriminierung.

⁷⁶ Oberstes Verwaltungsgericht, Urteil Nr. 7096 vom 19.05.2012 in der Rechtssache 3686/2012; Urteil Nr. 10734 vom 1.09.2014 in der Rechtssache 1463/2014.

⁷⁷ Z. B.: Oberstes Verwaltungsgericht, Urteil Nr. 8277 vom 11.06.2012 in der Rechtssache 3852/2012, Urteil Nr. 3645 vom 14.03.2014 in der Rechtssache 12679/2013 (zweimal wird „bewusst“ als Voraussetzung für Diskriminierung erwähnt).

⁷⁸ Oberstes Verwaltungsgericht, Urteil Nr. 5645 in der Rechtssache 15991/2013, Urteil Nr. 15637 in der Rechtssache 1925/2014.

⁷⁹ Oberstes Verwaltungsgericht, Urteil Nr. 1048 vom 27.01.2014 in der Rechtssache 8033/2013. Der Fall betraf die Anwendung einer Altersgrenze in einer Universitätsordnung.

⁸⁰ Oberstes Verwaltungsgericht, Urteil Nr. 9467 vom 7.07.2014 in der Rechtssache 1381/2014.

⁸¹ Z.B.: SGDK, Beschluss Nr. 259 vom 17.12.2008 in dem Verfahren Nr. 186/2008.

INTRODUCTION

The national legal system

Bulgaria is a unitary state where the Constitution⁸² and ratified international instruments are directly enforceable by the courts, and take precedence over conflicting national provisions. The legal system is continental, with no *stare decisis*. The Constitutional Court (CC) has exclusive authority to bindingly interpret the Constitution, as well, *inter alia*, to rule on: acts of Parliament's constitutionality; international treaties' compatibility with the Constitution prior to their ratification; primary legislation's compatibility with binding international law, including *jus cogens*. Only a limited number of public institutions have standing to seize the CC. There is no right to individual petition. Secondary legislation cannot contradict primary legislation, and is subject to repeal by the administrative courts. All courts are bound to apply higher-ranking constitutional and international norms instead of contradicting primary legislation. They have a symmetrical duty to apply primary legislation instead of contradicting secondary legislation.

The Protection Against Discrimination Act 2004 (PADA)⁸³ is the main anti-discrimination law, adopted to transpose the EU anti-discrimination directives. It is a single equality law universally banning discrimination on a range of grounds, providing uniform standards of protection and remedies, complete with specific bans in particular fields. PADA sets up a specialized independent equality body – the Protection Against Discrimination Commission (PADC), with the mandate of a quasi-jurisdiction to decide cases and sanction discrimination. Its decisions are subject to two-instance judicial review before the administrative courts. PADA also provides for parallel judicial recourse to the civil courts.

In parallel, other, pre-existing schematic prohibitions of discrimination are still in place under other laws governing specific fields, as well as under the Constitution. There is no coherence between PADA and other, older, legislative bans on discrimination, with differences in protected grounds, exceptions, and definitions. Further, there is inconsistency between PADA and other laws governing particular fields that provide for directly or indirectly discriminatory norms, contradicting PADA's universal ban.⁸⁴ Insignificant effort has been made to harmonise the legislation so as to ensure that PADA prevails over conflicting norms.

Apart from PADA, the other significant law on equality is the Integration of Persons with Disabilities Act (IPDA),⁸⁵ which bans disability discrimination specifically and provides for positive and accommodation duties in a number of fields. Further, a number of laws governing specific fields, such as education, employment, public procurement, and taxation, provide for positive measures on grounds such as disability, age, and caring responsibilities. Most of these laws predate PADA and are not consistent with it.

List of main legislation transposing and implementing the directives

Protection Against Discrimination Act (*Закон за защита от дискриминация*), adopted 2003, in force as of 2004, latest amendment 7 April 2015. Grounds: sex, race, national origin, ethnicity, human genome, nationality, origin, religion or faith, education, beliefs, political affiliation, personal or social status, disability, age, sexual orientation, family

⁸² Constitution (*Конституция*), adopted July 1991, latest amendment December 2015.

⁸³ Protection Against Discrimination Act (*Закон за защита от дискриминация*), adopted 2003, in force as of 2004, latest amendment April 2015.

⁸⁴ Examples of directly discriminatory norms include for example Article 141 of the Defense and Armed Forces Act (age and mental/ physical ability requirements for access to service) and Article 122 and Article 155 of the Ministry of the Interior Act (age and mental/ physical ability requirements for access to service; maximum age for service).

⁸⁵ Integration of Persons with Disabilities Act (*Закон за интеграция на хората с увреждания*), adopted 2004, in force as of 2005, latest amendment 13 October 2015.

status, property status, or any other ground provided for by law or by international treaty Bulgaria is a party to. Scope: universal.

Integration of Persons with Disabilities Act (*Закон за интеграция на хората с увреждания*), adopted 2004, in force as of 2005, latest amendment 13 October 2015. The ground covered is disability. The scope is universal.

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

The Constitution includes the following articles dealing with non-discrimination:

Article 6 - a general clause of universal application, covering race, national origin, ethnicity, sex, origin, religion, education, beliefs, political affiliation, personal and social status, and property status. This provision applies to all areas covered by the directives. Its material scope is broader than those of the directives. The constitutional anti-discrimination provision is directly applicable. It can be enforced against private actors (as opposed to the State).

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination explicitly covered

The following grounds of discrimination are explicitly prohibited in national law: sex, race, national origin, ethnicity, human genome, nationality, origin, religion or faith, education, beliefs, political affiliation, personal or social status, disability, age, sexual orientation, family status, property status, or any other ground provided for by law or by international treaty Bulgaria is a party to (PADA, Article 4).

2.1.1 Definition of the grounds of unlawful discrimination within the directives

National law only defines *disability* and *sexual orientation*. Under IPDA, § 1.1 Additional Provision, *disability* is “any loss or impairment of the anatomical structure, physiology, or psychology of an individual.” Further, under IPDA, § 1.2 Additional Provision, *long-term disability* is “anatomical, physiological, or psychological impairment resulting in a long-term reduction of an individual’s abilities to perform activities in a manner and to an extent possible for a healthy individual, where the medical authorities have certified a reduction in working ability or have stipulated a type and degree of disability of 50 per cent or more.”⁸⁶ These definitions are also applicable for purposes of PADA. If the fact of disability is disputed in a court case, the above definitions will be determinative of the issue. In practice, disability will be expected to be proven by a medical certificate. Persons with long-term disabilities are entitled to: medical and social rehabilitation, including various specified therapeutic procedures and aids (article 15 IPDA); a quota of adapted workplaces under the Labour Code – half of the total number of workplaces adapted for persons with disabilities (article 27 IPDA); tax alleviations (article 41 IPDA); financial aid for purposes of using specified services (article 41a IPDA); a monthly allowance for purposes of social integration, including specified expenditures, such as transportation, telecommunications, training, etc. – only for persons who do not live in institutions (article 42 IPDA); a further allowance based on the degree of disability – only for persons with a degree of 50 % or more (article 42b IPDA); allowances for specific purposes, such as buying and adapting a car, adapting a home, and accompanying and interpretation assistance (article 44 IPDA); a special right to municipal housing (article 48). Employers are entitled to apply for governmental funding for purposes of making a workplace accessible for a person with a long-term disability, or to adapt or equip a workplace for such a person (article 25).

Specific sub-categories of persons with long-term disabilities, such as persons with long-term disabilities with a degree of reduced working ability over 90 %, children with long-term disabilities of 71 % or more, persons with long-term disabilities with a degree of reduced working ability 50 % or more, and others, are entitled to further allowances for specific purposes (article 42g, article 42d, article 42e, and others).

The definition of *disability* is more liberal and inclusive than the one elaborated by CJEU in the case of *Ring and Scouboe* as it covers *any* limitation regardless of whether it is long-term or not. On the other hand, this domestic definition makes no mention of the interaction with societal barriers that produces a person’s hindrance. That amounts to a lack of recognition that persons with disabilities have no limitation as such but only in relation to slanted societal infrastructures, including attitudes.

Under the Automobile Transport Act,⁸⁷ Additional Provisions, § 1 (42) “a person with disabilities” and “a person of reduced mobility” are defined within the meaning of

⁸⁶ This definition is reproduced literally in the Employment Encouragement Act (*Закон за насърчаване на заетостта*), Additional Provision, § 1(29).

⁸⁷ Automobile Transportation Act (*Закон за автомобилните превози*), adopted September 1999, latest amendments December 2015.

Regulation (EU) No. 181/2011. Under the Railway Transport Act,⁸⁸ Additional Provisions, § 1 (41), "a person with disabilities" or "a person of reduced mobility" is defined as a person within the meaning of Article 3, Paragraph 15 of Regulation (EC) No. 1371/2007.

Further, secondary legislation defines "persons of reduced mobility" as including persons with physical, sensory, mental and combined disabilities, pregnant women, persons accompanying young children, persons temporarily hindered in their movements (in plaster, crutches), persons carrying large and heavy items, older people, persons shorter than 150 cm, including children, persons taller than 200 cm, and persons who don't understand or speak Bulgarian.⁸⁹ Another piece of secondary legislation defines "persons of reduced mobility" as including persons with disabilities within the meaning of IPDA, as well as older people, pregnant women, and persons accompanying young children.⁹⁰

Similar or broader definitions of persons of reduced mobility are included in a number of other secondary legal acts:

- Ordinance No. 22 of 22 December 2008 Concerning Technical Requirements For Ships On Inland Water Routes, Additional Provisions, § 1 (107):⁹¹ "persons of reduced mobility" are persons with specific problems in using public transport, as well as older people, handicapped people or with sensory disabilities, persons in wheelchairs, pregnant women and persons accompanying young children";
- Ordinance No. 261 of 13 July 2006 on the General Rules for Compensating and Assisting Passengers in Cases of Refusal by an Air Carrier to Let Them on Board an Aircraft and in Cases of Cancellation or Delay of a Flight, Additional provisions, § 1 (3):⁹² "a person of reduced mobility" is a person whose mobility is reduced in using transportation due to physical inability (sensory or motional, permanent or temporary), intellectual disability, age or any other reason for inability and whose position requires special attention and adaptation of the services offered to all passengers to the needs of this person".

The Supreme Administrative Court has held that while a sickness does not equate disability, certain cancers do meet the definition of disability under international law.⁹³

Sexual orientation is defined under PADA, Additional Provision, § 1(10), as "heterosexual, homosexual or bisexual orientation." The Supreme Administrative Court (SAC), in one recent case, implicitly defined sexual orientation as being innate, delegitimizing sexual orientation choice.⁹⁴

National discrimination law does not define race, ethnic origin, religion or belief, or age.

⁸⁸ Railroad Transportation Act (*Закон за железопътния транспорт*), adopted November 2000, latest amendments June 2015.

⁸⁹ Ordinance No. 4 of 1 July 2009 on Planning, Implementing and Maintaining Buildings (*Наредба № 4 от 1 юли 2009 г. за проектиране, изпълнение и поддържане на строежите в съответствие с изискванията за достъпна среда за населението, включително за хората с увреждания*; adopted July 2009, latest amendments July 2011), Additional Provisions, § 1(1). This ordinance applies universally as concerns architectural and infrastructural accessibility.

⁹⁰ Ordinance No. 20 of 8 September 2011 Concerning Safety Rules and Standards for Passenger Ships (*Наредба № 20 от 8 септември 2011 г. относно правилата за безопасност и стандартите за пътническите кораби*; adopted September 2011, latest amendments November 2014), Additional Provision §1(22). This ordinance applies to passenger ships.

⁹¹ Ordinance No. 22 of 22 December 2008 on Technical Requirements for Ships Sailing Interior Waterways (*Наредба № 22 от 22 декември 2008 г. за техническите изисквания към корабите, плаващи по вътрешните водни пътища*). Adopted December 2008, latest amendments February 2014.

⁹² Ordinance No. 261 of 13 July 2006 on the General Rules for Compensating and Assisting Passengers in Cases of Refusal by an Air Carrier to Let Them on Board an Aircraft and in Cases of Cancellation or Delay of a Flight (*Наредба № 261 от 13.07.2006 г. за общите правила за обезщетяване и оказване съдействие на пътници при отказ на въздушен превозвач да ги допусне на борда на въздухоплавателното средство и при отменяне или забавяне на полет*). Adopted July 2006, no amendments.

⁹³ See more information in Section 12.2 below.

⁹⁴ Supreme Administrative Court, Decision No. 9467 of 07 July 2014.

The Employment Encouragement Act (EEA),⁹⁵ Additional Provision, § 1(4a) defines “groups of unequal status on the labour market”, intersecting with a number of protected grounds.⁹⁶ This definition is only relevant for purposes of the positive measures provided for under EEA. EEA, Additional Provision, § 1(18) defines “adult”, applicable to the positive measures under EEA.⁹⁷

Further, the Religious Denominations Act (RDA)⁹⁸ defines a “religious denomination” as “a set of beliefs and principles, a religious community, and its religious institution”.⁹⁹ A “religious community” is defined as a “voluntary union of natural persons for purposes of manifestation of a certain religion, and performance of worship, religious rituals and ceremonies.”¹⁰⁰ RDA further defines a “religious institution” as “a religious community registered in accordance with [RDA] that has the capacity of a legal person, governing bodies, and a statute.”¹⁰¹ There is no defined relationship, in law or case law, between these definitions and religion as a protected ground within the meaning of PADA.

2.1.2 Multiple discrimination

In Bulgaria, a prohibition of multiple discrimination is included in the law. PADA defines multiple discrimination as “discrimination based on more than one [protected] grounds”.¹⁰² PADA places a statutory duty on public authorities to give priority to positive measures for the benefit of multiple discrimination victims.¹⁰³ PADC hears multiple discrimination cases sitting in an extended panel of 5 members (rather than 3).¹⁰⁴ The law does not provide for higher compensation levels in cases of multiple discrimination.

In Bulgaria, there is no case law dealing with multiple discrimination. While cases where complainants have alleged more than one ground have been decided by PADC and the administrative courts on judicial review, their rulings have discussed none of the implications of a plurality of grounds.

2.1.3 Assumed and associated discrimination

a) Discrimination by assumption

In Bulgaria, the following national law (including case law) prohibits discrimination based on perception or assumption of what a person is:

PADA defines “on [protected] grounds” as “on grounds of the actual, past or present, or *presumed* fact of one or more of these characteristics [...]”.¹⁰⁵ Therefore, discrimination on

⁹⁵ Employment Encouragement Act (Закон за насърчаване на заетостта), adopted December 2001, entry into force January 2002, latest amendments December 2015.

⁹⁶ “Groups of unequal status on the labour market” shall be groups of unemployed people of lesser competitiveness on the labour market, including: unemployed youth; unemployed youth with permanent disabilities; unemployed youth educated in social care institutions; long-term unemployed persons; unemployed persons with permanent disabilities; unemployed persons – single parents (adoptive parents) and/or mothers (adoptive mothers) with children not older than 3 years; unemployed persons who have served a prison sentence; unemployed persons older than 50 years; unemployed persons with elementary or lesser schooling and no vocational qualification; other groups of unemployed persons.”

⁹⁷ “Adult” shall be a person of working age who is not being educated in [school] or [university] and who has not reached the respective retirement age for women and men provided for under the Social Security Code”.

⁹⁸ Закон за вероизповеданията, adopted December 2002, latest amendments October 2015.

⁹⁹ Religious Denominations Act (RDA) (Закон за вероизповеданията), Additional Provisions, § 1 (1).

¹⁰⁰ RDA, Additional Provisions, § 1 (2).

¹⁰¹ RDA, Additional Provisions, § 1 (3).

¹⁰² Protection Against Discrimination Act (PADA) (Закон за защита от дискриминация), Additional Provisions, § 1 (11).

¹⁰³ PADA, Article 11 (2). Under Article 11 (1), authorities are placed under a general statutory duty to take positive action whenever necessary to achieve the legislation’s goals.

¹⁰⁴ PADA, Article 48 (3).

¹⁰⁵ PADA, Additional Provisions, § 1 (8).

perceived or assumed grounds is explicitly prohibited. Case law by both PADC and the courts expressly recognises this.

b) Discrimination by association

In Bulgaria, the following national law (including case law) prohibits discrimination based on association with persons with particular characteristics:

PADA defines “on grounds of” as “on grounds of the actual, past or present, or presumed fact of one or more of these characteristics in the person discriminated against, or in another person who is, actually or presumably, associated with the person discriminated against, where this association is a cause of the discrimination”.¹⁰⁶ Therefore, discrimination by association, including presumed association, is explicitly banned. Case law by PADC expressly recognises this. The law is in line with the judgment in Case C-303/06.

2.2 Direct discrimination (Article 2(2)(a))

a) Prohibition and definition of direct discrimination

In Bulgaria, direct discrimination is prohibited in national law (PADA, Article 4 (1); IPDA, Article 3). It is defined. PADA, Article 4 (2) defines direct discrimination as “treating a person on grounds [...] less favourably than another person is treated, has been treated, or would be treated in comparable similar circumstances”. The wording “comparable similar” has not led to a restrictive interpretation contrary to EU law. IPDA, Paragraph 1.3, Additional Provisions defines direct discrimination as “placing a person on grounds of disability at a disadvantage compared to another person who was, is, or could be placed in comparable similar circumstances”.

b) Justification of direct discrimination

PADA does not permit general justification for direct discrimination with respect to any ground. It provides for an exhaustive list of specific exceptions for various protected grounds, including the six EU grounds.¹⁰⁷ Because of the open-ended list of protected grounds, combined with the universal scope of the ban, this closed list of express exceptions should generate problems for future jurisprudence. So far there have not been any problems with the five grounds relevant for this report. Problems with other grounds, such as personal status or property status, are out of scope for this report.

2.2.1 Situation testing

a) Legal framework

In Bulgaria, situation testing is clearly permitted in national law. The law is silent, but general rules on evidence imply that testing results are admissible. General civil evidentiary rules put no limit on the admissible types of proof.¹⁰⁸ Under general court procedure, judges and PADC are free to assess any evidence according to their own ‘inner conviction’. Therefore, testing is implicitly allowed as a matter of course. The admissibility and merit of testing data in a particular case will be for the court to decide.

The civil courts, including the Supreme Court of Cassation, have expressly rejected respondents’ allegations that activist testers were not credible as witnesses because of their professional commitment to rights defense, or because of the purposefulness of the

¹⁰⁶ PADA, Additional Provisions, § 1 (8).

¹⁰⁷ PADA, Article 7.

¹⁰⁸ Civil Procedural Code (*Граждански процесуален кодекс*), Article 12.

testing exercise.¹⁰⁹ Judges have explicitly stated that as long as, based on an overall assessment of the case file, there is no other evidence to refute testers' allegations and testimonies, the latter have to be credited. In a Roma access to employment case, the court expressly held that testing carried out by activist witnesses was justified by their involvement in rights work. Judges have expressly held that activist claimants of declared affiliation with Roma rights groups have suffered more serious non-pecuniary damages because their sensitivity to discrimination was exacerbated as a result of their rights work.¹¹⁰

Neither judges, nor PADC have expressed misgivings about testing being potentially misleading or provocative. They have not stipulated methodological requirements or other guarantees against bias. They have responded to testing as a natural means to verify a complaint of discrimination. PADC has not only unquestioningly accepted testing as a valid source of facts and evidence, but has done its own testing to verify complaints.¹¹¹ It has explicitly stated that testing results proving the invalidity of a respondent's pretext constituted *prima facie* discrimination mandating a shift of the burden of proof.

b) Practice

In Bulgaria, situation testing has been used in practice. NGO lawyers and activists have used testing as a means to procure facts and evidence, as well as claimant figures for strategic litigation in defense of Roma rights. They have tested Roma's access to employment, as well as to hotel/ restaurant/ café and other catering services, including public swimming pools. In one case, testing accompanied by TV cameras was successfully used to document a practice of refusing Roma equal access to court buildings, and then admitted in court as evidence. In some cases, including a gay rights case, activist lawyers have used testing for purposes of discrediting respondents' pretexts within the framework of a pending case (rather than prior to initiating litigation).¹¹² In a case against Sofia University concerning denial of access to a student sauna, the claimants successfully tested respondent's defense that not gay men but non-students were excluded: testing revealed that non-gay non-students gained admission.¹¹³

2.3 Indirect discrimination (Article 2(2)(b))

a) Prohibition and definition of indirect discrimination

In Bulgaria, indirect discrimination is prohibited in national law (PADA, Article 4 (1); IPDA, Article 3). It is defined. PADA, Article 4 (3) defines indirect discrimination as "putting a person on [protected] grounds [...], through an apparently neutral provision, criterion or practice, at a disadvantage compared with other persons, unless such provision, criterion or practice is objectively justified by a legitimate aim and the means for achieving that aim are appropriate and necessary". IPDA, Paragraph 1.4, Additional Provisions defines indirect discrimination as "placing a person on grounds of disability at a disadvantage compared to other persons through an apparently neutral provision, criterion, or practice, unless that provision, criterion, or practice is objectively justified by a legitimate aim unrelated to the disability, and the means to achieve that aim are appropriate and do not exceed what is necessary to achieve it".

b) Justification test for indirect discrimination

¹⁰⁹ *Inter alia*, Supreme Court of Cassation, Decision No. 591 of 12 March 2008.

¹¹⁰ *Inter alia*, Sofia District Court, Decision in case No. 1969/2004, 09 July 2004; Pazardzhik Regional Court, Decision No. 622 in case No. 675/2005.

¹¹¹ Protection Against Discrimination Commission (PADC) members, including a Roma person, and staff have visited unannounced a cafe and a swimming pool to verify whether older clients and Roma are served.

¹¹² For instance, Sofia District Court, Decision in civil case No. 6520/2004, 21 April 2005. No information on the existence of newer case law is available.

¹¹³ Sofia District Court, Decision in civil case No. 6520/2004, 21 April 2005.

The test for justification is necessity. Neither the law, nor the case law has specified whether this is to be understood as strict proportionality or mere proportionality. There is no legislative or judicial guidance on what constitutes a "legitimate aim". There is a dearth of indirect discrimination cases and the case law has not evolved a standard for either "a legitimate aim" or "an appropriate and necessary measure". As a rule, PADC and judges have failed to undertake a proper analysis of necessity, including by looking into alternatives to impugned measures. In most cases, they have accepted declarations of necessity by respondents without questioning the linkage between the asserted aim and the specific measures. In this way, they have failed to properly apply the shifting burden of proof rule, *de facto* excusing respondents of their onus to establish a justification for disparate impact.

The way in which the legal definition refers to "on [protected] grounds" is problematic. It creates a possibility for indirect discrimination to be understood as a practice *based* on a protected ground, with "apparently neutral" taken to mean that the ground as a basis for the practice is simply concealed by a false or lacking explanation. A number of judicial decisions have shown a lack of understanding of the concept of indirect discrimination, some fusing it with (not only covert) direct discrimination and terming 'indirect discrimination' what was really less favourable treatment.¹¹⁴ The adverse implications in such cases are that the absolute ban on direct discrimination is then diluted by the general justification test valid for indirect discrimination.

c) Comparison in relation to age discrimination

In relation to age discrimination, national law does not specify how a comparison is to be made.

2.3.1 Statistical evidence

a) Legal framework

In Bulgaria, there are national rules permitting data collection. Those rules are not in equality law and make no provision on using data for purposes of equality litigation or positive measures. Such use is implicitly permissible, on the same grounds as testing – because under general evidentiary rules, any evidence the court finds relevant is admissible.

Data collection is provided for under the Statistics Act,¹¹⁵ the Protection of Personal Data Act,¹¹⁶ the Census 2011 Act,¹¹⁷ the Integration of Persons with Disabilities Act,¹¹⁸ the Ministry of Interior Act,¹¹⁹ and the Bulgarian Personal Documents Act.¹²⁰ These laws protect data regarding: racial or ethnic origin; national origin; mother tongue; political, religious or philosophical convictions; membership in political parties, or organisations with political, religious, philosophical or trade union aims; health status; sexual life; personal life; human

¹¹⁴ For instance, recently the Supreme Administrative Court held that there was indirect discrimination against a Muslim prison inmate whose food included pork (denial of reasonable accommodation) compared to Muslim inmates in another prison who did receive food accommodation: Decision No. 2514 of 21 February 2014, case No. 10989/2013.

¹¹⁵ Statistics Act (*Закон за статистиката*; adopted June 1999, latest amendment 15 February 2013), Article 21.

¹¹⁶ Protection of Personal Data Act (*Закон за защита на личните данни*; adopted January 2002, latest amendment 15 February 2013), Article 1 (3-5).

¹¹⁷ Census 2011 Act (*Закон за преброяване на населението и жилищния фонд в България през 2011 г.*), adopted May 2009, latest amendment 28 January 2011), Article 2.

¹¹⁸ Integration of Persons with Disabilities Act (IPDA), Articles 9 and 29.

¹¹⁹ Ministry of Interior Act (*Закон за Министерството на вътрешните работи*; adopted June 2014, latest amendment 11 August 2015), Article 10 (1.1) and (2), Articles 25–26.

¹²⁰ Bulgarian Personal Documents Act (*Закон за българските лични документи*; adopted August 1998, latest amendment 16 October 2015), Articles 18 and 65.

genome; or unlawful acts committed.¹²¹ Such data may not be collected unless the person concerned consents, or in specific exceptions accompanied with procedural guarantees. The exceptions include where:

- 1) this is necessary to carry out specific duties under labour law;¹²²
- 2) it is necessary to protect human life or health, and the person concerned is unable to give their consent;¹²³
- 3) the data is collected by a non-profit organisation, including with a political, philosophical, religious or trade union aim, in the course of its lawful activities, provided that this only involves the organisation's members or regular associates, and the data is not published without the consent of the person concerned;¹²⁴
- 4) the data has been published by the person concerned, or its collection is necessary for rights enforcement in court;¹²⁵
- 5) this is necessary for medical prevention or diagnostics, or provision of health services, provided that the data is processed by a medical professional or another person legally under a duty to keep a professional secret;¹²⁶
- 6) this is only for journalistic or artistic purposes, provided that the right to privacy of the person concerned is not infringed;¹²⁷
- 7) or a special law provides so.¹²⁸

No law provides for the collection of ground-disaggregated data explicitly for purposes of equality litigation or policies.¹²⁹

Public bodies using positive measures do use statistics to design those.¹³⁰ Statistics are collected either by the National Statistical Institute, which is a public institution governed under the Statistics Act, or by public services themselves, or by private research agencies on commission.¹³¹

In Bulgaria, statistical evidence is permitted by national law in order to establish indirect discrimination. National law implicitly permits any type of evidence in civil cases, including statistical evidence.¹³² There are no particular conditions for admission of statistics. The

¹²¹ Respectively, Statistics Act, Article 21 (2); Protection of Personal Data Act, Article 5; Census 2011 Act, Article 6 (3). The Ministry of the Interior Act does not define personal or sensitive data. The Bulgarian Personal Documents Act defines personal data as "any information regarding a particular natural person" (Paragraph 1.13 of the Additional Provisions).

¹²² Protection of Personal Data Act, Article 5 (2.1).

¹²³ Protection of Personal Data Act, Article 5 (2.3).

¹²⁴ Protection of Personal Data Act, Article 5 (2.4).

¹²⁵ Protection of Personal Data Act, Article 5 (2.5).

¹²⁶ Protection of Personal Data Act, Article 5 (2.6).

¹²⁷ Protection of Personal Data Act, Article 5 (2.7).

¹²⁸ Protection of Personal Data Act, Article 5 (2.2).

¹²⁹ While "data collection [...] necessary for rights enforcement in court" - point (4), could theoretically be construed as applicable to equality rights also, this is not express, and there was no such intention behind this provision. The legislative intent was more likely to authorise the police to provide individuals with data concerning the identity of parties they might wish to sue in court. This would differ from data collection for policy-, or law-making ends. Further, personal data is not statistical data. Furthermore, disaggregation by ground is not provided for. While it may be possible to gather data regarding the race of someone in particular (based on police perceptions), this is not equivalent to gathering race-disaggregated statistics. More importantly, this provision only authorises data collection in exceptional cases (to be narrowly construed as a matter of course), and does not mandate it.

¹³⁰ In documents providing for positive measures, Government institutions have used statistical data to analyse the status quo. For example, the National Programme for Improvement of the Living Conditions of Roma 2005-2015, in its "Analysis of the Situation" part, available at: http://www.nccedi.government.bg/upload/docs/NRP_07.03.2006_Final_2.htm (in BG); the Health Strategy for Persons in Unequal Position Belonging to Ethnic Minorities, the "Identification of the Problem" part, available at: http://www.nccedi.government.bg/upload/docs/zdravna_strategia_prieta.htm (in BG).

¹³¹ The National Statistical Institute gathers statistics based on self-determination. Other public services gather statistics based on self-determination in some cases, and, in others, on perception. Private sociological agencies gather statistics of both types.

¹³² Civil Procedural Code, Article 12.

admission and evaluation of all evidence, implicitly including statistics, is left to judges' discretion.¹³³

b) Practice

In Bulgaria, statistical evidence in order to establish indirect discrimination is used in practice. It is not widespread, but it is not uncommon. There has been no reluctance on the part of judges or PADC to consider statistics. There is no such controversy.

Sofia trial court judges have rendered several decisions in cases concerning sex quotas for admission to university. The courts have accepted as statistically established fact that women with higher academic scores have been denied admission for the benefit of men with lower results. In other cases, courts have accepted the predominance of Roma in the ethnic composition of certain residential areas as a fact based on statistics.¹³⁴

2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

In Bulgaria, harassment is prohibited in national law. It is defined. Under PADA, Additional Provisions, § 1 (1) it is "any unwanted conduct related to [protected] grounds [...] and manifested physically, verbally or in any other manner, having the purpose or effect of violating the dignity of a person and of creating a hostile, degrading, humiliating, offensive, or intimidating environment". In many cases, both PADC and the courts have qualified public hate speech/ group negative stereotyping as harassment.¹³⁵

In Bulgaria, harassment does explicitly constitute a form of discrimination: PADA, Article 5.

b) Scope of liability for harassment

Where harassment is perpetrated by an employee, in Bulgaria, the employer and the employee are liable. Each individual who performs an act of discrimination, including harassment, can be held liable. In addition, employers can be held liable for compensation for damages ensuing from actions of their employees or others carrying out work for them. This is a matter of general tort law, applicable to any legal person.¹³⁶ Further, persons, including employers, can be held liable and sanctioned by a fine if they knowingly aided an act of discrimination, including harassment, by a third party.¹³⁷ If an employee suffers harassment at the workplace by a third party, and complains about it to the employer, s/he has a duty to take action to stop the harassment.¹³⁸ If an employer fails to take such action, the affected employee could take legal action against them.

2.5 Instructions to discriminate (Article 2(4))

a) Prohibition of instructions to discriminate

¹³³ Civil Procedural Code, Article 12 in conjunction with Article 10.

¹³⁴ Inter alia, Plovdiv District Court, Decision No. 185 in civil case No. 1330/2005, 01.02.2006; Plovdiv Regional (appeals) Court, Decision No. 1934 of 24.10.2006 in civil case No. 862/2006; and Supreme Court of Cassation, Decision No. 1302 in civil case No. 1602/2006, 28.11.2007; PADC, Decision No. 58 in case No. 10/2006, 29.11.2006. Those statistics were presented by complainants in some cases, by respondents in others, or established in proceedings by witness testimony, or by expert opinion on the basis of official census statistics.

¹³⁵ For instance: Supreme Administrative Court, Decision No. 16554 of 11 December 2013 in case No. 27/2013; Protection against Discrimination Commission, Decision No. 397 of 29 October 2014 in case No. 39/2012.

¹³⁶ Obligations and Contracts Act (*Закон за задълженията и договорите*), Article 49.

¹³⁷ PADA, Article 8.

¹³⁸ PADA, Article 17.

In Bulgaria, instructions to discriminate are prohibited in national law. Instructions are not defined. PADA bans incitement to discrimination, going beyond the directives' requirement, and defines it to expressly include instructions to discriminate.¹³⁹ However, this definition may not be compatible with the Directives because it requires direct intent as an element. In many cases, both PADC and the courts have qualified public hate speech/ group negative stereotyping as incitement to discrimination.¹⁴⁰

In Bulgaria, instructions do explicitly constitute a form of discrimination. Under PADA, Article 5, incitement to discrimination, including instructions to discriminate, is expressly defined as a form of discrimination.

b) Scope of liability for instructions to discriminate

In Bulgaria, the instructor and the discriminator are separately liable.¹⁴¹ The instructor is liable for the instruction, and not for the discrimination that ensued. There is no information on case law concerning instructions as such. The case law on incitement concerns hate speech.

2.6 Reasonable accommodation duties (Article 2(2)(b)(ii) and Article 5 Directive 2000/78)

a) Implementation of the duty to provide reasonable accommodation for people with disabilities in the area of employment

In Bulgaria, the duty to provide reasonable accommodation is included in the law. It is not defined. PADA, Article 16, provides for accommodation for persons with disabilities in employment. The limit of the duty is when "costs are unreasonably big and would seriously hinder" the employer.¹⁴² An identically-worded duty for employers is reproduced under IPDA.¹⁴³ Other than this language, there is no guidance under the law what is "reasonable" or a "disproportionate burden".

Under the Labour Code, employers are under a duty to provide accommodation for workers who are unable to perform their job because of illness or accident.¹⁴⁴ This duty pre-dates both PADA and IPDA, as well as the directive.¹⁴⁵ It has no disproportionate burden limit. It is based on instruction by the health authorities. An employer who fails to comply with such instruction owes the employee compensation.¹⁴⁶

Under the Civil Servant Act, there is an absolute duty for employers to "adapt the workplace of the civil servant with a permanent disability in a way that makes it possible for the service to be carried out."¹⁴⁷

Under the Healthy and Safe Work Conditions Act, employers are under a duty to provide the appropriate facilities for employees with reduced work capability, e.g. people with disabilities, at their workplaces.¹⁴⁸ Employers are to be assisted and consulted in adapting

¹³⁹ PADA, Article 5 in conjunction with Additional Provisions, § 1 (5).

¹⁴⁰ For example: Supreme Administrative Court, Decision No. 16554 of 11 December 2013 in case No. 27/2013; Protection against Discrimination Commission, Decision No. 397 of 29 October 2014 in case No. 39/2012.

¹⁴¹ PADA, Article 71 and Article 78.

¹⁴² PADA, Article 16.

¹⁴³ IPDA, Article 24.

¹⁴⁴ Labour Code (*Кодекс на труда*), Article 314. Such accommodation can include both alleviations in work conditions for the same job, or reassignment to another job.

¹⁴⁵ Labour Code, including this particular provision, has been in force since 1986.

¹⁴⁶ Labour Code, Article 317 (4).

¹⁴⁷ Civil Servant Act (*Закон за държавния служител*), Article 30.

¹⁴⁸ Healthy and Safe Work Conditions Act (HSWCA) (*Закон за здравословните и безопасни условия на труд*), Article 16 (1.4).

the job to employees' capabilities, considering their physical and mental health, by special labour medicine authorities.¹⁴⁹

The lack of definition is not on record to have caused difficulties in implementation because there have been no reasonable accommodation cases yet, as far as information is available.

b) Practice

The duty applies to all employment relationships. There are no criteria under the law or case law for assessing 'unreasonable' or 'disproportionate'. There is no provision on taking into account the availability of financial assistance from the State.

c) Definition of disability and non-discrimination protection

The definition of disability under IPDA applies for all purposes under the law, including non-discrimination and reasonable accommodation.

d) Duties to provide reasonable accommodation in areas other than employment for people with disabilities

In Bulgaria, there is a duty to provide reasonable accommodation for people with disabilities outside the employment field. PADA, Article 32, provides for reasonable accommodation in education. The limit of the duty is, the same as in employment, when "costs are unreasonably big and would seriously hinder" the educator.¹⁵⁰ The Integration of Persons with Disabilities Act (IPDA) also provides for accommodation duties for both schools and universities.¹⁵¹ These duties are absolute (no disproportionate burden defence). Under IPDA, the Minister of Education and Science has a duty to provide children with disabilities with a supportive environment for their integrated education.¹⁵² This is an absolute duty, too. A court has held that this duty will only be satisfied when there is supportive environment for integrated education in every kindergarten and school in the nation. Further, the Minister of Education and Science has a duty to create educational opportunities for children with disabilities who are not integrated in a common educational environment.¹⁵³ This duty, too, is absolute. It is not an accessibility duty but implicitly refers to measures directed at creating specific opportunities for particular individuals. Higher education institutions, too, have absolute accommodation duties.¹⁵⁴

Under the Physical Education and Sports Act, schools have a duty to create conditions for adapted physical exercise and sports for students with special educational needs.¹⁵⁵ Persons with disabilities, in general, are entitled to the necessary conditions for various sports, although the law does not mention whose duty this is.¹⁵⁶ The Ministry of Youth and Sports has a duty to assist through targeted funding sportspeople with disabilities' preparation and participation at Olympic Games, and world and European championships.¹⁵⁷ That Ministry has a duty to assist the activities of sports organizations, related to persons with disabilities' adapted physical activity.¹⁵⁸

e) Failure to meet the duty of reasonable accommodation for people with disabilities

¹⁴⁹ HSWCA, Article 25 (2.3). Those authorities are charged, *inter alia*, with monitoring and analysing employees' health status (HSWCA, Articles 25a (1.2) and (1.4)).

¹⁵⁰ PADA, Article 32.

¹⁵¹ IPDA, Article 17 and Article 20.

¹⁵² IPDA, Article 17 (2).

¹⁵³ IPDA, Article 18.

¹⁵⁴ IPDA, Article 20.

¹⁵⁵ Physical Education and Sports Act (*Закон за физическото възпитание и спорта*), Article 21 (4).

¹⁵⁶ Physical Education and Sports Act, Article 33 (1).

¹⁵⁷ Physical Education and Sports Act, Article 33 (2).

¹⁵⁸ Physical Education and Sports Act, Article 33 (3).

In Bulgaria, failure to meet the duty of reasonable accommodation does not count as discrimination. Under PADA, unlike other forms of conduct, such as building or maintaining an inaccessible public architectural environment, it is not defined as a form of discrimination. There is no provision on such failure's relation to the bans on direct or indirect discrimination. This is also valid for failure to meet the various absolute accommodation duties under IPDA, the Labour Code, and the Healthy and Safe Work Conditions Act. Under PADA, there is a disproportionate burden defence for employers and educators, namely where the costs are "unreasonably big" or would "seriously hinder" the organisation. Under IPDA, employers have the same defence, but public bodies and universities have absolute duties, with no defence.

Under PADA, a failure to provide reasonable accommodation, as a breach of the law, is subject to fines in the amount of between EUR 125 (BGN 250) and EUR 1 000 (BGN 2 000) for a natural person, and between EUR 125 (BGN 250) and EUR 1 250 (BGN 2 500) for a legal person.

Under PADA, the shifting burden of proof would apply if the court or PADC agrees that a case against a failure to provide reasonable accommodation constitutes "proceedings for protection against discrimination" within the meaning of PADA, Article 9.

f) Duties to provide reasonable accommodation in respect of other grounds

In Bulgaria, there is a duty to provide reasonable accommodation in respect of one other ground in the public and the private sector.

Religion/ belief

Under PADA, Article 13 (2), employers have a duty to provide reasonable accommodation for religion/ belief in terms of working hours and rest days, where "this would not lead to excessive difficulties [...] and where [it is possible] [...] to compensate for the potential adverse consequences on the [business]".¹⁵⁹ There has been no litigation on record as yet based on this provision. It is unknown whether it is applied in practice or not.

g) Accessibility of services, buildings and infrastructure

In Bulgaria, national law requires services available to the public, buildings and infrastructure to be designed and built in a disability-accessible way. PADA, Article 5, stipulates that building and maintaining an architectural environment that hinders persons with disabilities' access to public places is discrimination. This ban is absolute, with no defence. It has been relied on, successfully, in many discrimination cases (brought under PADA) before PADC.¹⁶⁰ Under IPDA, public bodies have absolute duties to create disability-accessible architectural environments, transportation services, and sports facilities.¹⁶¹ Compensation for failures to do so has been sought under general tort law.

Under the Spatial Planning Act, construction works shall be done in accordance with the basic requirements under Annex 1 of Regulation (EU) No 305/2011 of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC, including

¹⁵⁹ Under discrimination law, there is no definition of religion or belief in this or any other context.

¹⁶⁰ For a recent example (after the cut-off date), see Supreme Administrative Court (SAC), Decision No. 158 of 08 January 2015 in case No. 7092/2014. SAC held that there was discrimination because the ramps installed did not afford independent access; access was limited and dependent on help; the ramps are immovable and could not be adjusted to different wheelchair types. Free admission for persons with disabilities into the establishment (a dolphinarium) had no relevance. SAC confirmed the penalty imposed on the company by PADC: EUR 250 (BGN 500), a minimum amount under the law. SAC also confirmed PADC's instruction for correctional measures: to "take the necessary action for constructing access for persons with disabilities to and inside the building".

¹⁶¹ IPDA, Articles 33-34, 36, 38.

accessibility in use ("4. [...] In particular, construction works must be designed and built taking into consideration accessibility and use for disabled persons.").¹⁶² Under that Act, the Minister of Regional and Urban Development singly or jointly with other competent ministers shall issue ordinances to fix the requirements for construction works, including for accessibility, including for persons with disabilities.¹⁶³ Executive bodies shall annually develop programs of measures to bring urbanized territory and existing individual buildings in accordance with accessibility requirements, and shall provide for funding for implementation.¹⁶⁴

Ordinance No. 4 of 1 July 2009 on Planning, Implementing and Maintaining Buildings in Accordance with the Requirements of an Accessible Environment for the Population, including People with Disabilities provides for extensive and detailed technical standards for accessibility of all urban environment and other areas.

Ordinance No. 33 of 3 November 1999 on Public Transportation of Passengers and Cargoes on the Territory of the Republic of Bulgaria provides for accessibility requirements for bus stations.¹⁶⁵ The duty to secure and maintain accessibility is for bus station owners.¹⁶⁶

A number of policies provide for accessibility. The *Strategic Plan of the Ministry of Labour and Social Policy* for 2013 – 2017 features financing for securing access to, and adaptation of, cultural, historical and sport sites. The *National Lifelong Learning Strategy 2014-2020* provides for securing support and an appropriate architectural environment for students, postgraduates and PhD researchers with disabilities.

The *National Programme on Developing School Education and Preschool Instruction and Preparation 2006 – 2015* features "integration of children with special educational needs" through creating a supportive environment, including an accessible physical environment, opportunities for individualized curricula education, provision of special textbooks and learning materials and technical tools, training of teachers, as well as eliminating the wrongful practice of assigning children who do not need it to special schools. The *National "Building of an Accessible Architectural Environment" Programme* provides for the building of ramps and other facilities for students with disabilities, adaptation of sanitary facilities and infrastructure maintenance. The *Strategy to Secure Equal Opportunities for Persons with Disabilities 2008-2015* provides for ensuring access to all public buildings, including state institutions, educational establishments, cultural and entertainment places, hospitals, workplaces, homes.

All types of transportation – land, air, and sea, are to be adapted. Students with special educational needs are to be provided with supportive teachers, special technical means and equipment, learning materials, etc. The *Action Plan to Secure Equal Opportunities for Persons with Disabilities 2014-2015* provides for securing access to all public sites and transportation too, as well as to information.¹⁶⁷ The Ministry of Labour and Social Policy *Employment Strategy* and the *National Strategy for the Child* provide for securing an accessible environment too.

In Bulgaria, national law contains a general duty to provide accessibility by anticipation for people with disabilities. PADA expressly states that building and maintaining a public architectural environment that hinders people with disabilities' access constitutes discrimination.¹⁶⁸ IPDA provides for integration of people with disabilities in the workplace

¹⁶² Spatial Planning Act (SPA) (*Закон за териториалното устройство*), Article 169 (1.4).

¹⁶³ SPA, Article 169 (4).

¹⁶⁴ SPA, Article 169 (6).

¹⁶⁵ Ordinance No. 33 of 3 November 1999 on Public Transportation of Passengers and Cargoes on the Territory of the Republic of Bulgaria, Article 54 (2.11-12).

¹⁶⁶ Ordinance No. 33 of 3 November 1999 on Public Transportation of Passengers and Cargoes on the Territory of the Republic of Bulgaria, Article 54 (3).

¹⁶⁷ Available at: <http://www.strategy.bg/FileHandler.ashx?fileId=4460> (in BG).

¹⁶⁸ PADA, Article 5.

via an accessible architectural environment.¹⁶⁹ It absolutely mandates that free access to public buildings and infrastructure be provided to people with disabilities by bringing down architectural, transportation and communications barriers.¹⁷⁰ Under IPDA, state bodies and local government authorities are responsible for the planning of urbanized territory.¹⁷¹ The Minister of Regional and Urban Development is responsible for adopting standards for accessible buildings and infrastructure.¹⁷²

The Civil Servant Act binds authorities to secure free access for people with disabilities to administration buildings by bringing down architectural, transportation and other barriers.¹⁷³ The Spatial Planning Act provides that transportation infrastructure shall ensure “best conditions” for accessibility for people with disabilities.¹⁷⁴ It provides that city planning shall set accessibility standards,¹⁷⁵ and create conditions for environmental and technical infrastructural accessibility.¹⁷⁶ It provides that construction shall be done according to accessibility standards, with the competent authorities under a duty to annually program and fund measures to bring the urbanized territory, buildings and equipment in accordance with accessibility standards.¹⁷⁷

Ordinance No. 4 of 1 July 2009 on Planning, Implementing and Maintaining Buildings in Accordance with the Requirements for an Accessible Environment for the Population, including people with disabilities (Ordinance No. 4) sets the technical standards in considerable detail.

The Minister of Transportation is responsible for adopting standards for public transportation accessibility.¹⁷⁸ Municipalities are responsible for building accessible kindergartens and schools, and for providing accessible public transportation.¹⁷⁹ Under the Spatial Planning Act, construction oversight officials are responsible for appraising a new building’s accessibility for people with disabilities.¹⁸⁰ The Minister of Regional and Urban Development is responsible for control over the implementation of this law, including accessibility standards for building.¹⁸¹

Under Ordinance No. 4, “accessible environment” is defined as “an environment in urbanised territories, buildings and equipment which every person of reduced mobility, with or without disabilities, can use freely and independently”.¹⁸² The Ordinance applies to all “urbanised territory, buildings and equipment”, in particular “pedestrian spaces, crossroads and zebra crossings, stairs, lifts and wheelchair ramps, parking lots, public telephones and automats, seating places, post boxes, toilets, signs”. All parties, private and public alike, are responsible to secure accessibility. Public institutions responsible to guarantee the implementation of this duty include the Minister of Regional and Urban Development, central and local government bodies, and municipality mayors.

The legislation provides for no grounds to justify a failure to ensure accessibility. The statutory duties are absolute. The case law explicitly and strongly acknowledges this. The civil court of last instance, the Supreme Court of Cassation, as well as the Supreme Administrative Court, responsible as a final instance for judicial review of PADC decisions,

¹⁶⁹ IPDA, Article 2.4 in conjunction with Article 4.4.

¹⁷⁰ IPDA, § 6, Transitional and Final Provisions.

¹⁷¹ IPDA, Article 32.

¹⁷² IPDA, Article 33.

¹⁷³ Civil Servant Act, Amendment Act of 2008, § 11, Final Provisions.

¹⁷⁴ SPA, Article 75 (3).

¹⁷⁵ SPA, Article 107.5.

¹⁷⁶ SPA, Article 112 (4).

¹⁷⁷ SPA, Article 169 (2).

¹⁷⁸ IPDA, Article 34.

¹⁷⁹ IPDA, Article 38.

¹⁸⁰ SPA, Article 168.

¹⁸¹ SPA, Article 220.

¹⁸² Ordinance No. 4, Additional Provision, § 1.2. There are also definitions for several types of “accessible itinerary,” “accessible entrance,” “accessible website,” and “accessible information map”.

have produced since 2008 a strong line of consistent decisions holding the Government, local councils and private parties liable for discrimination against people with physical disabilities by hindering their access to urban environment and transportation.¹⁸³

PADC too has taken a strong stance on accessibility. It has ruled that a lack of financial resources cannot be a justification for inaccessibility, nor can such a lack itself be justified because there was sufficient legal basis for the authorities to secure the necessary funds, and they had sufficient powers to do so.¹⁸⁴ PADC instructed the Minister of Finance and all municipality mayors to budget the necessary funds to eliminate architectural barriers.¹⁸⁵ It fined the Minister of State Administration and Administrative Reform with EUR 1 000 for failing to make accessible a polling station, with the same set of reasons.¹⁸⁶ It instructed the Minister of Justice to reorganise the building of the Sofia District Court, finding that its inaccessibility constituted discrimination.¹⁸⁷ PADC imposed a fine of EUR 500 on the Social Assistance Agency for keeping inaccessible its building, expressly holding that not only proprietors of public buildings, but also organisations that use and manage such buildings are bound by the duty to make them accessible.¹⁸⁸ The body ordered the agency to stop its omission, stipulating a 3-months timeline for it to report on the action it has taken. PADC ruled that an enterprise providing public dolphin-watching services was bound by the law to secure accessibility so that persons with disabilities could gain unassisted access. The Supreme Administrative Court upheld that decision.¹⁸⁹

h) Accessibility of public documents

There is no obligation under national law for public services to translate their documents in Braille. Under the Access to Public Information Act, persons with a visual impairment or hearing loss may request access to information in a form which suits their communication abilities.¹⁹⁰ The Bulgarian National Television, the Bulgarian National Radio and the Bulgarian Telegraph Agency have an obligation to provide information that is accessible to people with disabilities.¹⁹¹ They have to include specialized shows for persons with disabilities in their programme schedules.¹⁹²

An interpreter has to be appointed to participants in civil¹⁹³ and criminal¹⁹⁴ judicial proceedings who are deaf and unable to speak. Participants in administrative proceedings who are deaf, unable to speak or blind are also entitled to an interpreter.¹⁹⁵

The *Action Plan to Secure Equal Opportunities for Persons with Disabilities 2014-2015* provides for securing access to information.¹⁹⁶

¹⁸³ Supreme Court of Cassation, Decision No. 1301 in civil case No. 5117/2007, Decision No. 556 in civil case No. 1514/2007, Decision No. 589 in civil case No. 1728/2007, Decision No. 1158 in civil case No. 5162/2007, and Decision No. 1286 in civil case No. 3371/2007. A recent example: Supreme Administrative Court, Decision No. 158 of 08 January 2015 in case No. 7092/2014.

¹⁸⁴ PADC, Decision No. 60 of 08 April 2008.

¹⁸⁵ PADC, Decision No. 60 of 08 April 2008.

¹⁸⁶ PADC, Decision No. 45 of 27 February 2008.

¹⁸⁷ PADC, Decision No. 39 of 25 February 2008.

¹⁸⁸ PADC, Decision No. 171 in case No. 158/2008.

¹⁸⁹ More information is available in Section 12.2 below.

¹⁹⁰ Access to Public Information Act (*Закон за достъп до обществена информация*), Article 26 (4).

¹⁹¹ IPDA, Article 39 (1).

¹⁹² IPDA, Article 39 (2).

¹⁹³ Civil Procedural Code, Article 4 (3).

¹⁹⁴ Criminal Procedural Code (*Наказателно-процесуален кодекс*), Article 142 (2).

¹⁹⁵ Administrative Procedural Code (*Административнопроцесуален кодекс*), Article 14 (5).

¹⁹⁶ Available at: <http://www.strategy.bg/FileHandler.ashx?fileId=4460> (in BG).

3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

3.1.1 EU and non-EU nationals (Recital 13 and Article 3(2) Directive 2000/43 and Recital 12 and Article 3(2) Directive 2000/78)

In Bulgaria, there are no residence or citizenship/ nationality requirements for protection under the relevant national laws transposing the directives. Non-nationals within the territory, as well as nationals are entitled to protection from discrimination on any ground other than nationality.¹⁹⁷ Legal residence is irrelevant to entitlement to anti-discrimination protection; only factual being within the territory is a condition. Non-nationals, however, are protected from discrimination based on nationality only insofar as such discrimination has no basis in primary legislation.¹⁹⁸ Parliament may make law that discriminates against non-nationals, but executive bodies and private parties have no discretion to make such decisions. Parliament is free to adopt discriminatory laws based on nationality, with no constitutional limit to its discretion.¹⁹⁹

3.1.2 Protection against discrimination (Recital 16 Directive 2000/43)

a) Natural and legal persons

In Bulgaria, the personal scope of anti-discrimination law covers natural and legal persons for the purpose of protection against discrimination (PADA, Article 3 (1)). Legal entities and non-incorporated associations are protected, as well as individuals, where the former suffer discrimination on grounds of characteristics of their employees or members.²⁰⁰ The courts and PADC have generally recognised legal persons' victim standing. National law is in compliance with EU law.

In Bulgaria, the personal scope of anti-discrimination law covers natural and legal persons for the purpose of liability for discrimination. PADA makes no distinction between individuals and legal entities in terms of binding them by the ban on discrimination. The ban is expressly applicable *erga omnes*, including all legal persons.²⁰¹ Case law consistently recognised this until recently. In 2014, however, the Supreme Administrative Court (SAC), acting as final instance of judicial review of PADC decisions, in two decisions held that a discrimination perpetrator could only be a natural person: a legal person – only exceptionally, in cases expressly provided for by law.²⁰² A public authority could not be a perpetrator – only an individual exercising an authority's competence.

This is contrary to PADA. Furthermore, it contradicts many rulings rendered by SAC in previous years, finding legal persons liable as discriminators.

b) Private and public sector including public bodies

In Bulgaria, the personal scope of national law covers private and public sector including public bodies for the purpose of protection against discrimination.²⁰³

In Bulgaria, the personal scope of anti-discrimination law covers private and public sector including public bodies for the purpose of liability for discrimination.²⁰⁴ The prohibition is

¹⁹⁷ PADA, Article 3 (1).

¹⁹⁸ PADA, Article 7 (1.1).

¹⁹⁹ Constitution, Article 26 (2).

²⁰⁰ PADA, Article 3 (2).

²⁰¹ PADA, Article 6 (1).

²⁰² Supreme Administrative Court, Decision No. 5645 in case No. 15991/2013 and Decision No. 15637 in case No. 1925/2014.

²⁰³ PADA, Article 3 (1).

²⁰⁴ PADA, Article 6 (1).

expressly *erga omnes*. However, in 2014, SAC initiated a line of case law in direct contravention to PADA: in two decisions SAC held that a public authority could not be a discrimination perpetrator, only an individual exercising an authority's competence.²⁰⁵ This is contrary to PADA. PADA, as such, is in line with the directives but this new SAC interpretation is not. Furthermore, the latter contradicts many rulings rendered by SAC in previous years, finding public authorities liable as discriminators.

3.2 Material scope

3.2.1 Employment, self-employment and occupation

In Bulgaria, national legislation applies to all sectors of private and public employment, self-employment and occupation, including contract work, self-employment, military service, holding statutory office, for the five grounds.²⁰⁶ The respective provisions include the general ban discrimination which has universal scope and certain specific bans. The specific provisions do not detail the material scope of the general ban on discrimination but instead provide for illustrative prohibitions in the fields relevant to this question (ex.: no discriminatory job requirements; no demands for information about protected grounds from job applicants; no refusals to hire, and no hiring under worse conditions; equal pay; equal opportunities for vocational training and career advancement; right to equal conditions for access to a profession or activity, and to equal opportunities for exercising a profession or activity and for growing in them). Those specific provisions constitute Title I of PADA: "Protection in the exercise of the right to labour".

3.2.2 Conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy (Article 3(1)(a))

In Bulgaria, national legislation includes conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy for the five grounds in both private and public sectors as described in the directives.²⁰⁷

3.2.3 Employment and working conditions, including pay and dismissals (Article 3(1)(c))

In Bulgaria, national legislation includes working conditions including pay and dismissals, for all five grounds and for both private and public employment.²⁰⁸

3.2.3.1 Occupational pensions constituting part of pay

Under PADA, discrimination is expressly universally banned, with respect to all legal rights and legitimate interests, implicitly including occupational pensions.²⁰⁹ There is, however, no provision or case law that occupational pensions are part of "pay" or "working conditions". They are covered under PADA irrespective of that.

²⁰⁵ Supreme Administrative Court, Decision No. 5645 in case No. 15991/2013 and Decision No. 15637 in case No. 1925/2014.

²⁰⁶ PADA, Article 6 (1) and Articles 12-28.

²⁰⁷ PADA, Article 6 (1), Articles 12-28 and Article 37 (2).

²⁰⁸ PADA, Article 6 (1). Article 6 (1) does not list any specific fields of application. It does not mention dismissals or pay. It is a general norm providing for a universal scope, implicitly covering any specific field. It reads: "The ban on discrimination applies to all persons in the exercise and the defense of the rights and freedoms provided for under the Constitution and the laws of the Republic of Bulgaria."

²⁰⁹ PADA, Article 6 (1) and Articles 12-28.

3.2.4 Access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience (Article 3(1)(b))

In Bulgaria, national legislation applies to vocational training outside the employment relationship, such as that provided by technical schools or universities, or such as adult lifelong learning courses.²¹⁰

3.2.5 Membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations (Article 3(1)(d))

In Bulgaria, national legislation includes membership of, and involvement in workers or employers' organisations as formulated in the directives for all five grounds and for both private and public employment.²¹¹

3.2.6 Social protection, including social security and healthcare (Article 3(1)(e) Directive 2000/43)

In Bulgaria, national legislation includes social protection, including social security and healthcare as formulated in the Racial Equality Directive.²¹² All five grounds are covered.

3.2.6.1 Article 3.3 exception (Directive 2000/78)

PADA transposes the exception in Article 3 (3) of Directive 2000/78 with respect to age, and no other ground, as concerns eligibility for pension ages only.²¹³

3.2.7 Social advantages (Article 3(1)(f) Directive 2000/43)

In Bulgaria, national legislation implicitly includes social advantages as formulated in the Racial Equality Directive.²¹⁴ All five grounds are covered.

In Bulgaria, the lack of definition of social advantages does not raise problems.

3.2.8 Education (Article 3(1)(g) Directive 2000/43)

In Bulgaria, national legislation includes education as formulated in the Racial Equality Directive.²¹⁵ All five grounds are covered. The scope of protection under PADA is universal. Discrimination is banned with regard to all rights and freedoms (Article 6 (1)). Therefore, any discriminatory treatment in school would be covered, including educational content.

a) Pupils with disabilities

²¹⁰ PADA, Article 6 (1) and Articles 29-35. Article 6 (1) is a general provision, implicitly covering these fields. Articles 29-35 do not list specific fields of application but provide for specific bans (bans on particular conduct) in the fields of education and training.

²¹¹ PADA, Article 6 (1) and Article 36.

²¹² PADA, Article 6 (1).

²¹³ PADA, Article 7 (1.8).

²¹⁴ PADA, Article 6 (1). Article 6 (1) is a general norm providing for a universal scope, implicitly covering any specific field, including social advantages. It reads: "The ban on discrimination applies to all persons in the exercise and the defense of the rights and freedoms provided for under the Constitution and the laws of the Republic of Bulgaria." There is no case law on social advantages. There has never been a decision, by the courts or the equality body, as far as I am aware, to deny the universal, all-encompassing scope of PADA.

²¹⁵ PADA, Article 6 (1) and Articles 29-35. Article 6 (1) is a general provision, implicitly covering these fields. Articles 29-35 do not list specific fields of application but provide for specific bans (bans on particular conduct) in the fields of education and training.

In Bulgaria, the general approach to education for pupils with disabilities does raise problems. In 2008, the European Committee of Social Rights found that Bulgaria discriminated against children with intellectual disabilities by limiting their educational opportunities.²¹⁶

Patterns of educational exclusion/ segregation of children with disabilities include: 1) children at home, or in the street (Roma children with disabilities) with no access to school at all; 2) children in social care "homes" where the vast majority receive no schooling at all, while a mere 6 % are schooled under substandard curricula inside the institution by special school teachers who visit for lessons; 3) children who visit day care centres as a substitute for schooling and are taught rudimentary skills there; 4) children in special schools for children with hearing, sight or physical disabilities, and in separate special schools for children with intellectual disabilities where children are taught a substandard curriculum.

While under the legislation formally inclusive education is the rule,²¹⁷ the regulation lacks the necessary coherence and specificity to ensure implementation in practice. For instance, while the rules provide that special education may be resorted to only after all possibilities for inclusive education are exhausted, there is no legal definition of what it means to exhaust those possibilities. For instance, if the authorities fail to provide for financial resources for inclusive education, they could then claim there are no possibilities for the latter. Under the legislation, institutionalized children may only study in special schools.²¹⁸ Children with profound intellectual disability are implicitly excluded from any schooling.²¹⁹ While children with mild intellectual disability are no longer to be sent to special schools,²²⁰ there are no rules to govern the cases of children with such disabilities who already are in special schools. There are no adapted state educational requirements (specification of the requisite academic achievements) for children with developmental disability.²²¹ In practice, inclusive education is thwarted by an inefficient institutional infrastructure, including a lack of planning, resource allocation, data collection and know-how, and sometimes, by vested interests in maintaining special schools. There is inadequate accessibility in terms of architecture and communications. There is no unified methodology to teach children with developmental disabilities, or suitable teaching materials. Children with moderate and severe intellectual disability are predominantly sent to special schools.

There is no information available on the rights situation of children with physical disabilities in Bulgaria.

b) Trends and patterns regarding Roma pupils

In Bulgaria, there are specific patterns existing in education regarding Roma pupils, such as segregation. Roma predominantly live in segregated areas in severely substandard (inhuman) conditions, and Roma children predominantly study in schools located in such areas. Those schools are predominantly Roma, i.e. segregated, and seriously substandard. Other patterns of educational exclusion/ segregation of Roma include:

1. children at home, or in the street with no access to school at all;
2. children in separate classrooms in mainstream schools;
3. children in remedial schools (disproportionate representation);
4. children in schools for juvenile delinquents (disproportionate representation).

²¹⁶ European Committee of Social Rights, Decision on the merits of 3 June 2008, complaint No 41/ 2007. Available at: http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC41Merits_en.pdf.

²¹⁷ The National Education Act (*Закон за народната просвета*) and secondary legislation on the education of students with special educational needs - Ordinance No. 1 of 23 January 2009.

²¹⁸ Ordinance No. 1 of 23 January 2009.

²¹⁹ Ordinance No. 1 of 23 January 2009.

²²⁰ Ordinance No. 1 of 23 January 2009.

²²¹ Ordinance No. 1 of 23 January 2009.

PADA bans racial segregation as a form of discrimination (Article 5). It defines it, however, in a way that is not compatible with European law because the definition explicitly requires the state of separation to be 'forced'.²²² It thus implies that segregation may be chosen, i.e. that segregated persons may waive their right not to be discriminated against, including not to be segregated on racial grounds. Yet, the European Court of Human Rights has consistently held in Roma segregation cases that no waiver of the right to non-discrimination in this context is possible because that would conflict with an important public interest.²²³

In a few cases brought to court to challenge all-Romani schools,²²⁴ the 'forced' element in the definition has proved an obstacle to effective protection. In one case, the appeals court explicitly confirmed that there was separation on ethnic grounds but found that it was not 'forced' because it was "not a consequence of factors outside of the students' will and did not occur against their will – it did not result from legislation or administrative decision".²²⁵ It however found that the students suffered indirect discrimination because the school curricula and processes did not take account of their ethnic and linguistic differences. In two other cases the 'forced' hurdle prevented any protection.²²⁶ In a case concerning the disproportionate representation of Roma children in special schools, the equality body instructed the Minister of Education to take measures to stop the admission of healthy children in such schools.²²⁷

3.2.9 Access to and supply of goods and services which are available to the public (Article 3(1)(h) Directive 2000/43)

In Bulgaria, national legislation includes access to and supply of goods and services as formulated in the Racial Equality Directive.²²⁸ This is ensured by both the general, all-encompassing ban on discrimination, and by the specific provision of Article 37 banning any refusal to provide goods or services, as well as any provision of goods and services of lesser quality or under worse conditions. All five grounds are covered. It is not, however, clear whether this would extend to an obligation (breach of which is discrimination) to provide (design/ manufacture) goods which are easily usable by people with disabilities. More likely, the courts would not accept that this obligation covers goods that are not existing (that need yet to be manufactured/ designed).

3.2.9.1 Distinction between goods and services available publicly or privately

In Bulgaria, national law does not distinguish between goods and services available to the public (e.g. in shops, restaurants, banks) and those only available privately (e.g. limited

²²² Additional Provision, § 1.6.

²²³ For instance, European Court of Human Rights, *D.H. v. Czech Republic*, judgment of 13 November 2007; European Court of Human Rights, *Sampanis v. Greece*, judgment of 05.06.2008; European Court of Human Rights, *Orsus v. Croatia*, judgment of 16 March 2010 (GC).

²²⁴ In one case, segregation of *Turkish* children in separate classes was successfully challenged before the equality authority too (PADC, decision No 91 of 08 November 2007 in case No 28/2007).

²²⁵ Sofia City Court, Decision of 27 February 2007, civil case No 3139 of 2005. The Supreme Court of Cassation, the final instance, confirmed this decision: Decision No 723 of 01 August 2008, civil case No 6402 of 2007.

²²⁶ Blagoevgrad Regional Court, Decision No 139 of 01 December 2005 in case 1154/2004; Sofia Regional Court, Decision of 16 December 2005 in case No 871/2005 (both confirming negative trial court rulings on appeal). The first case was brought by Roma students studying in exclusively or predominantly Romani classes in school. The courts in effect found that the authorities had done nothing to create this situation, and could do nothing about it because the right to choice of school (of non-Roma parents/ students) was absolute and could not be interfered with. The second case was brought by the European Roma Rights Centre alleging that an all-Roma school was segregated (as well as substandard and ill-adapted to deal with the students' language differences). The courts found that the authorities did not 'force' any of the students to study in that particular school, therefore, there was no segregation, or any other breach of equality law.

²²⁷ PADC, Decision No 80 of 16 October 2007. The rationale would be that mistakes are made when officials decide for themselves what the ethnicity of other people is without consulting them and, no less important, that it is disrespectful to assume a determining role with respect to another's identity rather than leave this to them.

²²⁸ PADA, Article 6 (1) and Article 37.

to members of a private association).²²⁹ In one case in the past, however, without formally making such a distinction, the Supreme Administrative Court found that higher prices for non-members imposed by an association of visually impaired persons for access to phonographic library services did not constitute discrimination.²³⁰

In 2015, CJEU gave a preliminary ruling in a case concerning discriminatory provision of services to inhabitants of a Roma residential area. Roma, as well as non-Roma were denied access to their electricity meters as the electricity distribution undertaking installed the electricity meters for all consumers in that district at a height of 6-7m. In the non-Roma districts, meters are placed at a height of 1.70m, available for monitoring by consumers. According to the company, that difference in treatment was justified by frequent tampering with, and damage to meters, and by numerous unlawful connections to the network by the Roma. The equality body found that a non-Roma resident was discriminated against compared with customers whose meters are accessible. On appeal, the court asked CJEU whether the contested practice amounted to discrimination on grounds of ethnic origin. CJEU confirmed that.²³¹

3.2.10 Housing (Article 3(1)(h) Directive 2000/43)

In Bulgaria, national legislation includes housing as formulated in the Racial Equality Directive.²³² The provision is general, implicitly including housing. That covers all five grounds.

There is no provision on succession of tenancy rights for same-sex couples. Heterosexual unmarried couples do not benefit from succession of tenancy rights. Same-sex couples would not either.

3.2.10.1 Trends and patterns regarding housing segregation of Roma

In Bulgaria, there are patterns of housing segregation and discrimination against the Roma. The majority of Roma live in ghettos in dire conditions in substandard housing, some of it ramshackle, with very limited access to basic infrastructure, security of tenure or essential services, such as public transportation, emergency medical aid, garbage collection, policing, and, for some, even electricity and water supply.

The housing situation of Roma is a clear case of discrimination. In many places, the local authorities have for decades ignored their housing and infrastructure needs, investing nothing in development of residential areas populated by Roma. In many places, the authorities have consistently refused to include Roma residential areas in urban planning and to regulate them. Forced evictions and the lack of social protection for the people rendered homeless by them have further compounded this situation. In 2012, the European Court of Human Rights rendered a decision against Bulgaria, in *Yordanova and Others v. Bulgaria*, a case of an impending collective forced eviction threatening an entire Romani community.²³³ The Court held that there was a breach of the rights to home and to private and family life, because the eviction would render the persons homeless, which the authorities failed to consider. They also failed to consider the fact of their own contribution, over decades, for the situation. The Court ordered the authorities to change the law by introducing a proportionality test for such eviction decisions, and forbade them to reconsider the impugned eviction decision before so amending the law. The judgment has not been implemented.

²²⁹ PADA, Article 6 (1) and Article 37.

²³⁰ Supreme Administrative Court, Decision No. 451 of 14 January 2008 in case No. 10322/2007.

²³¹ For more information, see Section 12.2 below.

²³² PADA, Article 6 (1).

²³³ European Court of Human Rights, Application No. [25446/06](#).

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

In Bulgaria, national legislation provides for an exception for genuine and determining occupational requirements.²³⁴ That is valid for all grounds. The language is: "The following shall not constitute discrimination: [...] different treatment of persons based on a characteristic related to [protected] grounds [...] where, by reason of the nature of a particular occupation or activity, or of the conditions it is carried out in, such a characteristic constitutes an essential and determining occupational requirement, the aim is legitimate and the requirement does not exceed what is necessary to accomplish it [...]".

4.2 Employers with an ethos based on religion or belief (Article 4(2) Directive 2000/78)

In Bulgaria, national law provides for an exception for employers with an ethos based on religion or belief.²³⁵ The exception is for "different treatment of persons on grounds of religion, faith or gender with respect to an occupation carried out in religious institutions or organisations where, by reason of the nature of the occupation, or of the conditions it is carried out in, religion, faith or gender constitutes an essential and determining professional requirement in view of the nature of the institution or organisation, where the aim is legitimate and the requirement does not exceed the necessary to accomplish it; [...]". There is an inconsistency in wording between the Directive and PADA: rather than "genuine, legitimate and justified", under PADA the occupational requirement is "genuine and determining". However, that may not be material in practice. PADA also exempts "different treatment of persons on grounds of religion/ faith [...] in religious education or training, including training or education for the purposes of carrying out an occupation in a religious-ethos institution".²³⁶ This means that religious discrimination is allowed in access to religious education/ training with no proportionality required. There is no wording in the law underlining that this exception should not lead to discrimination on grounds other than religion.

- Conflicts between rights of organisations with an ethos based on religion or belief and other rights to non-discrimination

In Bulgaria, there is case law relating to conflicts between the rights of organisations with an ethos based on religion or belief and other rights to non-discrimination. PADC and the Supreme Administrative Court have explicitly ruled that PADC was not competent to hear disputes over alleged discrimination by religious institutions because the State could not interfere in the latter's internal affairs, and, therefore, could not provide protection for any civil rights, including equality, vis-à-vis them.²³⁷ The case concerned the dominant, majority church, the Bulgarian Orthodox Church and the alleged discrimination was on grounds of Roma ethnicity. It has not been reproduced with respect to minority faiths. No information is available whether any party has made an application to the European Court of Human Rights about this. There can be no plans to do that in the future as the deadlines are long past.

4.3 Armed forces and other specific occupations (Article 3(4) and Recital 18 Directive 2000/78)

In Bulgaria, national legislation does not provide for an exception for the armed forces in relation to age or disability discrimination. PADA makes no such exception. However, the special law governing the professional army provides for age and "ability" (both physical

²³⁴ PADA, Article 7 (1.2).

²³⁵ PADA, Article 7 (1.3).

²³⁶ PADA, Article 7 (1.4).

²³⁷ PADC, Decision No. 146 of 24 June 2013 in case No. 78/2012.

and psychological) requirements for access to recruitment.²³⁸ Both types of “ability” are required to be medically certified.²³⁹ This legislation and PADA are in conflict, which in practice arguably renders the age and disability discrimination ban under PADA void in relation to employment in the army.

4.4 Nationality discrimination (Article 3(2))

a) Discrimination on the ground of nationality

In Bulgaria, national law includes exceptions relating to difference of treatment based on nationality. In principle, PADA treats nationality as a protected ground, banning all forms of discrimination based on it in all fields of life.²⁴⁰ It makes a significant exception, however, for differential treatment based on nationality provided for under primary legislation.²⁴¹ Therefore, executive and local government bodies, as well as private parties, are not allowed to treat non-nationals differently based on their nationality, unless Parliament has authorised such treatment by law. Under PADA, both nationality and a lack of any nationality are included in the concept of nationality as a protected ground.²⁴²

In Bulgaria, nationality (as in citizenship) is explicitly mentioned as a protected ground in national anti-discrimination law.²⁴³

b) Relationship between nationality and ‘race or ethnic origin’

The law does not stipulate any relationship between nationality and race/ ethnicity, either in terms of indirect discrimination, or otherwise. No case law has discussed any overlap between nationality and race/ ethnic discrimination.²⁴⁴

4.5 Work-related family benefits (Recital 22 Directive 2000/78)

a) Benefits for married employees

In Bulgaria, it would constitute unlawful discrimination in national law if an employer only provides benefits to those employees who are married. PADA bans all discrimination based on family status.²⁴⁵ Family status covers marital status.

In 2008, there was a debate on legalizing same-sex families. This took place within the framework of public discussions on a draft new family Code which proposed to govern heterosexual de facto families. The debate on legalising homosexual families as well was opened up by LGBT activists in the media, and not by MPs or parliamentary parties. Opponents took the view that it was not in the interests of children to be raised in same-sex families; that homosexual couples could not have children of their own; that this would undermine marriage as a union between a man and a woman with a view to reproduction, based on differing roles; that it would pave the way to legalising polygamy and incest; that homosexual relationships were not traditional, and recognising them would mean giving a social group special rights based on their sexual conduct. The equality body issued a recommendation for the draft Family Code to include same-sex

²³⁸ Defence and Armed Forces of the Republic of Bulgaria Act (*Закон за въоръжените сили и отбраната на Република България*), Article 141 (1).

²³⁹ Defence and Armed Forces of the Republic of Bulgaria Act, Article 141 (2-3).

²⁴⁰ PADA, Article 4 (1).

²⁴¹ PADA, Article 7 (1.1).

²⁴² PADA, Article 7 (1.1) expressly exempts legal differences of treatment based on a lack of nationality, as well as nationality.

²⁴³ PADA, Article 4 (1).

²⁴⁴ In 2003, when the Directives were transposed via the PADA, there were a number of legal provisions differentiating on grounds of nationality. There still are. Those have never been reviewed to reveal whether they might be indirectly discriminatory against racial groups.

²⁴⁵ PADA, Article 4 (1).

couples in the definition of de facto families. Eventually, the draft was adopted without any provision on de facto marriage. The debate died out, and has not been reopened since.

b) Benefits for employees with opposite-sex partners

In Bulgaria, it would constitute unlawful discrimination in national law if an employer only provides benefits to those employees with opposite-sex partners.²⁴⁶

4.6 Health and safety (Article 7(2) Directive 2000/78)

a) Exceptions in relation to disability and health/safety

In Bulgaria, there are no exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78). There are no such exceptions for other grounds either.

PADA provides for none. However, under the Healthy and Safe Work Conditions Act, employers have a duty to assign to their employees only tasks that are compatible with their capabilities,²⁴⁷ considering the specific dangers for employees with reduced work capability.²⁴⁸ Further, there are a number of laws and secondary legislation instruments governing specific fields, such as transportation, including aviation, and other risk-intensive occupations, that provide for health requirements for access to employment in those fields. These norms providing for disability restrictions without any proportionality requirement conflict with PADA's ban on disability discrimination in all cases, apart from exhaustively listed specific exceptions.

4.7 Exceptions related to discrimination on the ground of age (Article 6 Directive 2000/78)

4.7.1 Direct discrimination

In Bulgaria, national law provides for exceptions for direct discrimination on grounds of age. Under PADA, there are altogether six exceptions for age, three of those referring to other laws that provide for age differentiation. For the latter, the law does not require proportionality.²⁴⁹ For the other three exceptions, it does.²⁵⁰

The first exception for age discrimination under PADA, which is not subject to proportionality, is for pension ages, including occupational pensions.²⁵¹ The second exception which is not subject to proportionality is for measures and programs under the Employment Encouragement Act.²⁵² Those include special measures based on age. The third exception not subject to a proportionality test is the fixing of a maximum age for eligibility for crediting under the Students and Doctoral Students Crediting Act.²⁵³

The exceptions that do provide for objective justification are for: fixing of requirements for minimum age, professional experience or length of service for recruitment or for access to certain advantages linked to employment;²⁵⁴ fixing of maximum age requirements for recruitment linked to the training requirements of the post in question, or the need for a reasonable period of employment before retirement;²⁵⁵ fixing of requirements for minimum

²⁴⁶ PADA, Article 4 (1) in conjunction with Article 6 (1).

²⁴⁷ HSWCA Article 16 (1.2a).

²⁴⁸ HSWCA Article 16 (1.3).

²⁴⁹ PADA, Article 7 (1.8-9) and (1.12).

²⁵⁰ PADA, Article 7 (1.5-6) and (1.11).

²⁵¹ PADA, Article 7 (1.8).

²⁵² PADA, Article 7 (1.9).

²⁵³ PADA, Article 7 (1.12).

²⁵⁴ PADA, Article 7 (1.5).

²⁵⁵ PADA, Article 7 (1.6).

and maximum age for access to training or education.²⁵⁶ The latter exception may fall within the scope of Directive 2000/78 as it implicitly applies to vocational training.

a) Justification of direct discrimination on the ground of age

In Bulgaria, it is not possible, generally, to justify direct discrimination on the ground of age. This is only possible in the exceptions outlined above. For three of those, no objective justification is required.

b) Permitted differences of treatment based on age

In Bulgaria, national law permits differences of treatment based on age for activities within the material scope of Directive 2000/78.²⁵⁷

c) Fixing of ages for admission or entitlements to benefits of occupational pension schemes

In Bulgaria, national law does not allow occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits, taking up the possibility provided for by article 6(2). PADA does allow for age requirements for purposes of pensions in general, including occupational ones, but those requirements have to be fixed by law.

The Supreme Administrative Court made contradictory rulings in 2014 on whether legal norms providing for age differentiation could, or could not be considered discrimination, and what the remedies would be.²⁵⁸ Recent age litigation includes a challenge to age discrimination linked to a statutory age limit in access to the position of juror (successful), and a challenge to a secondary legislation age limit in access to prison/ judicial guards' jobs (unsuccessful).²⁵⁹

4.7.2 Special conditions for young people, older workers and persons with caring responsibilities

In Bulgaria, there are special conditions set by law for older and younger workers in order to promote their vocational integration, and for persons with caring responsibilities to ensure their protection. Under the Labour Code, underage employees are entitled to special protection and an employer may assist young employees.²⁶⁰ The minimal age for access to employment is 16 years.²⁶¹ As an exception, 15-to-16-year-olds may be employed for light jobs that are not dangerous or harmful to them, and do not hamper their regular schooling or vocational training.²⁶² Such persons may be employed only after a comprehensive medical examination certifying their capability for the job and that it won't harm their health or development.²⁶³ Further, the employment of any such individual must be authorised by the authorities.²⁶⁴ Similar requirements are provided for 16-to-18-year-olds too.²⁶⁵ Underage employees may not do work which is beyond their capabilities, or harmful, or involving risks that an underage person is assumed to be unable to understand or to avoid due to their immaturity.²⁶⁶ Further, employers are under a duty to give special care to underage employees by providing them with alleviated conditions for work and

²⁵⁶ PADA, Article 7 (1.11).

²⁵⁷ PADA, Article 7 (1.5-6, 8-9) and (1.11-12).

²⁵⁸ Please see Section 12.2 for details.

²⁵⁹ See Section 12.2.

²⁶⁰ Labour Code, Article 294.6.

²⁶¹ Labour Code, Article 301 (1).

²⁶² Labour Code, Article 301 (2).

²⁶³ Labour Code, Article 302 (1).

²⁶⁴ Labour Code, Article 302 (2).

²⁶⁵ Labour Code, Article 303.

²⁶⁶ Labour Code, Article 304.

vocational training.²⁶⁷ An employer is under a duty to warn underage employees and their parents of the risks involved in the job and of the health and safety measures.²⁶⁸ Underage employees may not work more than 35 hours a week, or 7 hours a day, including vocational training time.²⁶⁹ Such employees are entitled to no less than 26 working days annual leave.²⁷⁰ Older workers have special protection too. In cases where workers are dismissed after reaching retirement age, regardless of the basis for their dismissal, they are entitled to compensation in the amount of 2 monthly salaries, and if they have worked with the employer for the last ten years, that compensation is in the amount of 6 monthly salaries.²⁷¹ By contrast, workers who are made redundant prior to having reached pension age are only entitled to no more than one month's salary in compensation.

Under the Labour Code, nursing women are entitled to certain special protections.

Under the Employment Encouragement Act, an employer who creates a new job and hires a person not older than 29 years to do it is entitled to public money for reimbursement of that person's salary for up to 18 months.²⁷² Further, an employer who creates a new intern position and hires a person not older than 29 years is entitled to public money for reimbursement of that person's salaries for up to nine months.²⁷³ If the intern has a basic education degree or lower and no qualifications, the reimbursement period may extend to 12 months.²⁷⁴ In all cases, recruits must be registered with the Employment Agency as employment seekers. Further, older workers are provided special conditions. An employer who creates a new job and hires a person older than 55 years is entitled to public money for reimbursement of that person's salary for up to a year.²⁷⁵

Under the Employment Encouragement Act, unemployed single parents (adoptive parents) and mothers (adoptive mothers) of children not older than 5 years enjoy special treatment too. Employers who hire them are entitled to state subsidies for their employment for up to a year.²⁷⁶ Vocational training institutions are also entitled to state subsidies for providing such workers with training where that is organised by the employer and the Employment Agency.²⁷⁷

4.7.3 Minimum and maximum age requirements

In Bulgaria, there are exceptions permitting minimum and maximum age requirements in relation to access to employment (notably in the public sector) and training. PADA permits the fixing of requirements for minimum age, professional experience or length of service for recruitment or for access to certain advantages linked to employment, provided that it is objectively justified by a legitimate aim and the means to accomplish it do not exceed what is necessary.²⁷⁸ It further permits the fixing of maximum age requirements for recruitment linked to the training requirements of the post in question, or the need for a reasonable period of employment before retirement, provided that it is objectively justified by a legitimate aim and the means to accomplish it do not exceed what is necessary.²⁷⁹

²⁶⁷ Labour Code, Article 305 (1).

²⁶⁸ Labour Code, Article 305 (2).

²⁶⁹ Labour Code, Article 305 (3).

²⁷⁰ Labour Code, Article 305 (4).

²⁷¹ Labour Code, Article 222 (3).

²⁷² Employment Encouragement Act, Article 36.

²⁷³ Employment Encouragement Act, Article 41. An intern in this case is a person with professional qualifications but no work experience (ibid.).

²⁷⁴ Employment Encouragement Act, Article 41a.

²⁷⁵ Employment Encouragement Act, Article 55a.

²⁷⁶ Employment Encouragement Act, Article 53a (1).

²⁷⁷ Employment Encouragement Act, Article 53a (2).

²⁷⁸ PADA, Article 7 (1.5).

²⁷⁹ PADA, Article 7 (1.6).

4.7.4 Retirement

a) State pension age

In Bulgaria, there is a state pension age at which individuals can begin to collect their state pensions. The ages at which individuals become entitled to receipt of an old age pension are fixed by law. Age is not the only criterion for entitlement to a pension.

The number of years of service is taken into account too.²⁸⁰ The relevant ages are different for women and men.²⁸¹ There is no need to defer receipt of one's pension. One can continue one's employment while collecting it.

If an individual wishes to work longer, the pension can be deferred.

An individual can collect a pension and still work.

b) Occupational pension schemes

In Bulgaria, there is a normal age when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements. If an individual wishes to work longer, payments from such occupational pension schemes can be deferred. An individual can collect a pension and still work. Workers, both women and men, become entitled to receipt of occupational pensions at 60.²⁸² As an exception, they can start collecting their occupational pensions 5 years earlier provided that this is provided for under a collective agreement.²⁸³

c) State imposed mandatory retirement ages

In Bulgaria, there are state-imposed mandatory retirement ages. They are *not* of general application. In some sectors only, such as the professional army,²⁸⁴ and the police,²⁸⁵ the relevant special laws impose age limits after which both women and men can no longer serve. However, there is no bar for them to find other employment, and still collect their pension. There have been minor changes in the maximum ages for the army in recent years.

In addition, under the Labour Code, one is subject to dismissal, at the employer's discretion, when one acquires the right to an old age pension.²⁸⁶ Furthermore, Professors, Assistant Professors and Doctors of Science are subject to dismissal, at the employer's discretion, when they reach 65 years.²⁸⁷ They still, nominally, retain employment rights, but effectively have no protection against dismissal on age grounds. No publicly accessible reasons for this legislative decision were articulated. There is an exception for Professors, Assistant Professors and Doctors of Science for whom the respective academic council decided to extend their labour contracts for a further year (but no more than three years for Professors and no more than two years for Assistant Professors).²⁸⁸

²⁸⁰ Social Security Code (*Кодекс за социално осигуряване*), Article 68.

²⁸¹ Social Security Code, Article 68. The respective ages are 60 for women, and 63 for men. These ages are to be gradually increased under the legislation until they reach 63 for women and 65 for men. However, age alone is not sufficient. A person needs in addition a certain number of years of work experience during which they made social security payments.

²⁸² Social Security Code, Article 243 (4).

²⁸³ Social Security Code, Article 243 (6).

²⁸⁴ Defence and Armed Forces of the Republic of Bulgaria Act, Article 160 (1). For soldiers, the limit is 50 years; that limit is raised for each higher rank, with 62 years as the limit for the highest ranking officers.

²⁸⁵ Ministry of Interior Act, Article 226 (1). The limit is 60 years.

²⁸⁶ Labour Code, Article 328.10.

²⁸⁷ Labour Code, Article 328.10.

²⁸⁸ Labour Code, Article 328.10.

A further age-based provision gives employers discretion to dismiss a worker who was hired after s/he became entitled to an old age pension, and exercised that right.²⁸⁹ In other words, employers can freely dismiss persons who they hired as pensioners.

In 2015, two new provisions were adopted (in force as of 1 January 2016) making it possible for the employer to dismiss: a) an employee who opted to receive a reduced pension a year earlier than the statutory old age upon acquiring the requisite number of years of service; and b) such an employee whom the employer hired after the employee had opted for a reduced pension.²⁹⁰

d) Retirement ages imposed by employers

In Bulgaria, national law does not permit employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract and/or collective bargaining and/or unilaterally. Those ages are imperatively governed by legislation, namely the Social Security Code in the general case, or special laws, such as those applicable to the police and army.

e) Employment rights applicable to all workers irrespective of age

After becoming a pensioner, leaving employment is the prerogative of the employee. Protection against dismissal and other employment rights apply to those workers irrespective of age. This applies to all workers, apart from those in the army and police, and some in academia.

f) Compliance of national law with CJEU case law

In Bulgaria, national legislation is, arguably, in line with the CJEU case law on age regarding compulsory retirement. While under PADA three age exceptions do not provide for a proportionality test, which is a compliance issue *per se*, only two age-based provisions actually exist that are thereby exempted and those do not appear unreasonable/disproportionate. Under the Labour Code, those two only provisions govern dismissal of certain categories of university staff once they reach 65 years and of pensioners who were hired after they became pensioners. While judicial interpretation is required concerning the proportionality of those provisions, arguably, they are in line with CJEU case law. In both cases, the persons concerned can seek alternative employment. Further, the special laws governing the police and army provide for compulsory retirement of officers at specified ages. In those cases, retirees are free to engage in other employment while collecting their pensions.

4.7.5 Redundancy

a) Age and seniority taken into account for redundancy selection

In Bulgaria, national law does not permit age or seniority to be taken into account in selecting workers for redundancy. Under the Labour Code, the only criteria for selection for redundancy are lesser qualifications and worse work performance.²⁹¹ However, this barely matters because once an employee becomes entitled to an old age pension and starts receiving it, this in itself is a legal basis for an employer to dismiss them, even if there is no redundancy.²⁹² It is the same for persons who opted to receive a reduced pension one year earlier than their old age upon reaching the requisite number of years.²⁹³ In the case of Professors, Associate Professors and Doctors of Science, once they reach

²⁸⁹ Labour Code, Article 328.10b.

²⁹⁰ Labour Code, Article 328.10a and 328.c.

²⁹¹ Labour Code, Article 329 (1).

²⁹² Labour Code, Article 328.10.

²⁹³ Labour Code, Article 328.10a.

the age of 65, this in itself is a legal basis for an employer to dismiss them, even if there is no redundancy (with limited exceptions based on decisions by the respective academic councils).²⁹⁴

b) Age taken into account for redundancy compensation

In Bulgaria, national law provides for compensation for redundancy. This is affected by the age of the worker.

Workers who are dismissed after having become entitled to retire, on any basis, implicitly including redundancy, are entitled to compensation in the amount of two monthly salaries.²⁹⁵ This is preferential treatment compared to workers who are made redundant prior to having become entitled to a pension - those are only entitled to no more than one salary in compensation.²⁹⁶ If workers dismissed after having become entitled to retire have worked with the employer for the last ten years, their compensation is in the amount of six monthly salaries.

4.8 Public security, public order, criminal offences, protection of health, protection of the rights and freedoms of others (Article 2(5), Directive 2000/78)

In Bulgaria, national law does not include exceptions that seek to rely on Article 2(5) of the Employment Equality Directive. PADA provides for no such exception.

4.9 Any other exceptions

In Bulgaria, another exception to the prohibition of discrimination (on any ground) provided in national law is the following:

- different treatment of persons on grounds of religion/faith in religious education or training, including training or education for the purposes of carrying out an occupation in a religious-ethos institution.²⁹⁷

²⁹⁴ Labour Code, Article 328.10.

²⁹⁵ Labour Code, Article 222 (3).

²⁹⁶ Labour Code, Article 222 (1).

²⁹⁷ PADA, Article 7 (1.4).

5 POSITIVE ACTION (Article 5 Directive 2000/43, Article 7 Directive 2000/78)

a) Scope for positive action measures

In Bulgaria, positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation is provided for in national law.

PADA not only authorizes but mandates, in a general way, positive measures to equalize opportunities for disadvantaged groups. Several specific authorisations for positive action exist:

- different treatment of persons with disabilities in training or education aimed at equalising their opportunities;²⁹⁸
- special measures for the benefit of disadvantaged persons or groups aimed at equalising their opportunities, as far as and as long as such measures are necessary;²⁹⁹
- special protection measures provided for by law for the benefit of parentless children, minors, single parents and persons with disabilities;³⁰⁰
- measures aimed at protecting the distinctive identity of persons belonging to ethnic, religious and linguistic minorities, and their rights, alone or with other members of their groups, to preserve and develop their culture, to profess and exercise their religion, and to use their language;³⁰¹
- measures in training or education aimed at guaranteeing the participation of persons belonging to ethnic minorities, as far as and as long as such measures are necessary.³⁰²

PADA places a general duty on all authorities to take measures to equalise opportunities for disadvantaged groups, as well as to guarantee participation by ethnic minorities in education, whenever necessary to accomplish the objectives of equality law.³⁰³ PADA requires authorities to take such measures as a priority for the benefit of victims of multiple discrimination.³⁰⁴

Under the Constitution, however, the position is different. The Constitutional Court (CC) held some years ago that preferential treatment on constitutionally protected grounds, including race/ethnicity, sex, and religion/belief is unconstitutional.³⁰⁵ Therefore, any legislation providing for such action would be unconstitutional. By contrast, preferential measures based on other grounds, excluded from the constitutional equality clause, such as disability or age, would be constitutional.³⁰⁶

There is a conflict, therefore, between the Constitution and PADA insofar as authorization for positive measures is concerned. The conflict may, however, be nominal. There are a number of positive policy measures in place for the benefit of ethnic groups, in particular, Roma, as well as sex quotas, which haven't been challenged over a number of years based on the constitutional case law. If a challenge were to be brought before the CC, it might well revise its earlier position about the unconstitutionality of positive action, and declare positive measures on grounds of sex, religion or ethnicity compatible with the Constitution. There has not been another CC ruling on this subject since. If, in a future case the CC were to reproduce its 1992 ruling, that should raise the issue of the supremacy of EU law.

²⁹⁸ PADA, Article 7 (1.10).

²⁹⁹ PADA, Article 7 (1.14).

³⁰⁰ PADA, Article 7 (1.15).

³⁰¹ PADA, Article 7 (1.16).

³⁰² PADA, Article 7 (1.17). The law does not specify the measures allowed. Any measure falling into that category is excepted.

³⁰³ PADA, Article 11 (1).

³⁰⁴ PADA, Article 11 (2).

³⁰⁵ Constitutional Court ruling No. 14 of 1992.

³⁰⁶ Constitutional Court ruling No. 14 of 1992.

b) Main positive action measures in place on national level

Quotas

Under the Labour Code, employers with more than 50 employees are under a duty to annually set aside 4-10 % of all their workplaces for purposes of accommodating people with disabilities and other entitled persons.³⁰⁷ 'Accommodating' here means transferring employees who become disabled while in employment to new jobs suitable for their altered/ reduced working abilities. Under the Integration of Persons with Disabilities Act, at least half of those workplaces are to be reserved for people with permanent disabilities.³⁰⁸ Under the Labour Code, an employer who fails to discharge a duty under that Code is liable to a fine between EUR 750 and 7 500 (BGN 1 500 and 15 000) (Article 414). In addition, labour inspectorates are competent to order employers to eliminate breaches of the Labour Code (Article 404). Not obeying such an order leads to a fine (Article 415). According to Agency for People with Disabilities' statistics, in 2014, 26 155 workplaces were set aside; 14 670 of those – for persons with permanent disabilities; 6 402 workplaces were actually occupied by people with disabilities, and 9 544 – by people with permanent disabilities; 6 760 workplaces set aside were advertised as vacant.³⁰⁹ This data is incomplete and unreliable because, as the Agency explicitly recognises in its 2014 report, 71 out of 98 territorial labour bureaux supplied data; possibly not all employers informed their bureau (1 949 did); there is no data on the number of employers who were under the duty; and the numbers stated for occupied and vacant workplaces don't seem to match up with the overall number of accommodated workplaces. "Accommodated" here means made suitable for persons with reduced/ altered working abilities.

Disability quotas are also provided for under the Civil Servant Act.³¹⁰ Authorities with more than 50 staff are bound to designate at least 2% of all positions for such people.³¹¹ Authorities with staff between 26 and 50 are bound to designate at least one position.³¹² Candidates for those positions compete only with other persons with disabilities.³¹³ In 2015, an amendment entered into force requiring 1 % to be set aside among civil servants in the Ministry of the Interior who are not police 'organs', among civil servants in the 'National Security' State Agency who are not directly involved in its specific activities, and among civil servants in the 'Technical Operations' State Agency (secret surveillance) who have employment contracts with the agency.³¹⁴

Preferential treatment narrowly tailored

Under the Employment Encouragement Act, younger and older workers are entitled to preferences. An employer who creates a job and hires a person 29 years old or younger (a younger person) is entitled to a subsidy for that person's salary for up to 18 months.³¹⁵ An employer who creates an intern position and hires a younger person is entitled to a subsidy for that person's salary for up to nine months.³¹⁶ If the intern has a basic education degree or lower and no qualifications, the period may extend to 12 months.³¹⁷ In all cases, recruits must be registered with the Employment Agency as employment seekers. Further, an

³⁰⁷ Labour Code, Article 315 (1).

³⁰⁸ IPDA, Article 27.

³⁰⁹ Available at: <http://ahu.mlsp.government.bg/portal/document/8444> (in BG).

³¹⁰ Civil Servant Act, Article 9a.

³¹¹ Civil Servant Act, Article 9a (1.1).

³¹² Civil Servant Act, Article 9a (1.2).

³¹³ Civil Servant Act, Article 9a (1.2).

³¹⁴ Civil Servant Act, Article 9a (1.3).

³¹⁵ Employment Encouragement Act, Article 36. These measures are not recent but they are significant because of being provided for by law and because of their scope.

³¹⁶ Employment Encouragement Act, Article 41. An intern in this case is a person with professional qualifications but no work experience (ibid.).

³¹⁷ Employment Encouragement Act, Article 41a.

employer who creates a job and hires a person older than 50 years (older person) is entitled to a subsidy for that person's salary for up to a year.³¹⁸

Broad social policy measures

Roma school desegregation measures are provided for under policy documents and a piece of secondary legislation: the *Framework Programme for Equal Integration of Roma into Bulgarian Society (2010-2020)*,³¹⁹ the *National Programme for Development of School Education and Preschool Instruction and Preparation (2006-2015)*,³²⁰ the *Strategy for Educational Integration of Children and Students of Ethnic Minorities*,³²¹ Decree No 4 of the Council of Ministers of 11 January 2005 Creating a Centre for Educational Integration of Children and Students from Ethnic Minorities,³²² and the *Programme for the Activity of the Centre for Educational Integration of Children and Students from Ethnic Minorities for 2013 – 2015*.³²³

Housing measures for Roma are provided for under the *Framework Programme for Equal Integration of Roma into Bulgarian Society (2010-2020)*,³²⁴ the *National Action Plan for the Decade of Roma Inclusion*,³²⁵ the *National Programme for Improving the Housing Conditions for Roma in Bulgaria (2005 - 2015)*.³²⁶

³¹⁸ Employment Encouragement Act, Article 55a.

³¹⁹ Available at: <http://www.nccedi.government.bg/page.php?category=35&id=1278> (in BG).

³²⁰ Available at: www.strategy.bg/FileHandler.ashx?fileId=509 (in BG).

³²¹ Available at: <http://www.nccedi.government.bg/page.php?category=35&id=1279> (in BG).

³²² Available at: <http://coiduem.mon.bg/page.php?c=4&d=36> (in BG).

³²³ Available at: <http://coiduem.mon.bg/page.php?c=4&d=200> (in BG).

³²⁴ Available at: <http://www.nccedi.government.bg/page.php?category=35&id=1278> (in BG).

³²⁵ Available at: <http://www.nccedi.government.bg/page.php?category=35&id=758> (in BG).

³²⁶ Available at: <http://www.strategy.bg/StrategicDocuments/View.aspx?lang=bq-BG&Id=433> (in BG). These measures are not recent but they are more significant than recent ones.

6 REMEDIES AND ENFORCEMENT

6.1 Judicial and/or administrative procedures (Article 7 Directive 2000/43, Article 9 Directive 2000/78)

a) Available procedures for enforcing the principle of equal treatment

In Bulgaria, the following procedures exist for enforcing the principle of equal treatment (judicial/ administrative/ alternative dispute resolution such as mediation):

Under PADA, two main procedures exist:

- judicial proceedings before the general courts;³²⁷
- specialised quasi-judicial proceedings before PADC, the independent equality body, with judicial review by two instances of administrative courts.³²⁸ This is complemented by a follow-up procedure for damages before the general courts (administrative ones for public-law respondents, and civil ones for everyone else).³²⁹

A victim can choose between the two. The general courts can make a declaration of discrimination and award compensation for damages, as well as order respondent to take remedial action, or to abstain from, or to terminate particular action or inaction found to be in breach of the law. The equality body can make a finding of discrimination, and order preventive or remedial action. It can also impose financial sanctions.³³⁰ It cannot award compensation.

Under PADA, the judicial remedy before the general courts expressly points out as competent the civil courts, whoever the respondent. However, where respondent is a public authority, the case law is moving in the direction of recognising as competent not the civil courts, but the administrative ones. The PADC remedy is universally applicable, whoever the respondent. Both remedies are binding.

If a discrimination allegation is made before another administrative body, such as a labour inspectorate, under a procedure provided for under other legislation, that body will likely refer such allegation to PADC, the latter being the specialised body to deal with such allegations.

b) Barriers and other deterrents faced by litigants seeking redress

Under PADA, both the general court and the PADC procedures are exempt from costs, both state fees and expenses.³³¹ However, administrative case law does not respect this, and parties are ordered to pay each other's costs on losing, as well as court fees. Not only that, but PADC demands to be awarded costs when complainants appeal against its decisions before the court.³³² Where complainants are unsuccessful, the court orders them to pay PADC lawyers' fees. The reason that administrative courts ignore PADA's exemption of litigants from costs, is that, under that rule, costs are to be recuperated from courts' budgets.

³²⁷ PADA, Article 71.

³²⁸ PADA, Articles 47, 50, and 68 (1).

³²⁹ PADA, Article 74.

³³⁰ The maximum amount of sanction imposable on an individual for an act of discrimination is the equivalent of EUR 1000. For legal persons this is EUR 1250. For a repeated offence, the sanction is automatically double. For a failure to abide by a decision of the equality body, the maximum sanction is EUR 5000. Where such a failure continues for more than three months after the decision imposing this sanction entered into force, the next sanction is up to EUR 10 000.

³³¹ PADA, Article 53 and Article 75 (2).

³³² PADC bases this practice on an interpretative ruling (тълкувателно решение) by the Supreme Administrative Court – No. 3 of 13.05.2010, rendered in commercial case No. 5 of 2009 (see PADC letter No. 44-00-1609 of 20.04.2015). This ruling is of general application, and not specific to cases under PADA. Its application to PADA cases contradicts PADA, Article 75 (2).

Litigants are free to represent themselves in both the judicial and PADC procedures.³³³ Before the Supreme Court of Cassation only, a complaint needs to be signed by a lawyer,³³⁴ but complainants can appear unrepresented at hearings. In practice, litigants without a lawyer would be at a disadvantage in court where proceedings are complicated and formal. Before the equality body, which has quasi-investigative powers and whose proceedings are more informal and victim-friendly, complainants are not that dependent on a lawyer. On the other hand, PADC is located in the capital, posing a geographical barrier.

Because of recent trends in case law shifting away from PADA provisions as regards the competence of civil courts in discrimination cases against public authorities, some such cases that were heard years ago by a civil court are on appeal being remanded to an administrative court, to start all over again, for no reason other than the courts' contradictory construction of competence rules in such cases.³³⁵ This breaches persons' rights to reasonable length proceedings. It does not limit access to remedies in any other way. The case law is divided and various judicial competence disputes between the courts have taken place, with an interpretative case now pending at Supreme Court level brought ex officio to unify the case law.

The time limit for the civil court remedy is the general one for civil cases – 5 years. For the PADC remedy it is 3 years. There is no limit on the amounts of compensation the courts can award. The maximum amounts of sanctions imposable by PADC are provided for under PADA, and appear reasonable. The rate of implementation of such decisions is not clear, however.

c) Number of discrimination cases brought to justice

In Bulgaria, there are available statistics on the number of cases related to discrimination brought to justice. However, those are not comprehensive. Statistics are only available for the Sofia City Administrative Court, hearing PADC-decided cases on judicial review as a first instance. In 2013, 119 such cases were filed with that court.³³⁶ In 2014, 180.³³⁷ In 2015, the cases were 228.³³⁸ No statistics are available for the number of such cases decided. There are no statistics for the Supreme Administrative Court, hearing PADC cases on judicial review as a last instance.³³⁹ There are no statistics for the civil courts. There are no statistics for administrative courts hearing discrimination cases as a first instance.

PADC does statistics concerning its own caseload, as a part of its annual report to Parliament, but the one for 2015 is not yet available. Although there is no such requirement under the law, PADC only publishes its annual reports on its website once they are approved by Parliament. Parliament can, in practice, delay that indefinitely. This happened in the years 2012 and 2013. The 2014 report, now published, was also delayed. PADC statistics are ground-, and field-disaggregated.

d) Registration of discrimination cases by national courts

³³³ For Supreme Court proceedings, both administrative (or judicial review) and civil, appellants only need to have a lawyer or *juris consult* to countersign their cassation appeal (Article 284 (2) of the Civil Procedure Code and Article 18 (1) of the Administrative Procedure Code) but the law does not require them to be represented at hearings.

³³⁴ Civil Procedure Code, Article 284 (2).

³³⁵ For instance, Decision No. 7685 of 18 November 2013 in civil case No. 10724/2013, Sofia City Court.

³³⁶ See *Report on the implementation of the law and the activities of administrative courts in 2013 (Доклад за прилагането на закона и за дейността на административните съдилища през 2013 г.)*, p. 226 (<http://www.sac.government.bg/pages/bg/progress-reports>) (in BG).

³³⁷ See *Report on the activities of the Sofia City Administrative Court in 2014 (Доклад за дейността на Административен съд София-град през 2014 г.)* (<http://www.admincourts Sofia.bg/Засяда/Доклади/Докладзадейността на АССГ за 2014 г.aspx>) (in BG).

³³⁸ See *Report on the activities of the Sofia City Administrative Court in 2015 (Доклад за дейността на Административен съд София-град през 2015 г.)*: <http://www.admincourts Sofia.bg/Засяда/Доклади/Докладзадейността на АССГ за 2015 г.aspx> (in BG).

³³⁹ Telephone interview with the Court's Head Statistician, 23 April 2015.

In Bulgaria, discrimination cases are registered as such by national courts. However, this only applies to the Sofia City Administrative Court, hearing PADC-decided cases on judicial review as a first instance.³⁴⁰ Those statistics are not ground-, or field-disaggregated. They are publicly available.

6.2 Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78)

a) Engaging on behalf of victims of discrimination (representing them)

In Bulgaria, organisations and trade unions are entitled to act on behalf of victims of discrimination. Before the equality body, any entity may represent an individual or another entity.³⁴¹ Before the civil courts, trade unions and legal persons for non-profit purposes registered in the public interest may represent victims.³⁴² Legal persons for non-profit purposes are foundations or associations.³⁴³ The ones self-determined to be in the public interest register with the Ministry of Justice.³⁴⁴ They are subject to stricter requirements.³⁴⁵ Arguably, a non-profit not registered under national legislation as one 'in the public interest' can still claim standing before the courts, by substantiating that in fact its activities are public interest ones.³⁴⁶

There is no legal duty for NGOs or trade unions to act.

b) Engaging in support of victims of discrimination

In Bulgaria, organisations and trade unions are entitled to act in support of victims of discrimination. Before the civil courts, trade unions and legal persons for non-profit purposes in the public interest may enter victim-brought cases in an 'interested party' capacity.³⁴⁷ There is no legal duty for NGOs or trade unions to do so. There is no formal possibility under the law for NGOs or trade unions to join cases before PADC.

c) Actio popularis

In Bulgaria, national law allows organisations and trade unions to act in the public interest on their own behalf, without a specific victim to support or represent (**actio popularis**). Under PADA, any entity can bring proceedings before PADC without identifying a specific victim.³⁴⁸ No special requirements apply; incorporation is enough. However, in 2014, the Supreme Administrative Court has initiated a case law trend requiring a specific victim to be identified before a sanctionable breach of PADA can be established.³⁴⁹

Before the civil courts, trade unions and public interest non-profits can take *actio popularis* action 'where the rights of many parties are infringed' (Article 71 (3) PADA). Entity incorporation is required. Non-profits not formally registered as being in the public interest need to substantiate how their activities are publicly useful in fact. Both trade unions and non-profits need to substantiate how the alleged discrimination affected many persons. There is no legal definition of 'many'. In the past, in one case, judges have accepted as

³⁴⁰ See Report on the implementation of the law and the activities of administrative courts in 2013 (Доклад за прилагането на закона и за дейността на административните съдилища през 2013 г.) (<http://www.sac.government.bg/pages/bg/progress-reports>) (in BG).

³⁴¹ Administrative Procedure Code, Article 18 (2).

³⁴² PADA, Article 71 (2).

³⁴³ Legal Persons for Non-profit Purposes Act (Закон за юридическите лица с нестопанска цел), Article 1 (2).

³⁴⁴ Legal Persons for Non-profit Purposes Act, Article 2 (1 and 3).

³⁴⁵ Legal Persons for Non-profit Purposes Act, Chapter Three.

³⁴⁶ The Legal Persons for Non-profit Purposes Act, Article 38 (1), specifies which activities qualify as public interest ones.

³⁴⁷ PADA, Article 71 (2).

³⁴⁸ PADA, Article 50.3.

³⁴⁹ Supreme Administrative Court, Decision No. 5645 in case No. 15991/2013; Decision No. 15637 in case No. 1925/2014.

few as 10 to be enough. In another case, they have frustrated implementation of the legal provision requiring that victims be enumerated, and each one – individualized. Trade unions and non-profits can seek a declaration of discrimination, and a court order on respondent to stop and abstain from the impugned conduct. No special rules apply concerning the shifting burden of proof. However, in one case a trial court judge held *obiter* that the shifting burden of proof was not meant to apply in *actio popularis* cases because NGOs had the resources to prove discrimination, unlike victims. Before PADC, *actio popularis* claimants can seek the same remedies as victims.

d) Class action

In Bulgaria, national law allows organisations and trade unions to act in the interest of more than one individual victim (**class action**) for claims arising from the same event. Under general civil procedure law, organizations for the protection of a particular category of victims, or for the protection of persons from a particular type of violation have standing to bring collective claims in court.³⁵⁰ Such claims can be brought on behalf of all victims of a single violation where their 'circle cannot be exactly defined but is definable'.³⁵¹ Entities would need to prove incorporation and the fact of existing 'for the protection' of the relevant victim category. In addition, they are expressly required by law to prove their abilities to 'seriously and in good faith' defend the collective interest harmed, as well as to bear the burden of taking the case, including costs and expenses.³⁵² Entities will have to explicate the circumstances defining the relevant 'circle of victims'. They can claim on behalf of all victims that a tortious action or inaction be declared unlawful, that the respondent be ordered to abort the violation, and/or to correct its consequences for the collective interest, or to pay compensation.³⁵³ These general provisions on collective claims implicitly apply to discrimination cases too. No special rules on the shifting burden of proof apply.

6.3 Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78)

In Bulgaria, national law requires a shift of the burden of proof from the complainant to the respondent. PADA requires this in all anti-discrimination proceedings, implicitly for any form of discrimination, where claimant has proven facts from which a conclusion for discrimination can be made.³⁵⁴ In 2014, a draft law was introduced to amend this provision. It proposed the following language: "In proceedings for protection against discrimination, after the party claiming to have been discriminated against, establishes facts from which an inference that discrimination is at hand can be made, the respondent party has to prove that the principle of equal treatment was not breached." In Parliament, the bill underwent an unannounced change after which the provision read: "In proceedings for protection against discrimination, after the party claiming to have been discriminated against, produces facts from which an inference that discrimination is at hand can be made, the respondent party has to prove that the principle of equal treatment was not breached."³⁵⁵

Implementation of the shift of the burden of proof rule is rudimentary. Judges and equality body members and staff lack meaningful comprehension of that rule. There has been no training on that for judges. Only one case (sex discrimination) is on record where the ruling hinged on the shifting burden of proof. The Supreme Administrative Court found that sex was the reason for the less favourable treatment on grounds that respondent failed to establish a legitimate reason.³⁵⁶

³⁵⁰ Civil Procedure Code, Article 379.

³⁵¹ Civil Procedure Code, Article 379 (1).

³⁵² Civil Procedure Code, Article 380 (3).

³⁵³ Civil Procedure Code, Article 379 (2-3).

³⁵⁴ PADA, Article 9.

³⁵⁵ Available at: <http://www.parliament.bg/bq/bills/ID/15141/> (in BG). This version was adopted in 2015, after the cut-off date for this report (State Gazette issue No 26 of 7 April 2015).

³⁵⁶ Decision No. 274 of 09 January 2012 in case No. 1319/2011.

In 2015, the shift of the burden of proof provision in PADA was amended. Article 9 now reads: "In proceedings for protection against discrimination, after the party claiming to have been discriminated against, *produces (presents)* facts from which an *inference* that discrimination is at hand can be made, the respondent party has to prove that the principle of equal treatment was not breached" (emphasis added). Prior to the amendment, the law read: "In proceedings for protection against discrimination, after the party claiming to have been discriminated against, *proves* facts from which a *conclusion* that discrimination is at hand can be made, the respondent party has to prove that the principle of equal treatment was not breached."³⁵⁷

6.4 Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78)

In Bulgaria, there are legal measures of protection against victimisation. PADA expressly prohibits victimisation as a form of discrimination.³⁵⁸ Victimisation is defined as: a) less favourable treatment of a person who has taken, or is presumed to have taken, or to be taking in the future any action for protection against discrimination; b) less favourable treatment of a person where a person associated with them has taken, or is presumed to have taken, or to be taking in the future any action for protection against discrimination; c) less favourable treatment of a person who refused to discriminate.³⁵⁹ Therefore, protection is accorded for victimisation by presumption and by association too. Action for protection against discrimination may include, but is not limited to, bringing proceedings before the equality body or the court, in either victim or third-party capacity, or testifying in proceedings.³⁶⁰ Therefore, any person who assisted any action against discrimination in any way is entitled to protection from victimisation.

6.5 Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)

a) Applicable sanctions in cases of discrimination – in law and in practice

PADC can impose financial sanctions between EUR 125 and 1 250 (BGN 250 to 2 500), amounts that would be dissuasive to the majority of individuals and small enterprises.³⁶¹ While medium-sized and large businesses may not be deterred by the actual amounts, the bad publicity of being found to be discriminators motivates them to actively engage in proceedings and in settlements where complainants are open to the latter. Those sanctions are administrative fines and are not awarded to the victim as compensation but go to the PADC budget.³⁶² Where a breach is repeated, the sanction is double.³⁶³ Those sanctions are uniformly applicable to all sectors and fields, including the private and public ones, as well as fields outside employment. PADC can, further, order particular remedial action by discriminators, and suspend the execution of employers' decisions where those may result in discrimination.³⁶⁴ The civil courts do not impose fines. They only award compensation for damages (Article 71 (1.3) PADA).

b) Ceiling and amount of compensation

There is no information available concerning the average amount of compensation awarded to victims. There is no maximum amount of compensation.³⁶⁵ The courts can award any amount that is fair (non-pecuniary damages) or proven (pecuniary damages).

³⁵⁷ For more information, see Section 12.1 below.

³⁵⁸ PADA, Article 5.

³⁵⁹ PADA, Additional Provision § 1.3.

³⁶⁰ PADA, Additional Provision § 1.3.

³⁶¹ PADA, Article 78-80.

³⁶² PADA, Article 83.

³⁶³ PADA, Article 81.

³⁶⁴ PADA, Article 76.

³⁶⁵ This concerns indemnification of a victim's pecuniary or non-pecuniary damages whatever those might be in the particular case, and not financial punishment by the state by decision of the equality body.

c) Assessment of the sanctions

Whether sanctions are effective hinges on whether PADC decisions are implemented at an adequate rate. The latter is unclear. Fines can be supposed to be enforced, and their amounts seem dissuasive. However, remedial orders cannot be supposed to be enforced, and there is no information what their actual rate of implementation is.

7 BODIES FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43)

- a) Body/bodies designated for the promotion of equal treatment irrespective of racial/ethnic origin according to Article 13 of the Racial Equality Directive

Under PADA, the Protection Against Discrimination Commission (PADC) is charged with promoting and enforcing non-discrimination as a specialised equality body.³⁶⁶

- b) Status of the designated body – general independence

PADC is independent by law.³⁶⁷ Its nine members are selected in part by Parliament (five), and in part by the President (four). Their term of office is five years. The budget of PADC is approved by Parliament directly.³⁶⁸ PADC is accountable to Parliament only. It reports to Parliament annually.³⁶⁹

- c) Grounds covered by the designated body

PADC deals with all protected grounds under PADA: sex, race, national origin, ethnicity, human genome, nationality, origin, religion or faith, education, beliefs, political affiliation, personal or social status, disability, age, sexual orientation, family status, property status, or any other ground provided for by law or by international treaty Bulgaria is a party to.³⁷⁰

- d) Competences of the designated body – and their independent exercise

PADC assists victims of discrimination,³⁷¹ carries out independent research,³⁷² and publishes independent reports³⁷³. It makes recommendations to public authorities, including for legislative change.³⁷⁴ It informs the public through the mass media on legal provisions against discrimination.³⁷⁵

PADC is competent to: hear complaints by victims and communications by third parties; find discrimination by legally binding decisions; impose financial sanctions; issue mandatory instructions for remedial or preventative redress.³⁷⁶ It can initiate its own proceedings at its discretion, in all fields and on all grounds, against any perpetrator.³⁷⁷ It can review and give opinion on draft legislation.³⁷⁸

- e) Legal standing of the designated body

In Bulgaria, the designated body has legal standing to bring discrimination complaints (on behalf or not of identified victim(s)) or to intervene in legal cases concerning discrimination.³⁷⁹ In practice, PADC has not initiated any lawsuits, and has only joined proceedings instituted by other parties in very few exceptional cases in the past.

³⁶⁶ PADA, Article 40.

³⁶⁷ PADA, Article 40.

³⁶⁸ PADA, Article 40 (3).

³⁶⁹ PADA, Article 40 (5).

³⁷⁰ PADA, Article 4 (1).

³⁷¹ PADA, Article 47.9. There is no public or institutional perception of a clash between the body's adjudicator functions and its victim's assistance mandate, and no debate. In practice, the assistance mandate is depressed: the body gives victims no assistance other than to explain how the procedure before it works and what they are expected to do in order to participate. It has initiated no court action.

³⁷² PADA, Article 47.10.

³⁷³ PADA, Article 47.11.

³⁷⁴ PADA, Article 47.6 and 47.11.

³⁷⁵ PADA, Article 47.12.

³⁷⁶ PADA, Article 47.

³⁷⁷ PADA, Article 47.

³⁷⁸ PADA, Article 47.

³⁷⁹ PADA, Article 47.5.

f) Quasi-judicial competences

In Bulgaria, the body is a quasi-judicial institution. Its decisions make findings on points of law, as well as of fact, and are formally binding.³⁸⁰ The proceedings before it are public, with a hearing of both parties.³⁸¹ It has the power to impose sanctions, including fines,³⁸² and 'soft' penalties, such as public apology or publication of (information about) its decision. Its decisions are subject to two-instance judicial review.³⁸³ PADC does have some authority. It imposes additional sanctions on non-performing respondents.³⁸⁴

g) Registration by the body of complaints and decisions

In Bulgaria, the body registers the number of complaints and decisions (by ground, field, type of discrimination, etc.). These data are available to the public as part of the body's annual report to Parliament. In practice, PADC only publishes its reports when Parliament approves them. There have been significant delays in recent years.

h) Roma and Travellers

PADC has not made the problems of Roma its priority. It has no strategic approach. It deals with all grounds and issues in a neutral way.

³⁸⁰ PADA, Article 65.

³⁸¹ PADA, Article 61.

³⁸² PADA, Article 65.

³⁸³ PADA, Article 68 (1).

³⁸⁴ PADA, Article 82.

8 IMPLEMENTATION ISSUES

8.1 Dissemination of information, dialogue with NGOs and between social partners

Dissemination of information

Information action taken by Bulgaria has been limited. Two bodies, mostly, have taken such action – PADC and the National Council for Cooperation on Ethnic and Integration Issues (formerly, National Council for Cooperation on Ethnic and Demographic Issues (NCCEII)) within the Council of Ministers, and it has consisted in superficial and insufficient general awareness raising measures. In past years, PADC has broadcast advertisements on the radio and television, and disseminated advertising brochures at seminars. Its members have given interviews to the media, and carried out seminars in various cities. PADC carried out a seminar for journalists in early 2014. PADC also claims to regularly inform journalists of pending cases and hearings.³⁸⁵ The PADC chair and other PADC representatives gave interviews to the media.³⁸⁶ In past years, NCCEDI has organised several conferences, published brochures, and distributed a survey questionnaire.

In recent years, according to its website, PADC implemented a one-year PROGRESS-funded project that ended on 31.05.2014. Its main objectives included dissemination of information regarding EU and national anti-discrimination legislation. Seminars were organized for legal practitioners, Ministry of Interior officials, educators, journalists.

There has been no community outreach. The media used have been the mainstream ones that may be inaccessible to isolated communities, such as Roma and people with sensor impairments, and the groups targeted by seminars have been predominantly people from the mainstream (officials, journalists, establishment-connected NGOs).

Dialogue with NGOs

PADC has not involved NGOs in cooperation or dialogue in any inclusive or meaningful way. In the past, it engaged in selective contacts with some NGOs on a non-transparent basis, excluding others. There is no mechanism for NGOs to provide PADC with their input on the law or practice, other than joining individual cases in an 'interested party' capacity (on discretionary permission by PADC). PADC has not engaged important, if any, NGOs in consultations regarding amendments to the legislation it has reportedly initiated. None of the amendments to PADA were consulted with NGOs.

Dialogue between social partners

No such action is on record.

Effectively, there is no body appointed on the national level to address Roma issues. Allegedly, a *Council for Roma Integration* within the Ministry of Labour and Social Policy was set up in 2006 to support the National *Roma Decade* Coordinator, meeting every 3 months. It is said to include 29 representatives of Roma NGOs. The existence, activities or results of this body are not known.

Within the Ministry of Culture there is said to be a *Roma Public Council on Cultural Issues* assisting the Ministry's policy of cultural integration of minorities.³⁸⁷ There is no information

³⁸⁵ Letter No 12-10-34 of 13 July 2015 addressed to a Bulgarian Helsinki Committee representative.

³⁸⁶ Ibid.

³⁸⁷ Based on information published at the Ministry of Culture's Internet site at: <http://mc.government.bg/page.php?p=13&s=24&sp=0&t=0&z=0> (in BG).

on activity by this council. In late 2009, the then Minister confirmed during parliamentary control, that such a body existed.³⁸⁸ Its existence is, at best, nominal.

8.2 Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

a) Mechanisms

Under general legal principles, PADA as *lex specialis*/ more recent/ primary law should override general/ older/ secondary legislation that conflicts with it. However, in practice, this depends on judicial interpretation. A judge may consider that it is not PADA, but the other, conflicting rule that is *lex specialis* in the case, even if it's older (or secondary). There is no special mechanism to ensure that any discriminatory norms are set aside, other than litigation before the courts or PADC, the equality body. However, in 2014, the Supreme Administrative Court introduced a new, restrictive interpretation to the effect that PADC was incompetent to declare a norm discriminatory.³⁸⁹ First, the Constitutional Court (CC) had to declare it unconstitutional (concerning primary law), or the administrative courts repeal it under general administrative procedure (concerning secondary legislation). However, standing to bringing such proceedings is limited: no individual can seize the CC, and only affected persons can seek judicial review of secondary legislation.

In 2012, a provision was introduced in PADA, requiring all public authorities, including local governments, to respect the aim of not allowing any direct, or indirect discrimination, when drafting legislation, as well as when applying it.³⁹⁰ This general mainstreaming duty complements the original duty under PADA for all public authorities to take all possible and necessary measures to achieve the aims of PADA.³⁹¹ Formally, this provides sufficient legal basis for bodies to revise any legislation that contradicts PADA. In practice, this has not been done. A failure to do so could be challenged before PADC on general non-implementation grounds under PADA, there being no special provision on sanctions referring to this particular duty. PADC could then, under PADA, make a declaration, and impose a sanction, as well as issue an instruction, or recommendation for implementation. However, in 2014, the Supreme Administrative Court introduced a new, restrictive interpretation to the effect that PADC could not hold liable, or sanction any public bodies.³⁹² It could only make recommendations to such bodies.

b) Rules contrary to the principle of equality

³⁸⁸ Available at: <http://www.parliament.bg/bg/plenaryst/ns/7/ID/651> (in BG).

³⁸⁹ Supreme Administrative Court, Decision No. 5645 in case No. 15991/2013; and Decision No. 15637 in case No. 1925/2014.

³⁹⁰ PADA, Article 6 (2).

³⁹¹ PADA, Article 10.

³⁹² Supreme Administrative Court, Decision No. 5645 in case No. 15991/2013; and Decision No. 15637 in case No. 1925/2014.

There are various rules in primary and secondary legislation that contradict PADA.³⁹³ A major effort is required to ensure that all laws and regulations are brought into conformity with the principle of equality.³⁹⁴

³⁹³ Examples of directly discriminatory legislation: Judiciary Act (*Закон за съдебната власт*), Article 162 (mental health related disability ("mental illness") bar (http://www.vks.bg/english/vksen_p04_06.htm#Chapter_five); Higher Education Act *Закон за висшето образование*, Article 4 (unfettered discretion for universities to differentiate on grounds of age, race and sex, inter alia) (<http://unpan1.un.org/intradoc/groups/public/documents/untc/unpan016453.pdf>); Defence and Armed Forces Act, Article 141 (age bars to employment) (<http://www.comd.bg/en/acts/republic-bulgaria-defence-and-armed-forces-act>); Ministry of the Interior Act, Article 155 (age and health bars to employment, referring to an ordinance by the Minister) (http://www.mvr.bg/NR/rdonlyres/5F939B72-40AD-45AB-A78A-D09207DB695C/0/ZMVR_EN.pdf); Diplomatic Service Act (*Закон за дипломатическата служба*), Article 27 (mental disability ("chronic psychic illness") bar) (<http://www.lex.bg/bg/laws/ldoc/2135565718>) (in BG); Classified Information Protection Act (*Закон за защита на класифицираната информация*), Article 40 (mental disability ("psychic illnesses") bar) (http://www.mvr.bg/NR/rdonlyres/C4EA720F-B6D3-4316-A3F9-CB4BEB9251B1/0/06_Law_Protection_ClassifiedInformation_EN.pdf); Access and Disclosure of Documents and Declaration of Affiliation of Bulgarian Nationals with State Security [...] Act (*Закон за достъп и разкриване на документите и за обявяване на принадлежност на български граждани към Държавна сигурност [...]*), Article 6 (mental disability ("psychic illness") bar to access to employment) (<http://www.comdos.bg/media/Normativna%20osnova/ADDAABCSSISBNASA-15.02.2013.doc>); Norms which discriminate indirectly would be far more numerous and time-consuming to identify.

³⁹⁴ The whole body of legislation, including statutory law and secondary legislation, should be reviewed and analysed for incompatibilities with PADA. Careful thinking should be done to devise ways to harmonize conflicting norms with PADA. This will not only require conflicting norms to be amended or repealed, but also PADA to be revised in order to allow for additional legitimate exceptions.

9 COORDINATION AT NATIONAL LEVEL

A number of structures exist within the executive, with mandates to promote and/or implement equality. Some are public bodies, some are joint governmental-civil society consultative councils. The latter make no decisions but are meant to inform decision-making processes. Some of the bodies are specialized in one or more grounds in one or more fields, while others are grounds-inclusive in specific fields. The relationships between the various authorities' mandates are not clear and there is overlap. Their relevance for the directives' implementation is limited, at best. They are mentioned for exhaustiveness.

In 2013, the Council of Ministers set up a *National Human Rights Coordination Mechanism* (NHRCM). The NHRCM aim is to "contribute to better implementation of the country's obligations before international monitoring and control mechanisms."³⁹⁵ This body is expected to improve coordination between state agencies and independent human rights bodies by distributing tasks relative to international human rights reporting duties. It is further meant to discuss the expediency of Bulgaria's joining international human rights instruments, and to propose legislative changes relevant to human rights. The NHRCM sits twice yearly, chaired by the Foreign Affairs Minister, with participants from national human rights institutions, executive bodies and, allegedly, NGOs. In practice, it is unclear whether any, or, if any, what kind of NGOs take part. The Bulgarian Helsinki Committee, the most important national human rights organisation, has not been included in any way.

Within the Council of Ministers, the *National Council for Cooperation on Ethnic and Integration Issues* (NCCEII) is a consultative body with a mandate to assist governmental policy on minorities, and to coordinate between the government and minorities' NGOs.³⁹⁶ NCCEII is comprised of senior public officials and ethnic minority NGO representatives. Its tasks include promoting ethnic equality, and studying the specific problems facing ethnic minorities.³⁹⁷ The chairperson of NCCEII serves as National Coordinator of the *Roma Inclusion Decade 2005-2015*. At regional level, there are 27 *councils on ethnic and integration issues*, local versions of NCCEII. These are comprised of regional and local government representatives, regional communal services suppliers, NGOs, and municipal 'ethnic issues' experts. Similar consultative councils also exist at municipal level.

Under the Minister of Education, there is a *Centre for Educational Integration of Children and Students from Ethnic Minorities*. Its task is to assist the Ministry of Education in implementing educational integration of minority students.³⁹⁸ It develops and funds projects promoting ethnic minority students equal access to education.³⁹⁹ It fundraises from donor institutions, and a subsidy from the Ministry of Education's budget.⁴⁰⁰

Within the Ministry of Labour and Social Policy (MLSP), the *Policy for Persons with Disabilities, Equal Opportunities and Social assistance* Directorate develops policy and programmes for vulnerable groups.⁴⁰¹ Another directorate within MLSP, the *Demographic Development, Ethnic Issues, and Equal Opportunities Directorate*, deals with equality policy too.

³⁹⁵ See a brief report on the government's website: <http://www.government.bg/cgi-bin/e-cms/vis/vis.pl?s=001&p=0228&n=5467&q> (in BG).

³⁹⁶ Regulations on the Structure and Activities of the National Council for Cooperation on Ethnic and Integration Issues, Article 1 (<http://www.nccedi.government.bg/page.php?category=103&id=1495>) (in BG).

³⁹⁷ Regulations on the Structure and Activities of the National Council for Cooperation on Ethnic and Integration Issues, Article 2 (1.5) (<http://www.nccedi.government.bg/page.php?category=103&id=1495>) (in BG).

³⁹⁸ Decree N 4 of the Council of Ministers of 11 January 2005 establishing CEICSEM, Article 1.

³⁹⁹ Decree N 4 of the Council of Ministers of 11 January 2005, Article 2.

⁴⁰⁰ Decree N 4 of the Council of Ministers of 11 January 2005, Article 9.

⁴⁰¹ Information on the Ministry of Labour and Social Policy's Internet site at: <http://www.mlsp.government.bg/index.php?section=POLICIESI&lang=eng&I=306> (in BG).

The *National Council on Integration of People with Disabilities* is a similar consultative body.⁴⁰² Its tasks include: assisting the implementation of the policy for integration of people with disabilities; studying and analysing disabled people's needs, and making proposals for action to authorities, organizations, and commercial entities; giving opinions on draft legislation for disabled people's integration; facilitating the coordination between authorities and other organizations, and the organizations of, and for people with disabilities; interacting with other consultative bodies and disability NGOs and international organizations; raising public awareness of disability issues.⁴⁰³

The *Agency for People with Disabilities*, an executive body within MLSP is charged with implementing the public policy of integration of people with disabilities.⁴⁰⁴ Its tasks include: creating and maintaining a database on people with disabilities; keeping a register of the specialized enterprises and cooperatives of people with disabilities; developing programmes and funding projects for stimulating economic initiatives for the benefit of people with disabilities; developing programmes and funding projects for social integration of people with disabilities; awarding employers funds for accommodating working places to disabled people's needs; giving opinions on draft legislation pertaining to disability; reporting annually on the measures for disabled people's integration.⁴⁰⁵

There is no governmental structure to deal with sexual orientation policy. There is also no department dealing with equality/non-discrimination issues relating to religion/ belief.

There is no anti-racism or anti-discrimination National Action Plan.

⁴⁰² Regulations on the Structure and Activities of the National Council on Integration of People with Disabilities, adopted 17 December 2004, establishing NCIPD, Article 2.

⁴⁰³ Regulations on the Structure and Activities of the National Council on Integration of People with Disabilities, Article 3 (<http://www.nccedi.government.bg/page.php?category=103&id=1495>) (in BG).

⁴⁰⁴ Structural Regulations of the Agency for People with Disabilities, Article 2 (1) (<http://ahu.mlsp.government.bg/portal/document/138>) (in BG).

⁴⁰⁵ Structural Regulations of the Agency for People with Disabilities, Article 2 (1) (<http://ahu.mlsp.government.bg/portal/document/138>) (in BG).

10 CURRENT BEST PRACTICES

1. The European Economic and Social Committee (EESC) has shortlisted and highlighted as an excellent practice the Bulgarian Helsinki Committee's litigation in the European Court of Human Rights (ECtHR) case of *Yordanova and Others v. Bulgaria*.⁴⁰⁶ This honourable mention was in the framework of the 2014 EESC Civil Society Prize, "*Rewarding Excellence in Civil Society Initiatives: The Integration of Roma*". The ECtHR ruling in the *Yordanova* case was, further, voted best ECtHR ruling for 2012 by the *Strasbourg Observers* blog of the [Human Rights Centre](#) at [Ghent University](#).⁴⁰⁷ The ruling is considered a strong precedent of housing rights protection for vulnerable minorities.

2. In 2010, the Government initiated a process of deinstitutionalisation of children (including children with disabilities) in social care 'homes'. Deinstitutionalisation is meant to be accomplished in 2025 by closing down all institutions for children in Bulgaria, and providing for alternative care services. Its basis is the "*Vision for Deinstitutionalisation of Children in Bulgaria*" National Strategy. In 2010, when deinstitutionalisation started out, the overall number of institutions for children was 137, and the number of institutionalized children - 5 695. As of 31 December 2014, the number of institutions was 95, and the number of children in them - 2 218. Of those 'deinstitutionalised', 111 or 16.6 % are dead, and 88 or 13.1 % were transferred to another institution. Accordingly, 199 of the total of 668 'deinstitutionalised' children were, in fact, not deinstitutionalised.⁴⁰⁸ Still, the process is of great importance.

3. In 2015, the Supreme Administrative Court (SAC), of its own motion, referred a set of questions concerning special protection on disability grounds to the Court of Justice of the EU (CJEU). The complainant in the case, a person with a psychosocial disability, was a public servant who was made redundant. She appealed against this order, claiming that under the Labour Code the agency employing her had a duty to ask the Labour Inspectorate for prior permission to make her redundant because she was a person with disability. The first-instance court held that the Labour Code did not apply to her as she was a public servant. The Public Servant Act applied to her and it did not provide for such special protection. On appeal, SAC found that public servants with disabilities and employees with disabilities (governed under the Labour Code) were treated differently under the legislation in terms of special protection against dismissal, and decided to ask the CJEU whether the Convention on the Rights of Persons with Disabilities (CRPD), the Charter of Fundamental Rights of the EU and Directive 2000/78/EC should be interpreted as allowing such a difference.⁴⁰⁹

⁴⁰⁶ See at: <http://www.eesc.europa.eu/resources/docs/ge-04-14-791-en-c.pdf>, p. 11.

⁴⁰⁷ See at: <http://strasbourgobservers.com/2013/01/15/poll-the-best-and-the-worst-ecthr-judgments-of-2012/>.

⁴⁰⁸ All figures are official figures provided to the Bulgarian Helsinki Committee by the State Child Protection Agency (by letter of 27 January 2015) and by the Social Assistance Agency (by letter No. 05-14 of 29 January 2015).

⁴⁰⁹ See more information in Section 12.2 below.

11 SENSITIVE OR CONTROVERSIAL ISSUES

11.1 Potential breaches of the directives (if any)

The law

- The definition of incitement to discrimination, including instructions to discriminate, under PADA expressly requires direct intent.
- The definition of racial segregation under PADA expressly requires the state of separation to be 'forced'.⁴¹⁰ The European Court of Human Rights has consistently held in Roma segregation cases that no waiver of the right to non-discrimination.⁴¹¹
- PADA defines indirect discrimination in a way that makes judges and PADC conflate it with covert direct discrimination. The language is misleading because it refers to "on grounds of", which contradicts "apparently neutral".
- Parallel to PADA, pre-existing abstract bans on discrimination are in place under other laws. There is no coherence between PADA and those older bans, with differences in protected grounds, exceptions, and definitions.
- There is inconsistency between PADA and other directly or indirectly discriminatory norms.

The case law

In 2014, the Supreme Administrative Court (SAC), the final instance reviewing PADC decisions, made a number of new, restrictive requirements for PADA enforcement that contradict PADA, as well as EU law:⁴¹²

- PADC could not declare every breach of PADA and other equality laws a breach, or sanction it: only those breaches that met the definition for an administrative breach under the general Administrative Breaches and Sanctions Act. That required establishing a concrete action/ omission, a concrete perpetrator, a concrete victim, and guilt.
- A concrete victim needed to be identified. Discrimination, in order to be found, had to be a concrete fact, and not a hypothetical possibility.⁴¹³
- A perpetrator could only be a natural person. Legal persons could be perpetrators only exceptionally, in cases expressly provided for by law.
- A public authority could not be a perpetrator – only an individual exercising its competence.
- A legal provision could not constitute discrimination as it was not a concrete action/ omission. The adoption of a legal provision was not a concrete action/ omission either.
- PADC could not declare laws to be discriminatory: a law that was not declared unconstitutional by the Constitutional Court (CC) could not be discriminatory.
- PADC could not declare secondary legislation to be discriminatory either: such legislation that was not declared unlawful by SAC (under general administrative procedure) could not be discriminatory.
- Where PADC found a legal norm to contradict equality law, it could not declare a breach of the law. It could not order the responsible authority to repeal/ amend that norm. It could only make a recommendation, or take legal action before SAC (where secondary legislation is concerned).

This tendency was not conclusively overturned in 2015.

⁴¹⁰ PADA, Additional Provision, § 1.6.

⁴¹¹ For instance, *D.H. v. Czech Republic*, judgment of 13 November 2007; *Sampanis v. Greece*, judgment of 05 June 2008; *Orsus v. Croatia*, judgment of 16 March 2010 (GC).

⁴¹² See Section 12.2.

⁴¹³ Supreme Administrative Court, Decision No. 15637 of 19 December 2014 in case No. 1925/2014. The case concerned the application of an age bar under secondary legislation.

SAC has held that, for discrimination to be at hand, a difference of treatment should be based *solely* on a protected ground, excluding „mixed motives“ cases where a protected characteristic was one among other reasons for less favourable treatment.⁴¹⁴ At the same time, SAC is inconsistent: in a recent case, it held that „discriminatory treatment is at hand regardless of whether a protected ground is the only, or one of the reasons for less favourable treatment.“⁴¹⁵

As mentioned, SAC has applied the justification test only relevant for indirect discrimination to cases of less favourable treatment, i.e. direct discrimination. It has applied the concept of indirect discrimination to a number of cases of direct less favourable treatment. For instance, in 2014, in a case where a Muslim prison inmate complained that his food included pork (denial of reasonable accommodation), SAC held that there was indirect discrimination against this complainant compared to Muslim inmates in another prison who did receive food accommodation.⁴¹⁶

In some cases, SAC has shown a serious lack of understanding of the concept of a comparator, holding that age requirements for access to employment did not constitute discrimination because they applied to all candidates, and not just the complainant.⁴¹⁷

SAC has required intent, often holding expressly that “treatment [must be] carried out *knowingly* on one of the [protected] grounds”.⁴¹⁸ As mentioned, in 2014, SAC held twice that only conduct that was “guilty” could qualify as a breach under PADA.⁴¹⁹ At the same time, its case law is contradictory: on one occasion in 2014, SAC held that “direct discrimination did not require discriminatory intent, therefore, the lack of such is irrelevant for qualifying treatment as discriminatory, including where it was based on an understanding that it was lawful”.⁴²⁰

In a 2014 case, SAC interpreted “sexual orientation” as having to be innate, and not “consciously” chosen, in order to be protected. SAC denied asylum protection to a gay Cameroonian because he “decided”, at age 35, to “choose” a sexuality that was not his “innate” one.⁴²¹ The Court did not define “to decide”, “to choose”, or “innate” in this context. Accordingly, the usual meanings of the words apply. The ruling is in breach of the Directive because it fails to give protection against “any” discrimination based on sexual orientation. It applies instead a restrictive definition of the protected ground that effectively authorizes discrimination as long as it is based on “chosen” as opposed to “innate” sexual orientation. The directive does not define sexual orientation in any way and, therefore, does not limit it in any way. It cannot be limited at the national level to only sexual orientation that is “innate”. Under the directive, any sexual orientation is protected.

The equality body practice

PADC, as a rule, refuses to consider (on admissibility) or uphold (on the merits) discrimination complaints by persons with disabilities who failed to produce medical proof of their disability.⁴²² It has failed to properly apply the definition of disability, which is

⁴¹⁴ Supreme Administrative Court, *Inter alia*, Decision No. 8277 of 11 June 2012 in case No. 3852/2012.

⁴¹⁵ Supreme Administrative Court, Decision No. 274 of 09 January 2012 in case No. 1319/2011.

⁴¹⁶ Supreme Administrative Court, Decision No. 2514 of 21 February 2014, case No. 10989/2013.

⁴¹⁷ Supreme Administrative Court, Decision No. 7096 of 19 May 2012 in case No. 3686/2012; Decision No. 10734 of 1 September 2014 in case No. 1463/2014.

⁴¹⁸ *Inter alia*, Supreme Administrative Court, Decision No. 8277 of 11 June 2012 in case No. 3852/2012; Decision No. 3645 of 14 March 2014 in case No. 12679/2013 (“conscious” perpetration requirement reiterated twice).

⁴¹⁹ Supreme Administrative Court, Decision No. 5645 in case No. 15991/2013, Decision No. 15637 in case No. 1925/2014.

⁴²⁰ Supreme Administrative Court, Decision No. 1048 of 27 January 2014 in case No. 8033/2013. The case concerned the application of an age bar under a university’s regulations.

⁴²¹ Supreme Administrative Court, Decision No. 9467 of 7 July 2014 in case No. 1381/2014.

⁴²² *Inter alia*, PADC, Decision No. 259 of 17 December 2008 in case No. 186/2008.

concerned with the fact of impairment, regardless of whether it was medically diagnosed or not.

PADC, like SAC, often shows a lack of understanding of indirect discrimination, in some cases fusing it with direct discrimination.

11.2 Other issues of concern

PADC does not use its powers, including its competence to start *ex officio* proceedings, in any strategic way. It has no priorities. It has failed to target serious issues of discrimination, such as Roma segregation in education, Roma destitution and isolation in housing, people with disabilities' institutionalization, etc.

There is no reliable measurement of the implementation rate of PADC decisions. According to PADC members and staff, PADC binding instructions (orders) have a poor record of execution by respondents.⁴²³ In such cases, the body has no formal power other than to impose further fines.

SAC, contrary to PADA, orders losing parties in proceedings for review of PADC decisions to pay costs and expenses.⁴²⁴ PADA is express that proceedings are exempt from all fees and costs but the courts frustrate this provision because it requires them to pay the latter from their own budgets. The case law on this means that complainants against PADC decisions have to pay PADC legal representation costs. PADC actively seeks its costs at the expense of losing complainants, claiming to be bound by law to do so.⁴²⁵ Where PADC is the losing party, SAC and the lower court order it to pay expenses too.

⁴²³ Margarita Ilieva & Desislava Simeonova, Study on Equality Bodies set up under Directives 2000/43/EC, 2004/113/EC and 006/54/EC (VT/2009/012), Bulgaria, April 2010: Focus Group Discussion with PADC members and staff.

⁴²⁴ *Inter alia*, Supreme Administrative Court, Decision No. 10734 of 1.09.2014 in case No. 1463/2014; Decision No. 1048 of 27 January 2014 in case No. 8033/2013; Decision No. 1667 of 6 December 2014 in case No. 10013/2013; Decision No. 3645 of 14 March 2014 in case No. 12679/2013.

⁴²⁵ PADC letter No. 44-00-1609 of 20 April 2015 addressed to an individual named Boyko Boev.

12 LATEST DEVELOPMENTS IN 2015

12.1 Legislative amendments

On 25 March 2015, Parliament adopted a bill to amend two provisions of the Protection Against Discrimination Act: Article 9 on the shift of the burden of proof, and a new provision which partially defines 'sex' as a protected ground to include transgender status. The amendments were published in the State Gazette on 7 April 2015. Article 9 as amended: "In proceedings for protection against discrimination, after the party claiming to have been discriminated against, *produces (presents)* facts from which an *inference* that discrimination is at hand can be made, the respondent party has to prove that the principle of equal treatment was not breached" (emphasis added). New subsection 17 in § 1 of the Additional Provision: "Within the meaning of art. 4, section 1 [listing the protected grounds] the ground of 'sex' includes also gender reassignment cases." These two amendments are separate and not interlinked.

Leading to the amendments, a bill was introduced in Parliament by the Government on 16 January 2014 (see flash report 1190-BG-39). In terms of Article 9, it read: "In proceedings for protection against discrimination, after the party claiming to have been discriminated against, *establishes* facts from which an inference that discrimination is at hand can be made, the respondent party has to prove that the principle of equal treatment was not breached." Subsequently, while in Parliament, between the first and second hearings, the bill underwent an unannounced change that replaced "establishes" with "produces (presents)".⁴²⁶ That change was not discussed when the bill was voted. Prior to the amendment, the law read: "In proceedings for protection against discrimination, after the party claiming to have been discriminated against, *proves* facts from which a *conclusion* that discrimination is at hand can be made, the respondent party has to prove that the principle of equal treatment was not breached."

The amended provision on the shift of the burden of proof is meant to bring national law closer to the directives' intention of making an inference of discrimination sufficient for the respondent to be required to carry out a rebuttal in order for a discrimination claim to fail. Substituting "conclusion" with "inference" makes it clearer that claimants' onus of proof is not stringent. Furthermore, while "establishes" in the initial version of the bill was synonymous with "proves" in the law before the amendments, "produces (presents)" in the amended version is a clear improvement, effectively alleviating complainants' onus of proof. The new definition of 'sex' makes that concept more inclusive than the ordinary meaning of the word, explicitly covering transgender. The amendments bring national law in stricter compliance with the Recast Directive 2006/54/EC, and with Directives 2000/43/EC and 2000/78/EC.

The original draft law was introduced in Parliament and adopted at first hearing within a day. Accordingly, no meaningful discussion took place at that stage. No such discussion took place between the first and second hearings either. However, the bill underwent a change of wording at that stage that was not announced, or discussed. Both versions of the bill were drafted without any, or any meaningful, civil society involvement. Whether any NGOs were consulted before the amendments were drafted is not publicly known. A Bulgarian Helsinki Committee proposal to use "gender identity" or "gender expression" instead of "gender reassignment", officially introduced into Parliament between the two hearings, was ignored.

While Article 9 prior to the amendments was still arguably in compliance with the directives (because a. it only required a possible conclusion, and not a necessary one, which is comparable to an inference; and b. while it required claimant to prove facts, rather than just assert them, that requirement could be interpreted correctly to expect claimant to only

⁴²⁶ Second version of the bill: <http://parliament.bg/bills/43/402-01-12.pdf>. The first version is no longer available on Parliament's website.

prove the primary facts: less favourable treatment, a comparable situation, an actual/perceived protected ground, but not the causal link between the ground and the treatment), in practice, both judges and Protection Against Discrimination Commission members showed a lack of understanding of the implications of this special rule. This insufficiency did affect the case law, especially in cases of sex discrimination where the protected ground tends to be more concealed as a reason for less favourable treatment. The amendments clearly indicate that claimants should only bear an alleviated onus of proof in order for the court to make a presumption of discrimination, while respondents need to actively produce evidence in order to rebut any such presumption.

However, it will be a matter for judicial interpretations what it is to “produce (present)” facts. In legal proceedings discourse, one asserts (alleges, or claims) facts, and one produces (presents) evidence, whereby, if successful, one proves facts, and then asserted facts become established facts for the court. To “produce (present) facts” will require construction. It will be an issue whether it is enough for a claimant to only assert a fact, or proof is necessary too. In the latter case, the question will remain what sort or amount of proof is necessary.

The new subsection in the Additional Provisions of PADA attempts to bring the law closer to the Recast Directive and CJEU’s case law (Case C13-94, *P. v. S.*, and Case C-117/01, *K.B.*) with respect to the applicability of the principle of equal treatment for men and women to gender reassignment cases.

Internet link source:

<http://dv.parliament.bg/DVWeb/showMaterialDV.jsp?idMat=93361>.

12.2 Case law

Case development: On 19 May 2015, the Supreme Court of Cassation (SCC) and the Supreme Administrative Court (SAC)⁴²⁷ jointly made an interpretative ruling concerning, inter alia, the issue of jurisdiction in court discrimination cases brought against public authorities. For years, the case law had been contradictory on this issue, with some of the civil courts deciding that the administrative courts were competent, and vice versa. Under the Protection Against Discrimination Act (PADA), the civil courts have general competence to hear all cases of alleged discrimination, regardless of who the respondent is, public or private (Article 71 (1)). The administrative courts only have jurisdiction to hear claims for damages against public respondents when the claimant first resorted to the equality body and obtained a favourable ruling from it (Article 74 (2)). In such cases, the applicable procedure is the State and Municipal Liability for Damages Act (SMLDA).⁴²⁸ However, under general administrative law (Administrative Procedure Code, Article 128 (1.5)), the administrative courts are the ones competent to hear all compensation claims against public bodies. As a result and because of institutional reasons (a desire to reduce their case load), the civil courts in many cases refused to hear antidiscrimination compensation claims when there had been no equality body proceedings first, and referred those claims to the administrative courts. The administrative courts, based on PADA, referred such cases to the civil courts. To resolve this, and other, unrelated to PADA, issues of contradiction in the case law, in 2014, the two Supreme Courts initiated ex officio an interpretative case.

By Interpretative ruling in case 2/2014⁴²⁹ the Courts held that the administrative courts were competent to hear all discrimination compensation claims against public bodies. In a dissenting opinion, ten justices (out of 103) held that the administrative courts were only competent to hear discrimination compensation claims against public bodies when the

⁴²⁷ Върховен касационен съд; Върховен административен съд.

⁴²⁸ Закон за отговорността на държавата и общините за вреди.

⁴²⁹ Тълкувателно постановление 2/2014. Supreme Court of Cassation and Supreme Administrative Court, Interpretative ruling of 19 May 2015 in interpretative case 2/2014.

claimant first resorted to the equality body and obtained a finding of discrimination from it; in all other cases, the civil courts were competent.

By implication, the civil courts will be competent in discrimination cases against public authorities where no compensation is sought, as well as in all discrimination cases against private parties.

This ruling which contradicts PADA may entail a risk that, in discrimination compensation claims against public authorities, the administrative courts may not apply the special procedural provisions of PADA concerning the shifting burden of proof and exemption from taxes and fees, deciding instead that only the SMLDA procedure was applicable.

Internet link source:

http://www.vks.bg/Dela/2014_02_VKS_VAS_postanovlenie.pdf (in Bulgarian) Last accessed 20 August 2015

Disability

Name of the court: Supreme Administrative Court

Date of decision: 08 January 2015

Name of the parties: "Festa Dolphinarium" v. Lyudmil Velchev and Protection Against Discrimination Commission

Reference number: Decision N 158 of in administrative case N 7092/2014

Address of the webpage:

<http://www.sac.government.bg/court22.nsf/d038edcf49190344c2256b7600367606/0ca62145158ce99ec2257db2005153bd?OpenDocument> (in Bulgarian)

Brief summary: A person with a disability (limited mobility) complained before the equality body (EB) that the "dolphinarium" in Varna was not architecturally accessible. The EB ruled that the company running the dolphinarium was indeed liable for discrimination, maintaining architectural inaccessibility being a form of discrimination under the law. This decision was then confirmed on appeal by the first-instance administrative court. The defendant company appealed the decision of the first-instance court before the Supreme Administrative Court (SAC).

SAC held: "[T]here is a discriminatory result vis-à-vis a person with disabilities within the meaning of article 5 of the Protection Against Discrimination Act. The ramps installed by the company do not secure independent access, and access is limited and dependent on another's help. It is established that the architectural environment is inaccessible; the ramps are immovable [...] and cannot be adjusted to different wheelchair types. The special privilege afforded in terms of free admission to the dolphinarium for persons with disabilities has no legal relevance to the dispute." The SAC confirmed the lower court's confirmation of the penalty imposed on the company by the equality body, and the latter's instruction for correctional measures. The penalty was in the amount of BGN 500 (EUR 250), a minimum amount under the law. The instruction was to "abort the discrimination on grounds of disability consisting of maintaining an inaccessible architectural environment outside and inside the building" and to "undertake the necessary action for constructing access for persons with disabilities to and inside the building".

Name of the court: Supreme Administrative Court

Date of decision: 26 January 2015

Name of the parties: Nelly Simeonova-Racheva, Nevyana Racheva, Trifon Kolev and Center for the Defense of Rights in Healthcare v. Minister of Healthcare

Reference number: Decision N 820 of in administrative case N 3498/2014

Address of the webpage:

<http://www.sac.government.bg/court22.nsf/d038edcf49190344c2256b7600367606/04093ee4486c151dc2257dd200418a39?OpenDocument> (in BG)

Brief summary: Three affected individuals (close relatives of deceased cancer patients in a small town) and an NGO defending health rights complained before the equality body (EB) that the Minister of Healthcare did not provide facilities for equal quality cancer treatment for all patients. The complainants alleged that their close relatives who died of cancer were discriminated against on grounds of disability and personal status. The deceased were not informed about contemporary treatments that were only available in the two biggest cities, and were treated with the outdated equipment available locally. The EB ruled that the Minister was liable for harassment on grounds of disability: unwanted conduct consisting of an omission to provide treatment available elsewhere, resulting in a threatening (intimidating) environment for persons with cancer. It issued an injunction for the Minister to undertake positive/ special measures to secure persons with cancer timely and quality treatment on an equal basis. It recommended to the Council of Ministers to introduce in Parliament a draft law to equalise opportunities for persons with cancers by regulating in detail and with better safeguards their right to health information. The EB reasoned that: persons with cancers were a highly vulnerable group, and cancer was a form of disability; the authorities were under a duty under national and international law to take measures to equalise their opportunities; an integral part of such measures was to secure accessible health services, and that corresponded also to patients' right to life; at least 8000 cancer patients per year did not receive vital timely treatment due to insufficiency of equipment in terms of both quality and quantity; in practice, all cancer patients were on waiting lists causing them to miss the optimal time for treatment; the Minister's omission to secure quality and accessible therapy compounded persons with cancers' unequal situation, and by failing his duties under the law to undertake positive/ special measures he infringed their right to equal treatment and to equal opportunities; the intimidating environment consisted of being subjected to waiting lists and missing the optimal time for treatment, as well as a lack of sufficient and contemporary equipment, a lack of sufficient public funding for treatment, a lack of social workers, a lack of up-to-date statistical data, availability of specific apparatus in only two locations, etc. Cancer patients in areas where no high technology for treatment was available suffered multiple discrimination on grounds of disability and personal status, the latter construed to include a person's place of residence. Inadequate health information further compounded those persons' inequality.

On appeal, the first-instance court repealed this decision. The complainants appealed the lower court's decision before the Supreme Administrative Court (SAC).

SAC held that while a sickness did not equate disability, certain cancers did meet the definition of disability under international law. SAC rejected the EB's reasoning that a person's place of residence was part of the protected ground of 'personal status'. SAC agreed, however, with the EB's finding that the Minister's 'unwanted conduct' consisted of his omission to undertake the necessary action expressly required under art. 10 and 11 of the Protection Against Discrimination Act (PADA) (public authorities' general equality duty, including for positive measures) in order to guarantee persons with disabilities resulting from cancers the right to healthcare. SAC held that any conduct hindering the right to health was 'unwanted' within the meaning of the harassment ban. The Court agreed with the EB's finding that the Minister's omission consisted of a failure to fix guarantees for the provision of effective and adequate information for patients concerning the types of treatment available and their respective advantages and disadvantages. SAC confirmed that the omission included not guaranteeing persons with oncological disabilities equal access to quality treatment. The Court confirmed that the lack of a de facto opportunity for persons with oncological disabilities to access the highest healthcare standard resulted from the Minister's omission to undertake action to remove the reasons for their hindered access. According to the Court, the fact that certain patients were unable to access any treatment, not just the best available treatment, due to a lack of medical equipment and necessary funding infringed their right to access to healthcare. The Court agreed that the unavailability of statistical data concerning cancers was a further omission by the Minister. The Court held that all those omissions affected patients' opportunities for timely and

effective treatment, impinging upon their dignity. The Court reasoned that the Minister's unwanted conduct created an environment threatening to patients' health and life. SAC upheld the EB's injunction on the Minister to undertake the requisite action under art. 10 and 11 PADA.

Name of the court: Supreme Administrative Court

Date of decision: 16 July 2015

Name of the parties: Petya Milkova v. the Privatisation and Post-Privatisation Agency

Reference number: Decision No. 8771 in administrative case No. 12369/2014

Address of the webpage:

<http://www.sac.government.bg/court22.nsf/d038edcf49190344c2256b7600367606/e8204a2d6e811432c2257e8400317137?OpenDocument> (in Bulgarian)

Brief summary: SAC, as a last instance, made of its own motion a ruling to refer to the Court of Justice of the EU (CJEU) a set of questions concerning special protection on disability grounds against dismissal of public servants. The complainant in the case, Petya Milkova, a person with a psychosocial disability, was a public servant at the Privatisation and Post-Privatisation Agency (the Agency), a governmental body, until February 2014 when she was made redundant by order of the Agency's executive director. She appealed against this order, claiming that under the Labour Code, Article 333 (1.3), the Agency had a duty to ask the Labour Inspectorate for prior permission to make her redundant because she was a person with disability. The Sofia City Administrative Court (SCAC) held that such special protection under the Labour Code did not apply to her as she was a public servant. The Public Servant Act applied to her and it did not provide for such protection, nor did it refer to the Labour Code in that respect. The SCAC confirmed the redundancy order, and Petya Milkova appealed against its ruling before the SAC.

Considering that public servants with disabilities and employees with disabilities (governed under the Labour Code) were treated differently under the legislation in terms of special protection against dismissal, SAC decided to ask the CJEU whether the Convention on the Rights of Persons with Disabilities (CRPD), the Charter of Fundamental Rights of the EU and Directive 2000/78/EC should be interpreted as allowing such a difference.

SAC formulated the following questions for the CJEU:

1. Does Article 5, section 2 CRPD allow national legislation which only provides for special protection against dismissal for persons with disabilities employed under a labour relationship but not for public servants having the same disabilities?
2. Does Directive 2000/78/EC, in particular, Article 4 allow national legislation which only provides special protection against dismissal to persons with disabilities employed under a labour relationship but not to public servants with the same disabilities?
3. Does Article 7 of Directive 2000/78/EC allow special protection against dismissal to be provided to persons with disabilities employed under a labour relationship but not to public servants with the same disabilities?
4. In case the answers to the first and third questions are negative, should the protection provided for under national legislation to persons with disabilities employed under a labour relationship be also applied to public servants with the same disabilities?

SAC is essentially asking whether the supranational bans on *any* discrimination against persons with disabilities mean that national law may not differentiate between persons with disabilities on grounds other than disability, such as who their employer is (public or private) and the nature of their employment contract (labour or public service). SAC also wishes to know whether special protection (positive measures) which supranational law does not mandate but the national legislator chooses to provide for may apply to some but not to all persons with a particular disability. SAC proceeds from the assumption based on

CRPD (Article 5 (1-2)) that persons with disabilities are entitled to equal protection without *any* discrimination and to effective protection against discrimination on *all grounds*.

It is a positive development that SAC expressly states in its reasons that legislation and case law may constitute discrimination. In 2014, SAC held the opposite in several cases, jeopardizing the scope of equality protection on the national level.

Roma

Name of the court: Court of Justice of the EU (CJEU)

Date of decision: 16 July 2015

Name of the parties: CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia

Reference number: Case C-83/14

Address of the webpage:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=165912&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=329479>

Brief summary: CJEU gave a preliminary ruling in a case of alleged discrimination of a non-Roma woman who was denied access to her electricity meter, along with her Roma neighbours. Ms Nikolova runs a grocer's shop in a district inhabited mainly by Roma. In 1999 and 2000, CHEZ RB, an electricity distribution undertaking, installed the electricity meters for all the consumers of that district at an inaccessible height of 6-7m. In the non-Roma districts, the meters are placed at a height of 1.70m, available for monitoring by consumers. According to CHEZ RB, that difference in treatment is justified by frequent tampering with and damage to meters and by numerous unlawful connections to the network by the Roma. In December 2008, Ms Nikolova lodged a complaint with the Commission for Protection against Discrimination (the KZD), contending that the installation of the meters in an inaccessible location was due to the fact that mostly the inhabitants of the district were Roma. Although Ms Nikolova was not Roma herself, she considered that she too was suffering discrimination. The KZD found that Ms Nikolova had indeed been discriminated against compared with the customers whose meters were in accessible locations. CHEZ RB brought an appeal against that decision before the Sofia City Administrative Court. That court asked the Court of Justice whether the contested practice amounts to discrimination on grounds of ethnic origin.

CJEU held that the installation of electricity meters at an inaccessible height in a predominantly Roma district was liable to constitute discrimination on the grounds of ethnic origin when such meters were installed in other districts at a normal height. Even assuming that it was established that there had been abuse of the meters in that district, such a practice seemed disproportionate to the objectives of ensuring the security of the electricity transmission network and the due recording of electricity consumption.

CJEU held that the principle of equal treatment applies not only to persons who have a certain ethnic origin, but also to those who, although not themselves a member of the ethnic group concerned, suffer, together with the former, less favourable treatment or a particular disadvantage on account of a discriminatory measure. The presence in the district of inhabitants who are not Roma did not in itself rule out that the contested practice was imposed on account of the ethnic origin shared by most of the district's inhabitants (namely, Roma ethnic origin).

The evidence to be taken into consideration included, in particular, the fact that the practice at issue had been established only in districts where Roma are the majority. Also, the fact that CHEZ RB had asserted before the KZD that the damage and unlawful connections were mainly due to Roma was capable of suggesting that the contested practice was based on ethnic stereotypes. The Bulgarian court will also have to take account of the compulsory, widespread and lasting nature of the practice. That practice

affects without distinction all the inhabitants of the district, irrespective of whether their individual meters have been the subject of abuse and, if so, who has committed that abuse. Thus, the practice at issue may be perceived as suggesting that the inhabitants of that district are, as a whole, considered to be potential perpetrators of unlawful conduct. CJEU held that the practice amounts to unfavourable treatment of the inhabitants on account of both its offensive and stigmatising nature and the fact that it is next to impossible for them to check their electricity meters for the purpose of monitoring their consumption.

If the Bulgarian court were not to hold that the practice is directly discriminatory, that practice could, in principle, constitute indirect discrimination. Assuming that the practice had been carried out exclusively in order to respond to abuse committed in the district concerned, it would be based on apparently neutral criteria while affecting persons of Roma origin in considerably greater proportions. Thus, it gave rise to a disadvantage in particular for Roma compared to non-Roma. The protection of the security of the electricity transmission network and the due recording of electricity consumption are legitimate aims but it is necessary for CHEZ RB to prove that abuse has in fact been committed in respect of the electricity meters in the district concerned and that a risk of such abuse still remains. Furthermore, the Bulgarian court will have to examine whether other appropriate and less restrictive measures existed for resolving the problems encountered.

Even if no other measure as effective as the practice complained of exists for the purpose of achieving the aims, that practice seems to be disproportionate to those aims and to the legitimate interests of the inhabitants of the district, in the light in particular of the offensive and stigmatising nature of the practice and of the fact that it has, without distinction and for a very long time, denied the inhabitants of an entire district the possibility of monitoring their electricity consumption regularly.

In essence, the Court's ruling recognised the complainant as a victim of discrimination regardless of not being Roma herself. She suffered discrimination by association to her Roma neighbours. The provider company needed to prove their allegations of tampering and other unlawful conduct invoked by them as a reason for the impugned treatment. However, their very allegations that Roma were responsible for such conduct amounted to an indication that the practice was racially-based. Furthermore, even if proven, such facts could not serve as a basis for treating all the inhabitants as potential offenders regardless of their individual history. The practice stigmatised all Roma as perpetrators and deprived them of a consumer right recognised under EU directives: the right to monitor and control their electricity consumption. The exercise of that right was blocked by the impugned practice. That, and its offensive nature, made the practice unjustifiable.

CJEU considered that the Directive precluded a national legal provision, such as the one existing under Bulgarian legislation, to the effect that unfavourable treatment for purposes of equality protection is one that prejudices, directly or indirectly, rights or legitimate interests. It considered that provision to be a restrictive interpretation of the Directive which bans "any" discrimination. However, within the Bulgarian legal system the expression "rights and legitimate interests" covers any activity. It is hard to see what would remain outside of this definition. Therefore, a finding that Bulgarian law is in breach of the Directives in that respect appears debatable.

In 2015, there were no developments in the case at the national level.⁴³⁰

A prevailing trend in Roma litigation is action against hate speech – complaints by Romani individuals and public interest motions by NGOs and others to the equality body alleging harassment and incitement to discrimination, as well as to the Prosecutor's

⁴³⁰ In 2016 – outside of the reporting period – three court hearings took place in January, March and May. A further hearing is scheduled for October 2016.

Office in more serious cases amounting to incitement to hatred or discrimination under the Criminal Code. The Prosecutor's Office refuses to deal with such cases reasoning either that it was a matter of free expression, or effectively agreeing with the racist slander describing it as a matter of public concern, or referring to more technical impediments to enforcement, such as that no one is criminally liable for party programs because those were adopted by collective bodies. The equality body generally takes an effective stance against hate speech.

Two other trends are complaints to the Prosecutor's Office in cases of hate-based anti-Roma violence, and challenges against the inaccessibility of electric meters in Roma residential areas. Figures are not publicly available.

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Please list below the **main transposition and anti-discrimination legislation** at both federal and federated/provincial level.

Country: Bulgaria

Date: 31 December 2015

Title of legislation (including amending legislation)	Title of the law: Protection Against Discrimination Act Abbreviation: PADA Date of adoption: 16 September 2003 Latest amendments: 2 August 2013 Entry into force: 7 April 2015 Web link: http://lex.bg/bg/laws/ldoc/2135472223 Grounds covered: sex, race, national origin, ethnicity, human genome, nationality, origin, religion or faith, education, beliefs, political affiliation, personal or social status, disability, age, sexual orientation, family status, property status, or any other ground provided for by law or by international treaty Bulgaria is a party to.
	Civil/administrative/criminal law: Civil
	Material scope: Universal
	Principal content: harassment, sexual harassment, victimisation, incitement, inaccessible environment, racial segregation); universal personal scope; reasonable accommodation duties; positive duties; shifting burden of proof; specialised body to adjudicate and promote equality; judicial remedy; class actions and actio popularis claims; NGO interveners; exemption from costs.
Title of legislation (including amending legislation)	Title of the law: Integration of Persons with Disabilities Act Abbreviation: IPDA Date of adoption: 2 September 2004 Latest amendments: 13 October 2015 Entry into force: 1 January 2005 Web link: http://lex.bg/bg/laws/ldoc/2135491478 Grounds covered: disability
	Civil/administrative/criminal law: Civil
	Material scope: Universal
	Principal content: Bans direct and indirect discrimination; reasonable accommodation duties employment, education, infrastructure etc.; positive measures.
Title of legislation (including amending legislation)	Title of the law: Ordinance No 4 on Planning, Implementing and Maintaining Buildings in Accordance with the Requirements of an Accessible Environment for the Population, including People with Disabilities Abbreviation: n/a Date of adoption: 1 July 2009 Latest amendments: 15 July 2011 Entry into force: 14 July 2009 Web link: http://lex.bg/bg/laws/ldoc/2135639181 Grounds covered: disability
	Civil/administrative/criminal law: Administrative
	Material scope: Architecture and infrastructure
	Principal content: Bans direct and indirect discrimination; reasonable accommodation duties employment, education, infrastructure etc.; positive measures

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Country: Bulgaria

Date: 31 December 2015

Instrument	Date of signature (if not signed please indicate) Dd/mm/yyyy	Date of ratification (if not ratified please indicate) Dd/mm/yyyy	Derogation s/ reservation s relevant to equality and non- discriminati on	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals ?
European Convention on Human Rights (ECHR)	Yes 7 May 1992	Yes 7 September 1992		Yes	Yes
Protocol 12, ECHR	No	No		No	n/a
Revised European Social Charter	Yes 21 September 1998	Yes 7 June 2000		Ratified collective complaints protocol? Yes	Yes
International Covenant on Civil and Political Rights	Yes 8 October 1968	Yes 21 September 1970		Yes	Yes
Framework Convention for the Protection of National Minorities	Yes 9 October 1997	Yes 7 May 1999		n/a	Yes
International Covenant on Economic, Social and Cultural Rights	Yes 8 October 1968	Yes 21 September 1970		No	Yes
Convention on the Elimination of All Forms of Racial Discrimination	Yes 1 June 1966	Yes 8 August 1966		Yes	Yes
Convention on the Elimination of Discrimination Against Women	Yes 17 July 1980	Yes 8 February 1982		Yes	Yes

Instrument	Date of signature (if not signed please indicate) Dd/mm/yyyy	Date of ratification (if not ratified please indicate) Dd/mm/yyyy	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
ILO Convention No. 111 on Discrimination	Yes unavailable	Yes 22 July 1960		n/a	Yes
Convention on the Rights of the Child	Yes 31 May 1990	Yes 3 June 1991		n/a	Yes
Convention on the Rights of Persons with Disabilities	Yes 27 September 2007	Yes 26 January 2012		No	Yes

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