



European equality law review

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

2016/1

IN THIS ISSUE

- The New Architecture of EU Equality Law after CHEZ: Did the Court of Justice reconceptualise direct and indirect discrimination?
- The Istanbul Convention and the EU: Converging standards on violence against women?
- Age Discrimination in the light of CJEU case law
- Gender Stereotyping in the case law of the EU Court of Justice

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Contents

Introduction on the state of play	v
Members of the European network of legal experts in gender equality and non-discrimination	viii
The New Architecture of EU Equality Law after CHEZ:	
Did the Court of Justice reconceptualise direct and indirect discrimination?	1
<i>Christopher McCrudden</i>	
The Istanbul Convention and the EU: Converging standards on violence against women?	11
<i>Kevät Nousiainen</i>	
Age Discrimination in the light of CJEU case law	22
<i>Declan O'Dempsey</i>	
Gender Stereotyping in the case law of the EU Court of Justice	37
<i>Alexandra Timmer</i>	
 European case law update	
Court of Justice of the European Union	48
European Court of Human Rights	54
 Key developments at national level in legislation, case law and policy	
Austria	60
Belgium	62
Bulgaria	67
Croatia	68
Cyprus	69
Czech Republic	75
Denmark	79
Estonia	85
Former Yugoslav Republic of Macedonia	87
France	87
Germany	90
Greece	91
Hungary	95
Iceland	101
Ireland	102
Italy	105
Latvia	107
Liechtenstein	107
Malta	108
Montenegro	109

The Netherlands	110
Norway	112
Poland	113
Portugal	115
Romania	116
Serbia	119
Slovakia	121
Slovenia	125
Spain	126
Sweden	127
Turkey	128
United Kingdom	130

Introduction on the state of play¹

This is the third issue of the biannual European equality law review, produced by the European network of legal experts in gender equality and non-discrimination. This issue provides an overview of legal and policy developments across Europe, and reflects as far as possible the state of affairs from 1 July to 31 December 2015.

The aim of the European network of legal experts in gender equality and non-discrimination is to provide the European Commission and the general public with independent information regarding gender equality and non-discrimination law, and more specifically the transposition and implementation of the EU equality and non-discrimination Directives. In addition to this biannual review, the Network produces annual country reports, thematic reports and comparative analyses. All publications and other relevant information can be found on the Network's website: www.equalitylaw.eu.

In this issue

This third issue contains one section relating the most recent case law of the Court of Justice of the European Union and of the European Court of Human Rights and one section detailing the most recent developments in legislation, case law and policy on the national level,² as well as four in-depth analytical articles. In the field of non-discrimination law, Christopher McCrudden, the Network's senior expert on EU and human rights law, first provides an article examining the consequences and legal implications of a recent landmark decision of the Court of Justice of the EU,³ exploring whether the Court has redefined the concepts of direct and indirect discrimination, in particular with regard to the ground of racial or ethnic origin. Declan O'Dempsey has authored the second non-discrimination article which provides an up-to-date overview of the Court of Justice's rich and evolving body of case law on age discrimination in the employment field. In the field of gender equality, the first article is authored by Kevät Nousiainen, the Network's national gender equality expert for Finland, and discusses the Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention) and the EU, with a focus on converging standards on violence against women. The Network's acting specialist coordinator for gender equality, Alexandra Timmer, then provides an article examining gender stereotypes as they appear in the case law of the Court of Justice of the EU.

European policy developments⁴

In July 2015, the Council of Europe's Commission against Racism and Intolerance (ECRI) presented its Annual Report for 2014.⁵ The main trends noted in the report include a dramatic increase in antisemitism, Islamophobia, online hate speech and xenophobic political discourse, across Europe.

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- 1 The work of the European Commission with regards to gender equality law can be followed on its website: <http://ec.europa.eu/justice/gender-equality/>. Similarly, its work related to tackling discrimination on racial or ethnic origin, religion or belief, disability, age and sexual orientation can be found here: <http://ec.europa.eu/justice/discrimination/>. All the Network's publications are available on the Commission website.
 - 2 On the basis of information provided by the national experts, Erin Jackson from Utrecht University drafted the sections regarding gender equality while Isabelle Chopin, Catharina Germaine and Jone I. Elizondo from the Migration Policy Group drafted those regarding anti-discrimination and made the final compilation.
 - 3 Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*, 16 July 2015.
 - 4 This section, as the rest of the Review, covers the period of 1 July to 31 December 2015.
 - 5 Annual report on ECRI's activities, covering the period from 1 January to 31 December 2014, CRI (2015) 26, available at: http://www.coe.int/t/dghl/monitoring/ecri/activities/Annual_Reports/Annual%20report%202014.pdf, last accessed 7 June 2016.

In October 2015, an important addition to the relatively weak body of equality data available in Europe was made as a special module of the Eurobarometer was published on Discrimination in the EU in 2015.⁶ The survey explores attitudes and perceptions of Europeans towards discrimination on the grounds of gender, ethnic origin, religion or belief, age, disability, sexual orientation and gender identity as well as their opinions on different policy measures to combat discrimination. In addition, the survey looks into the social acceptance of specific groups belonging to ethnic and religious minorities and of LGBT persons.

With regard to gender equality law, the European Commission held two public consultations during the period covered by this issue. The first was a public consultation on the implementation and application of Council Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security. It took place from 21 September to 14 December 2015, and welcomed views from citizens, stakeholders, EU Member States, EU institutions, and intergovernmental and non-governmental organisations, among others. The second consultation followed the Commission's publication of a Roadmap to address the challenges of work-life balance faced by working families⁷ and concerned possible actions to address the challenges of work-life balance faced by working parents and caregivers. A public questionnaire was made available on 25 November 2015 on the possible tools at EU level to support work-life balance.

In December 2015, the Commission showed its commitment to combating discrimination on the grounds of sexual orientation and gender identity by publishing its List of Actions to Advance LGBTI Equality.⁸ The publication is to be implemented during the period 2016-2019 and contains a number of measures within areas such as improving rights and ensuring legal protection; monitoring and enforcement of existing rights; reaching citizens, fostering diversity and non-discrimination; and supporting key actors responsible for promoting and advancing equal rights for LGBTI people in the EU.

In addition, the Commission also published the Strategic Engagement for Gender Equality 2016-2019 in December 2015.⁹ The report outlines the Commission's commitment to and strategy for promoting equality between men and women. The Commission outlines a reference framework for increased effort at all levels based on the continuation of five key areas of action from the 2010-2015 strategy: equal economic independence for women and men; equal pay for work of equal value; equality in decision-making; dignity, integrity and ending gender-based violence; and promoting gender equality beyond the EU.

Recent Network publications

The Network has recently published four thematic reports; two concerning gender equality law and two concerning non-discrimination law. The two latter reports are complementary as they both concern duties to provide reasonable accommodation for persons with disabilities. The first was authored by Delia Ferri and Anna Lawson and provides a legal analysis of the duties of employers to provide reasonable accommodation for job seekers and employees with disabilities.¹⁰ The second was authored by Lisa Waddington and Andrea Broderick and looks into duties to provide reasonable accommodation for

6 Special Eurobarometer 437 "Discrimination in the EU in 2015", available at: <http://ec.europa.eu/COMMFrontOffice/PublicOpinion/index.cfm/Survey/getSurveyDetail/instruments/SPECIAL/surveyKy/2077>, last accessed 24 May 2016.

7 http://ec.europa.eu/smart-regulation/roadmaps/docs/2015_just_012_new_initiative_replacing_maternity_leave_directive_en.pdf.

8 The list, published on 7 December 2015, is available at: http://ec.europa.eu/justice/discrimination/files/lgbti_actionlist_en.pdf, last accessed 24 May 2016.

9 The report is available at: http://ec.europa.eu/justice/gender-equality/document/files/strategic_engagement_en.pdf, accessed 17 May 2016.

10 Ferri, D., Lawson, A. (2016), *Reasonable accommodation for disabled people in employment*, European network of legal experts in gender equality and non-discrimination, available at: <http://www.equalitylaw.eu/downloads/3724-reasonable-accommodation-for-disabled-people-in-employment>, last accessed 24 May 2016.

persons with disabilities beyond the employment field, across the EU Member States.¹¹ The first thematic report on gender equality is ‘Legal implications of EU accession to the Istanbul Convention’.¹² Authored by Kevät Nousiainen and Christine Chinkin, the thematic report clarifies the legal preconditions and impact of the possible accession of the EU to the Istanbul Convention. It also considers the Convention in relation to EU law and describes the current positions of the 28 EU Member States. The second thematic report, authored by Aileen McColgan, provides a comparative analysis of the extent to which 31 European states have adopted measures that promote the reconciliation of working and private and family life. The report, ‘Measures to address the challenges of work-life balance in the EU Member States, Iceland, Liechtenstein and Norway’,¹³ focusses specifically on measures (such as flexible working arrangements, family-related leave and carers’ leave) which go beyond those required by EU law.

In addition, two country reports for each of the 35 countries of the Network, one for gender equality law and one for non-discrimination law, as well as executive summaries translated into French and German, have been finalised and are now available on the Network’s website (www.equalitylaw.eu). They are authored by the Network’s national experts and provide a detailed overview of the relevant legal frameworks including case law. Finally, on the basis of the country reports produced in 2015, one comparative analysis for each of the two strands of the Network have been published.¹⁴ They provide a detailed analysis of the transposition and implementation across the 35 countries of the Network of EU non-discrimination law, on the one hand, and of gender equality law on the other.

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- 11 Waddington, L., Broderick, A. (2016), *Disability law and reasonable accommodation beyond employment*, European network of legal experts in gender equality and non-discrimination, available at: <http://www.equalitylaw.eu/downloads/3795-disability-law-and-reasonable-accommodation-beyond-employment>, last accessed 24 May 2016.
 - 12 Chinkin, C., Nousiainen, K. (2016), *Legal implications of EU accession to the Istanbul Convention*, European network of legal experts in gender equality and non-discrimination, available at: <http://www.equalitylaw.eu/downloads/3794-legal-implications-of-eu-accession-to-the-istanbul-convention>, accessed 17 May 2016.
 - 13 McColgan, A., (2015), *Measures to address the challenges of work-life balance in the EU Member States, Iceland, Liechtenstein and Norway*, European network of legal experts in gender equality and non-discrimination, available at: <http://www.equalitylaw.eu/downloads/3631-reconciliation>, accessed 17 May 2016.
 - 14 Chopin, I., Germaine, C. (2016), *A comparative analysis of non-discrimination law in Europe 2015*, European network of legal experts in gender equality and non-discrimination and Timmer, A., Senden, L. (2016), *A comparative analysis of gender equality law in Europe 2015*, European network of legal experts in gender equality and non-discrimination, both available at <http://www.equalitylaw.eu/publications/comparative-analyses>, last accessed 24 May 2016.

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The New Architecture of EU Equality Law after CHEZ:

Did the Court of Justice reconceptualise direct and indirect discrimination?

Christopher McCrudden*

Introduction

The Court of Justice's decision of 16 July 2015, in Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia*, is a critically important case for two main reasons. First, it represents a further step along the path of addressing ethnic discrimination against Roma communities in Europe, particularly in Bulgaria, where the case arose. Second, it provides interpretations (sometimes *controversial* interpretations) of core concepts in the EU anti-discrimination directives that will be drawn on in the application of equality law well beyond Bulgaria, and well beyond the pressing problem of ethnic discrimination against Roma.

This article will focus particularly on the second issue, the potentially broader implications of the case. In particular, it will ask whether the Court of Justice's approach in *CHEZ* is subtly redrawing the boundaries of EU equality law in general, in particular by expanding the concept of direct discrimination, or whether the result and the approach adopted is *sui generis*, one depending on the particular context of the case and the fact that it involves allegations of discrimination against Roma, and therefore of limited general application.

CHEZ in the Bulgarian context

Before turning to these broader issues, however, the importance of the case in the Bulgarian context deserves attention. For many years, a practice has been operated by CHEZ, one of the major Bulgarian suppliers of domestic electricity, of distinguishing between urban districts in the way in which electricity meters were provided to consumers of its electricity.¹ In urban areas which were inhabited mainly by persons of Roma origin, the meters were placed on pylons forming part of the overhead electricity supply network at a height of between six and seven meters; by contrast, in other areas, they were placed at a height of 1.70 meters, usually on the consumer's own property. The reason that CHEZ gave for the difference was that it was necessary to place the meters higher in certain areas in order to prevent fraud, in particular by making unlawful connections to the electricity supply by people in these areas more difficult. The areas chosen were those in which the problem of illegal connections and tampering with the meters was particularly prevalent.

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1 The facts stated here are abstracted from the more detailed finding of the CJEU, at Paragraphs [21] to [23].

The national equality body in Bulgaria, the *Komisija za zashtita ot diskriminatsia* (KZD), has for many years been concerned with what they consider the unlawful discrimination against Roma that this practice involved, and it has issued several findings of unlawful discrimination against CHEZ in this regard, which are routinely appealed to the Bulgarian courts. Issues of both Bulgarian and EU equality law arise in these cases. In a previous case, KZD itself referred questions regarding the interpretation of EU equality law to the CJEU on a preliminary reference, but the CJEU held that it had no jurisdiction to consider the matter because KZD was not a court and therefore could not refer questions to the CJEU.² In that case, Advocate General Kokott provided an extensive Opinion on the merits of the discrimination issue.³

And there matters stood until the latest case, which is the subject of this article, in which the Bulgarian administrative court, hearing an appeal by CHEZ against a finding of KZD, referred an elaborate set of questions to the CJEU, which accepted jurisdiction because in this case the referring body was a court, and replied with a reasoned judgment addressing the substantive issues raised by the questions presented. Again, Advocate General Kokott provided a detailed Opinion.⁴ Judge Prechal was the Judge-Rapporteur. Both, of course, have extensive experience in dealing with discrimination issues.

The decision of the CJEU in *CHEZ* is unlikely to be the end of the Bulgarian litigation, since the responses by the CJEU to the questions presented will require the referring Bulgarian court to engage in further extensive fact finding and application of EU law to those facts, as well as considering whether Bulgarian anti-discrimination law adequately implements EU law in several respects. It will be of considerable interest in the context of Roma rights to see how the Bulgarian court deals with the answers provided by the Court of Justice. The *CHEZ* case looks set to make the CJEU a key element in future Roma rights litigation strategy, as the European Court of Human Rights has been in the past.

Broader issues considered

Turning to the broader questions to which the case potentially gives rise, these can usefully be divided into four areas of EU equality law interpretation, and the remainder of the article will address each of these in turn: (i) the implications of the case for the use of the EU equality directives prohibiting ethnic discrimination in non-Roma contexts; (ii) the meaning of ‘direct’ discrimination; (iii) the scope of ‘indirect’ discrimination; and (iv) the appropriate way in courts applying EU anti-discrimination law to address the ‘justification’ issue in indirect discrimination.

All, except the first of these, have potentially considerable importance for each of the equality directives, whether concerned with ethnic discrimination or not, because the Court’s reasoning relates both to the *meaning of concepts* that are common to all the directives (‘direct discrimination’, ‘indirect discrimination’, and ‘justification’) and to the implications these have for *litigation practice* across all of these directives in so far as they address ‘indirect discrimination’ (Who can take cases of indirect discrimination?). This article will first suggest what these broader implications may be, before turning finally to the question of whether, despite these potentially broader implications, the case should be seen as driven by the context of the particular facts of the case, and in particular whether it should be seen as primarily driven by the type and degree of discrimination against Roma prevalent in central and eastern Europe in particular.

Implications for ‘ethnic’ discrimination litigation

One of the recurring issues that arises in the context of ‘ethnic’ discrimination is what is meant by the term ‘ethnic’, and in which contexts the term applies. This issue is particularly acute where, as in several European states, there is considerable unease regarding ‘racial’ categories, which are seen

² *Belov* (C-394/11, EU:C:2013:48).

³ Opinion in *Belov* (C-394/11, EU:C:2012:585).

⁴ Opinion of Advocate General Kokott delivered on 12 March 2015.

as dangerously close to accepting the long-discredited myth that there is a scientific basis for racial differences. In such contexts, the use of the ‘ethnic’ criterion seems less controversial because it does not have the tainted associations of ‘racial’ categories. But what is ‘ethnicity’ for the purposes of Council Directive 2000/43/EC?⁵

The *CHEZ* case provides intriguing answers to this question. To understand why, we need to understand several aspects of the way in which the case was presented. The case involves an allegation of direct and indirect discrimination against CHEZ by Anelia Nikolova, who runs a grocer’s shop in the district of a town which is inhabited mainly by persons of Roma origin. There were several complications in her case. The first complication was that Ms Nikolova originally presented the case in the Bulgarian legal proceedings as a case of discrimination on grounds of ‘nationality’, but the Bulgarian proceedings were conducted on the basis that the case concerned an allegation of ethnic discrimination under the Directive (discrimination on the basis of nationality is expressly excluded from the coverage of the Directive).⁶ The second complicating factor was that the Bulgarian court regarded Ms Nikolova’s allegation of ethnic discrimination against her as based on her identifying with the Roma community in the district in which she traded,⁷ and therefore as of Roma ethnicity, but she stated before the CJEU that she was not herself Roma, and the CJEU did not base their finding on any ‘identification’ theory.⁸

We shall see the implications of these issues for the interpretation of direct and indirect discrimination generally in a moment, but the issue on which the article will focus first, is how the Court approached the meaning of ‘ethnicity’ in general, and Ms Nikolova’s ethnicity in particular.

Advocate General Kokott first noted that, from a ‘European perspective,’ ‘the Roma are to be regarded as a separate ethnic group who also require special protection,’⁹ simply citing the European Court of Human Rights decision in *DH v. Czech Republic*,¹⁰ but giving no further explanation. The Grand Chamber went somewhat further, however. In a brief, but significant, holding, the Court considered that ‘the concept of ethnicity ... has its origin in the idea of societal groups marked in particular by common nationality, religious faith, language, cultural and traditional origins and backgrounds.’¹¹ Applying this ‘objective’ understanding, Roma constituted an ethnic group, with the Court not only citing with apparent approval the ECtHR’s decision in *DH*, but also those in *Nachova v. Bulgaria*,¹² and *Sejdić and Finci v. Bosnia*.¹³ The implications of this approach in the EU context in cases where groups other than Roma are involved remains to be seen, and we can expect references to the Court seeking further explanations, for example concerning whether all the criteria in the list need to be satisfied before a group can be considered as constituting an ‘ethnic’ group, or merely some, and if so which, and what the differences are between ‘ethnicity’ and ‘nationality’, and between ‘ethnicity’ and ‘religion’.¹⁴

And what of Ms Nikolova’s ethnicity? In contrast to the ‘objective’ standard adopted regarding what an ethnic group is, a much more ‘subjective’ approach is adopted, by Advocate General Kokott at least, as regards whether a particular person is to be regarded as a member of the ethnic group in question. The ‘mere finding that the Roma are a separate group,’ she observed, was ‘not sufficient in itself to provide a satisfactory answer’ to the question of whether, under the Directive, Ms Nikolova ‘may rely

5 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22).

6 CJEU, at Paragraph [26]; AG, at Paragraph [29].

7 CJEU, at Paragraph [26]; AG, at Paragraph [29].

8 CJEU, at Paragraph [49].

9 AG, at Paragraph [43].

10 *D.H. and Others v. the Czech Republic*, no. 57325/00.

11 Appearing to apply the approach to ethnicity articulated by the United Kingdom final court, the House of Lords (before it became the Supreme Court), in *Mandla v. Lee*, although that case is not cited by the CJEU.

12 *Nachova v. Bulgaria*, no. 43577/98.

13 *Sejdić and Finci v. Bosnia Herzegovina*, nos. 27996/06 and 34836/06.

14 For further discussion, see Christopher McCrudden and Brendan O’Leary, *Courts and Consociations: Human Rights versus Power-sharing* (OUP, 2013), 121 et seq.

on the prohibition of discrimination based on ethnic origin'.¹⁵ One way in which claimants might be able to do so would be if the claimant herself belonged to the Roma ethnic group, and Advocate General Kokott makes clear that '[i]n case of doubt, self-identification by the individual concerned continues to be the determining factor in assessing whether or not he or she is to be regarded as a member of the ethnic group in question'.¹⁶ The Grand Chamber did not address the issue directly. If Advocate General Kokott's approach stands, then problematic issues may arise, such as whether, in a case of alleged indirect discrimination, an individual may simply opt-in to an ethnic group that would itself deny membership to that individual?¹⁷ For reasons that we will consider in a moment, that problem may be reduced in significance because of another aspect of the Court's judgment, concerning 'discrimination by association'.

The meaning of 'direct' discrimination

The concept of 'direct' discrimination is at one and the same time both central to the architecture of the EU equality directives, and highly problematic in its meaning. This centrality, combined with its uncertain meaning, is a recipe for litigation, and this issue has dominated much anti-discrimination litigation in the domestic courts of several Member States, particularly as equality law has expanded exponentially over the last ten years. It is not surprising, therefore, that it should also be a central issue in the context of path-breaking cases such as *CHEZ*.

There are several related issues that complicate a legal understanding of direct discrimination. One issue is whether the concept should be seen as primarily addressing discrimination against individuals or groups. A second critical issue is whether it should be seen from the perspective of the alleged perpetrator or from the perspective of the alleged victim, and this question is often linked to the issue of whether, and if so how far, the discriminatory intention of the perpetrator is relevant. A third complicating factor is what precisely the relationship is, legally, between direct and indirect discrimination. We know, of course, that in most circumstances direct discrimination cannot be 'justified', whereas indirect discrimination incorporates an idea of justification into the concept itself, but what, in particular, is the added value of the concept of indirect discrimination, and what effect should this have on the scope of direct discrimination?

As in the domestic context, a critical question in the interpretation of direct discrimination is what discrimination 'on the grounds of' a particular protected characteristic (such as ethnicity) involves. In the *CHEZ* case, the issue was further complicated by one of the features of the case mentioned above: that Ms Nikolova complained of direct ethnic discrimination against her, even though she was not herself a member of the ethnic group that she said was the target of the less favourable treatment.

The approach that Advocate General Kokott adopted was to interpret the concept of direct discrimination as applying not only to persons who were members of the targeted group but also to those 'associated' with that group, developing further the concept of 'discrimination by association,' as she termed it, which the CJEU first adopted in the *Coleman* case.¹⁸ In *Coleman*, the Court held, for example, that discrimination against person A because of their association with person B who is disabled, on the ground of the disability of person B, constituted discrimination against A on the grounds of disability. In other words, discrimination 'on the grounds of' a protected characteristic did not depend on the person discriminated

¹⁵ AG, at Paragraph [44].

¹⁶ AG, at Paragraph [50].

¹⁷ See, for example, the decision of the UK Supreme Court in *E v. Governing Body of JFS* [2009] UKSC 15. A boy claimed admission to a Jewish school on the basis that he was Jewish, arising from his self-identification with Judaism. He was refused admission on the basis that his mother was not Jewish, either by birth or conversion, and he had not himself converted to Judaism, and that according to Jewish law (*Halacha*), he was not considered to be Jewish even though he self-identified as a Jew. The author was Junior Counsel representing JFS in this case.

¹⁸ *Coleman v. Attridge Law*, C-303/06, European Court of Justice (Grand Chamber), 17 July 2008.

against having, or being perceived to have, these characteristics; Council Directive 2000/78/EC¹⁹ did not prohibit discrimination only 'on the grounds of [*the victim's*]' protected characteristics, but another person's characteristics as well.

As applied to the facts of the *CHEZ* case itself, Ms Nikolova was permitted to allege that she had been directly discriminated against on grounds of ethnicity; she was treated less favourably because she lived in a Roma-dominated district. As Advocate General Kokott says: 'The contested practice by CHEZ is directed in a wholesale and collective manner at all persons who are supplied with electricity by that undertaking' in that district.²⁰ She continues: 'Should it transpire hereinafter that this practice entails discrimination against the Roma living in that district, the wholesale and collective character of the practice means that inevitably 'discrimination by association' is also suffered by those who are not themselves Roma,' including Ms Nikolova.²¹

There are several important issues arising from different elements in the approaches taken to the meaning of direct discrimination as set out above. The first involves the concept of 'discrimination by association'. Apart from the fact that the CJEU is careful to avoid using this term, the Advocate General and the Court subtly differ on when it arises. The broadest approach is that set out by the Advocate General. She finds that it arises 'first and foremost, by those who are in a close personal relationship with a person possessing one of the [protected] characteristics',²² such as was the case in *Coleman* itself. She goes on, however, to make clear that 'the existence of such a personal link is certainly not the only conceivable criterion for regarding a person as suffering "discrimination by association".'²³ In an important, if controversial, sentence she continues: 'The fact that the measure at issue is discriminatory by association may be inherent in the measure itself, in particular where that measure is liable, because of its wholesale and collective character, to affect not only the person possessing one of the [protected] characteristics ... but also – as a kind of 'collateral damage' – includes other persons.'²⁴

The CJEU itself addresses this issue in language that is potentially equally broad, if in a different way. The requirement of equal treatment, the Court says, 'applies not to a particular category of person but by reference to the grounds mentioned ... so that principle is intended to benefit also persons who, although not themselves a member of the [protected] group concerned, nevertheless suffer less favourable treatment or a particular disadvantage on one of those grounds.'²⁵ The Court's approach is relatively uncontroversial in so far as it regards as direct discrimination a situation where person A treats person B less favourably because of person C's protected characteristics – that is *Coleman*, and now *CHEZ*. But the question that the Advocate General's and the Court's language gives rise to, and which may generate further references to the CJEU, is how far beyond the *Coleman*- and *CHEZ*-type situations, 'discrimination by association' goes.

To take one topical example that is currently the subject of litigation in the United Kingdom under domestic anti-discrimination law,²⁶ would it amount to direct discrimination for person A to treat person B less favourably on the grounds of A's protected characteristics, completely ignoring B's and C's characteristics? The issue arose in the following way: the applicant (B), who was gay, requested that a cake be made for him by a bakery (A), the directors of which were Christian, and whose religious and political beliefs were opposed to same-sex marriage. Same-sex marriage is not permitted in Northern

19 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

20 AG, at Paragraph [60].

21 AG, at Paragraph [60].

22 AG, at Paragraph [57].

23 AG, at Paragraph [58].

24 AG, at Paragraph [58].

25 CJEU, at Paragraph [56].

26 *Lee v. Ashers*, Northern Ireland County Court, 19 May 2015, available at: http://www.equalityni.org/ECNI/media/ECNI/Cases%20and%20Settlements/2015/Lee-v-Ashers_Judgement.pdf currently on appeal to the Northern Ireland Court of Appeal. The author is Junior Counsel representing *Ashers* in this case.

Ireland, unlike the rest of the United Kingdom. The cake requested was to be iced with the message ‘support gay marriage’. The bakery refused because the directors objected to the message, but were otherwise quite prepared to serve the customer, and had done so in the past. The customer wanted to bring the cake with the message to a party which was to celebrate the end of ‘anti-homophobia week’, which would be attended by several people who were gay (C). A cake, with the requested message, was subsequently prepared by another bakery and was brought to the party by B. The directors of the bakery argued that they neither knew nor cared whether B or C were gay; they objected to the message on the cake, not the characteristics of B or C. The court held, however, that the actions of A amounted to unlawful discrimination ‘on the grounds of’ sexual orientation and political belief; in this case, it was the beliefs and sexual orientation of A, rather than B or C that was relevant. The case is currently under appeal. The issues arise under domestic law, rather than EU law, but they neatly illustrate the type of situation that can arise for decision under the expanded approach to the phrase ‘on the ground of’ that the Advocate General and the Court of Justice have now adopted.

Leaving these questions aside, the *CHEZ* judgment is also important for what it says about the meaning of direct discrimination more generally. The interest arises because of the Advocate General’s and the Court’s approach to whether *CHEZ*’s practice entailed direct discrimination against Roma living in that district. The answer from the Advocate General was ‘no’,²⁷ whereas the CJEU suggests that it may, and sets out the type of issues the referring court needs to consider further.²⁸ On this critical issue, then, there is some apparent difference between the CJEU and Advocate General Kokott.

The Advocate General sets out two different ways in which it *might* be argued that direct discrimination arises. First, the contested practice might have been chosen by the company ‘*on the basis of* the ethnic origin of the inhabitants’ of the district.²⁹ On this issue, she holds that there are ‘no specific indications either in the order for reference or in the observations submitted by the parties to the proceedings to suggest that the contested practice was chosen specifically’ on that basis.³⁰ Alternatively, the contested practice might be considered directly discriminatory ‘where a measure is apparently neutral, but actually affects or is capable of affecting only persons possessing’ the protected characteristic.³¹ On this issue, she also held that these circumstances did not exist in this case.

The CJEU did not address the Advocate General’s second approach, but in the case of the first, the Court was unwilling to follow the Advocate General’s conclusion. Instead, the Court identified what would be needed for a finding of direct discrimination of that type to be found, and urged the referring court to engage in thorough fact finding in order to determine whether the districts had been targeted specifically because they were Roma-dominated.

The potential importance of the case lies more in the second approach taken by the Advocate General than that of the CJEU. If this second approach reflects the position under EU equality law, what type of measure is ‘apparently neutral, but actually affects or is capable of affecting only persons possessing a certain [protected] characteristic’? The term used subsequently by the Advocate General is that the measure must be ‘inextricably linked’ to the protected characteristic.³² She provides three examples where this arises. Discrimination on grounds of a person’s pregnancy, she says, is direct discrimination against the pregnant woman on grounds of sex ‘because it is capable of affecting women *only*’.³³ Discrimination against a person on the basis of whether the person is entitled to an old-age pension is direct age discrimination because such a rule is ‘capable of having an effect *only* for the benefit or to the

27 AG, at Paragraph [87].

28 CJEU, at Paragraph [80].

29 AG, at Paragraph [81].

30 AG, at Paragraph [81].

31 AG, at Paragraph [82].

32 AG, at Paragraph [86].

33 AG, at Paragraph [83].

detriment of persons of a certain age.³⁴ Direct discrimination on grounds of sexual orientation against a couple arises 'where a benefit provided for [married] couples is withheld from same-sex couples who ... do not themselves have access to the institution of marriage.'³⁵ The Advocate General held that, on the facts of the *CHEZ* case, the contested practice 'is not as inextricably linked to their ethnic origin as pregnancy is to a person's sex, as entitlement to an old-age pension is to a person's age ...'.³⁶ Living in the targeted district was not 'inextricably' linked to Roma ethnicity because there were many in the district who were not Roma.

But how far might the AG's second approach go? There is lengthy jurisprudence in the United Kingdom on these questions, and if the practice there is anything to go on, this is likely to be a source of further tricky references to the CJEU. To give just one example: is it direct *ethnic* discrimination if less favourable treatment is accorded someone on the basis of whether a person is Jewish according to Jewish *religious* law ('*Halacha*')?³⁷ In particular, where, exactly, is the dividing line between this second approach to direct discrimination and the concept of indirect discrimination?

The meaning and practice of 'indirect' discrimination

If the *CHEZ* case, in retrospect, may be seen as significantly blurring the boundaries between direct and indirect discrimination, it may also be seen as expanding the potential of indirect discrimination itself, at least in so far as domestic case law and domestic legislation in some Member States understand the concept. In this expansion, the Advocate General and the Grand Chamber appear to stand shoulder to shoulder.

There are two main aspects of the approach to indirect discrimination in the Advocate General's Opinion and the Judgment of the Court to which attention should be drawn. The first concerns the conceptual meaning of indirect discrimination. In quick succession, the Advocate General and the Court make three important conceptual points: (i) the term 'apparently' in the definition of direct discrimination (as in, 'where an *apparently* neutral provision ...') does not refer to a practice that is 'manifestly' neutral, but one that is 'ostensibly' neutral;³⁸ (ii) if the contested measure was introduced because those affected were targeted on the basis of their protected characteristic, then that amounts to direct rather than indirect discrimination;³⁹ (iii) the term 'put ... at a particular disadvantage' does not mean that a particularly serious disadvantage must be identified, but rather that there is indirect discrimination wherever the contested practice affects members of a protected group, in the words of the Advocate General, 'more adversely' than others.⁴⁰

Whilst important in clarifying the concept of indirect discrimination in these fundamental respects, none of these points should come as any real surprise to practitioners. More surprising, and potentially more significant in terms of changing litigation practice in some Member States, is the second main aspect of the Advocate General's and the Court's approach to indirect discrimination. This involves expanding the range of those who are able to mount an indirect discrimination complaint, an expansion due to the application of the concept of 'discrimination by association' to indirect discrimination.

34 AG, at Paragraph [83].

35 AG, at Paragraph [83].

36 AG, at Paragraph [86].

37 See, the decision of the UK Supreme Court in *Ev. Governing Body of JFS* [2009] UKSC 15. A boy claimed admission to a Jewish school on the basis that he was Jewish, arising from his self-identification with Judaism. He was refused admission on the basis that his mother was not Jewish, either by birth or conversion, and he had not himself converted to Judaism, and that according to Jewish law (*Halacha*), he was not considered to be Jewish even though he self-identified as a Jew. The author was Junior Counsel representing JFS in this case.

38 AG, at Paragraph [92]; CJEU, at Paragraph [93].

39 CJEU, at Paragraph [95].

40 AG, at Paragraph [93].

The issue arose because Ms Nikolova's claim of indirect discrimination, like her claim of direct discrimination, was not based on she herself being Roma but was rather based on her being, in the words of the Advocate General quoted above, 'collaterally damaged'⁴¹ by the indirect discrimination that primarily affected the Roma group, because it was they who predominated in the district targeted for the special measures taken by the company. Although not put in these terms, she suffers what might be called '*indirect* indirect discrimination', and both the Advocate General and the Court accepted that such a claim should be allowed under the Directive.⁴² The important point here is not just that such a claim is permitted under the EU equality directives, but that (following *CHEZ*) such a claim *is required* under national law for national law to be regarded as properly implementing these directives.

This means in practice that those Member States that only permit allegations of indirect discrimination to be made by members of the group adversely affected, or by a body specially designated to take such cases in the public interest, and not by others (such as Ms Nikolova), are now in violation of EU equality law. This is a significant expansion, in at least some Member States, in the range of those who must now be permitted under national laws to be able to litigate indirect discrimination claims.

The approach adopted in the United Kingdom, for example, would appear now not to comply with the equality directives, as interpreted by the CJEU in *CHEZ*. In the Equality Act 2010, the definition of indirect discrimination is as follows:⁴³ a person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's. A provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if each of four conditions is satisfied: if A applies, or would apply, it to persons with whom B does not share the characteristic; *and* if it puts, or would put, *persons with whom B shares the characteristic* at a particular disadvantage when compared with persons with whom B does not share it; *and* if it puts, or would put, B at that disadvantage; *and* if A cannot show it to be a proportionate means of achieving a legitimate aim. All four of these criteria must be satisfied for it to amount to indirect discrimination.

As can be seen, the highlighted provision in the approach taken in the UK would clearly exclude someone in the position of Ms Nikolova, and it would appear that, as a result of the *CHEZ* case, the UK is in violation of EU law. The implications of this broadening in the practice of indirect discrimination are of some importance.

If this broader approach is applied in the sex discrimination context, for example, it would appear to require national law to permit a man working in the same pay grade as a group of women to take an equal value pay claim against his employer, based on the discrimination against the women compared, provided he could show that his wages were adversely affected because he worked in a pay grade dominated by women. Whether this is a progressive development is, perhaps, open to debate.

On the one hand, it may lead to indirect discrimination being more widely used than it appears to be at the moment. It is notoriously the case that indirect discrimination has been underutilised in comparison with direct discrimination and that the effect of this has been that considerable areas of institutional or structural discrimination have been left unchallenged. On the other hand, it could lead to the major method by which such structural discrimination can be challenged being increasingly occupied and moulded by litigation brought by members of groups which are only tangentially affected ('collaterally damaged') by the structural discrimination, with the potential that the voices of the groups primarily affected will be more marginalised than if they had been the primary litigants. It has long been a source of complaint that the major beneficiaries of some types of sex discrimination claims have been men; the application of 'discrimination by association' to indirect discrimination could become another example of the same phenomenon.

41 AG, at Paragraph [58].

42 AG, at Paragraph [61]; CJEU, at Paragraph [60].

43 Equality Act 2010, Section 19.

‘Objective justification’ in indirect discrimination

The third significant issue that the CJEU addresses concerns the scope of the ‘objective justification’ that applies in the indirect discrimination context. Both the Advocate General and the Court carefully set out the approach that the referring court must adopt when it is assessing the claims of ‘objective justification’ advanced by the company for the contested practice.⁴⁴ There are two main requirements which the domestic court must find to be satisfied before it can uphold a claim of objective justification: the action must be in pursuit of a ‘legitimate aim’; and the means of achieving that aim must be appropriate and necessary (the requirement of ‘proportionality’).

The Court accepts that, in the context of the *CHEZ* case itself, the prevention of fraud and other unlawful conduct could, in theory, constitute a legitimate aim, but stresses the need for the court to go beyond simply identifying the theoretical legitimacy of the aim. The domestic court must assess whether a legitimate aim is *actually* being pursued. As the Court says, the ‘company has the task at the very least of establishing objectively, first, the actual existence and extent of that unlawful conduct and, second, ... the precise reasons for which there is, as matters currently stand, a major risk in the district concerned that such damage and unlawful connections to meters will continue.’⁴⁵ As regards the means adopted, the court must ‘determine whether other appropriate and less restrictive measures ... exist for the purpose of achieving the aims invoked by CHEZ.’⁴⁶ And, like the Advocate General, the Court also points to the need to take into account the legitimate interest of the consumers of electricity ‘in having access to the supply of electricity in conditions which do not have an offensive or stigmatising effect.’⁴⁷

The Court goes further, however, than merely leading the referring court through the issues that it must address. It concludes the section of its judgment in which it addresses ‘objective justification’ with a none-too-subtle steer, in case the referring court had not picked up the signals that the Court was sending. Although the Court recognises that it is ‘for the referring court to carry out the final assessments which are necessary’ in deciding whether the company has established an ‘objective justification’,⁴⁸ the Court states clearly: ‘it seems that it necessarily follows from the taking into account of all the foregoing criteria that the practice at issue cannot be justified ... since the disadvantages caused by the practice appear disproportionate to the objectives pursued.’⁴⁹

What is driving the Court’s anti-discrimination case law?

It is likely to become a topic of considerable scholarly debate, as well as practical importance, as to why the Court adopts the positions it does in *CHEZ*. There are several difficulties in divining the Court’s motivation. There is, first, the fact that *CHEZ* cannot be taken as an isolated case and it must be set in the wider context of the Court’s recent case law as a whole – a task that is well beyond the scope of this brief article. There is, second, the fact that the Court itself is generally notoriously unforthcoming in articulating the deeper principles that may be driving its approach to anti-discrimination law, and this lack of transparency is noticeable in *CHEZ* too.

These caveats aside, however, there are hints in the Court’s judgment and clearer (if still cursory) statements in Advocate General Kokott’s opinion that several values animate the approach they take in the case. There are three ideas in particular that recur in the opinion and/or the judgment: stigma,

44 AG, at Paragraph [111]; CJEU, at Paragraph [113].

45 CJEU, at Paragraph [116].

46 CJEU, at Paragraph [122].

47 AG, at Paragraph [132]; CJEU, at Paragraph [124].

48 CJEU, at Paragraph [127].

49 CJEU, at Paragraph [127].

offence and humiliation.⁵⁰ As perceived by the Advocate General and the Court, particularly the former, the practice of the company is imbued with an approach to the Roma residents of the districts targeted that seems, at best, to ignore the humiliating effect of the special measures adopted and unconcerned if all in the district are stigmatized by the company's practice, and at worst, calculated to produce just such humiliation and stigma. If the analysis suggested in this article of the Court's understanding of the context of the case is correct, then it is uncertain how far the Court in *CHEZ* can really be seen as adopting general principles of European anti-discrimination law in areas in which such a degree of stigma and humiliation are less apparent in practice. Although expressed as interpretations of equality law of general application, ultimately what we see in *CHEZ*, perhaps, is an example of the fracturing of EU equality law, with the *particular* protected ground in question and even the *particular* protected group involved being the real determinants of the approach adopted.⁵¹

And perhaps that is preferable to the adoption of a general theory of EU equality *tout court* that sees the avoidance of humiliation and stigma as the overall purpose of equality law across all grounds, and across all protected groups. There is a telling moment in the Advocate General's opinion where she appears to see the whole of EU anti-discrimination law through the lens of harassment (from which she appears to derive ideas of offensiveness, humiliation, and stigma), which seems too much like the proverbial tail wagging the proverbial dog.⁵² Whilst adopting a highly expressive analysis of the function of EU equality law may be progressive in the context of dealing with discrimination against the Roma people as in the *CHEZ* case, it may be much less progressive if it means that *only* practices that are demeaning, humiliating, and stigmatizing are addressed aggressively, or if they are regarded as being at the core of anti-discrimination law. If that were to become the new norm, it would be far from progressive. However important it is to address discriminatory practices of that type, anti-discrimination law is more, much more, than that, although what exactly remains stubbornly problematic.

50 'Humiliation': AG, at Paragraphs [60] and [133]; 'stigma': AG, at Paragraphs [4], 49, [60], [66], [95], [101], [129], [131], [132], [135], [139], [147]; CJEU, at Paragraphs [87], [108], [124], [128]; 'offence': CJEU, at Paragraphs [87], [108], [124], [128], [129].

51 See the earlier discussion in Christopher McCrudden, 'Thinking about the Discrimination Directives', 1(1) *European Anti-Discrimination Law Review* 17 (2005).

52 AG, at Paragraph [133].

The Istanbul Convention and the EU: Converging standards on violence against women?

Kevät Nousiainen*

Introduction

The Council of Europe (CoE) Convention on preventing and combating violence against women and domestic violence,¹ known as the Istanbul Convention, is the first binding European human rights instrument that sets specific, binding standards to prevent violence against women (VAW), to protect its victims and to punish perpetrators. The proposal that the European Union (EU) should accede to the Istanbul Convention has been raised by the European Parliament,² and the European Commission Roadmap dated October 2015³ mentions the possible accession of the EU to the Istanbul Convention. In its Roadmap, the Commission notes that accession would create a coherent EU framework for an issue which, according to a majority of Europeans, should be most urgently dealt with.⁴ Negotiations with the Member States (ongoing at the time of writing) will show the level of political consensus in the EU. A total of 14 EU Member States have already ratified the Istanbul Convention, and 27 have signed it. In March 2016, the Commission presented two proposals for the Council on EU accession to the Convention.⁵

It became possible for the EU to join human rights treaties with the Lisbon Treaty,⁶ but so far the possibility has been used only once, when the EU acceded to the UN Convention on the Rights of Persons with Disabilities in 2010.⁷ Obligations of the EU under human rights treaties are defined by its power to act – where the EU has no powers, it cannot be held responsible for human rights violations under a treaty to which it is a party. A careful examination of the EU competence concerning issues within the scope of the Istanbul Convention is therefore necessary. Treaties concluded by the EU are binding on EU institutions and the Member States.⁸

Many Member States have a long history of policies to combat violence against women, and the EU *acquis* also requires Member States to implement certain legal measures related to the Convention (especially concerning sexual harassment, sexual abuse and the exploitation of children, the implementation of

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1 CETS No. 210.

2 European Parliament resolution of 9 June 2015 on the EU Strategy for equality between women and men post 2015 (2014/2152(INI)), *supra* 13.

3 http://ec.europa.eu/smart-regulation/roadmaps/docs/2015_just_010_istanbul_convention_en.pdf, accessed 9 May 2016.

4 http://ec.europa.eu/smart-regulation/roadmaps/docs/2015_just_010_istanbul_convention_en.pdf.

5 Proposal for a Council Decision on the conclusion, by the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence COM(2016)109 final; and Proposal for a Council Decision on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence COM(2016)111.

6 Under Article 216 TFEU, the EU has the external competence to conclude international agreements, which are binding on EU institutions and Member States.

7 Convention on the Rights of Persons with Disabilities, *United Nations Treaty Series*, Vol. 2512, p. 3.

8 Article 216 TFEU.

protection orders, and the rights of crime victims). While the EU has a long and impressive track record in the area of sex discrimination, legal steps towards banning VAW as a form of discrimination have been much slower. One difficulty lies in the relatively weak mandate of the EU in the area of criminal law. The Istanbul Convention presents more precise requirements for criminal law than human rights conventions have so far done. Criminal law is largely within the mandate of the EU Member States. Thus, the impact of EU ratification would be mostly felt in areas where the Convention does not require 'hard' criminal law measures. The EU has already taken steps to protect victims of gendered violence, and has also otherwise adopted measures that are in line with what the Convention requires.

In 2015 the European network of legal experts in gender equality and non-discrimination provided a thematic report on the legal implications of EU accession to the Istanbul Convention, co-authored by Kevät Nousiainen and Christine Chinkin.⁹ The report examines relevant human rights law, provides a short analysis of the legal implications of the possible EU accession to the Istanbul Convention, and compares the state of affairs in the Member States concerning legislation that is relevant from the point of view of possible EU accession.

The history of addressing VAW has been both international and transnational from the beginning. The fact that international, EU and national policies have interacted shows the global nature of both the problem and its remedies, which makes the possible accession of the EU to the Convention a logical further development. This article first takes a look at the conceptual and practical difficulties that for so long prevented effective measures to combat VAW both at the national and international level, and then turns to consider the Istanbul Convention. The Convention is based on prior developments in human rights law, but takes them a step further. The scope of the Convention is broad, and the obligations arising from it are both manifold and concrete. The article then discusses the responses of the EU and its Member States to VAW, stressing that international, transnational and national policies involved in addressing VAW have been intertwined. The level of convergence on measures against VAW among EU Member states and the EU competence concerning the Convention obligations are also discussed. The article ends by reflecting on what added value EU accession to the Istanbul Convention would bring.

VAW in human rights law – crime and discrimination

Sex discrimination has been explicitly prohibited by EU law since the 1970s. Violence against women gained attention more slowly than discrimination in certain other fields of life, in the labour market in particular. This slowness may be astonishing, as even the European Commission in its Roadmap mentioned above describes violence against women as a 'violation of women's human rights and an extreme form of discrimination, entrenched in gender inequalities and contributing to reinforce them'.¹⁰

The United Nations' (UN) response to violence against women was similarly a delayed one in comparison with the organization's response to discrimination in other fields of life. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted by the UN General Assembly in 1979, does not explicitly mention violence against women. Specific international law instruments on violence against women were only adopted after the Convention, but even these were recommendations, not binding treaties.

The slow pace of addressing VAW by both national legislation and international human rights law stems from a difficulty in recognizing violence experienced by women 'because they are women,' or

9 Nousiainen, K., Chinkin, C. (2016), *Legal Implications of EU Accession to the Istanbul Convention*, European Union, at <http://www.equalitylaw.eu/downloads/3794-legal-implications-of-eu-accession-to-the-istanbul-convention>, accessed 25 April 2016. The report contains a chapter on international law, a chapter on the legal implications of the Convention for EU law, and a comparative analysis of national law in the Member States on issues that are relevant in relation to the Istanbul Convention.

10 http://ec.europa.eu/smart-regulation/roadmaps/docs/2015_just_010_istanbul_convention_en.pdf, p. 3.

targets women disproportionately, as a form of violence that shall be punished as a crime and a form of discrimination. Certain types of violence were in the 1970s pointed out as specific in the sense that their victims are typically women. Partner battering, sexual offences and harassment at work were named as acts that tend to target women.¹¹ The feminist claim was that such acts of violence differ qualitatively from acts of violence that are traditionally recognized as crimes,¹² and that the legal response to violence against women also differs from how violence is generally sanctioned. Violence against women was explained as being a part of the structural subordination of women.

These claims were (and still are) controversial. Gendered structures of violence may be difficult to recognize exactly because they are 'an extreme form of discrimination,' as the Commission Roadmap calls them.¹³ The idea of violence being socially structured on the basis of gender is contested in many ways: by claiming that acts by violent women do not show up in criminal statistics due to the unwillingness of male victims to report them, by claiming that women resort to other types of violence than men, or by reference to violence against children, which is often committed by their mothers.

Knowledge of the gendered patterns of violence has accumulated over the last few decades.¹⁴ By now, it seems to be well established that, for example, femicides by a present or former male partner greatly outnumber homicides committed by a female partner. Sexual crimes are gendered in a specific manner, with prevalently male perpetrators and female victims.¹⁵ The concept of VAW takes gender inequality and discrimination against women into account, and stresses its systemic and pandemic nature.¹⁶

VAW was redefined as a form of discrimination in international law instruments in the 1990s. The CEDAW Committee adopted a General Recommendation on violence against women (No. 19) in 1992, which views gender-based violence as a form of discrimination which 'impairs or nullifies women's enjoyment of human rights, and is a form of discrimination.' The CEDAW Committee motivated the Recommendation with the failure of States Parties to reflect 'the close connection between discrimination against women, gender-based violence, and violations of human rights and fundamental freedoms.'¹⁷ The Declaration on the Elimination of Violence against Women (DEVAW) was adopted by the UN General Assembly plenary meeting in the context of the Vienna World Conference of Human Rights in 1993. In 1994, the United Nations Commission on Human Rights decided to appoint a Special Rapporteur on violence against women (Resolution 1994/45). Special Rapporteurs have since elaborated standards for the obligations that states have concerning violence against women. The UN Beijing Platform for Action (1995), another policy instrument, named violence against women as one critical area of concern for governments, the international community and civil society to take strategic action. These international law instruments

11 Susan Brownmiller claimed that rape is used by men as a tool of intimidation against women, rather than a means of lust, and pointed out that rape was widely used in war and armed conflict, in Brownmiller, S. (1975), *Against Our Will: Men, Women and Rape*, Simon Schuster. Catherine MacKinnon defined sexual harassment as a form of discrimination prohibited under the US Civil Rights Act, Title VII in MacKinnon, C. (1979), *Sexual Harassment of Working Women*, Yale University Press. Literature on partner violence (femicide, assaults, battering) started to appear in the 1970s, see for example Dobash, R.E., Dobash, P.P. (1979), *Violence against wives: A case against patriarchy*, Free Press.

12 The claim was raised against the view that violence by women against men is also common, and that domestic violence should be considered as a form of aggression shown by both sexes, see for example Geller, R. (1974), *The violent home: A study of physical aggression between husbands and wives*, Sage.

13 http://ec.europa.eu/smart-regulation/roadmaps/docs/2015_just_010_istanbul_convention_en.pdf, p. 3.

14 More recent studies include Johnson, H., Ollus, N. and Nevala, S. (2008), *Violence against women: an international perspective*, Springer (containing interviews of women in 11 countries), European Agency for Fundamental Rights (FRA) (2014), *Violence against women: an EU wide survey* (containing an EU-wide survey), and European Institute for Gender Equality (EIGE) (2014), *Estimating the costs of gender-based violence in the European Union*.

15 For Eurostat-based statistics on homicides and sexual offences by sex, see https://knoema.com/crim_hom_soff/intentional-homicide-and-sexual-offences-by-legal-status-and-sex-of-the-person-involved-number-and-r, accessed 9 May 2016.

16 The UN Special Rapporteur on violence refers to violence against women in these terms, see Report of the Special Rapporteur.

17 CEDAW Recommendation No. 19, *supra* 4.

were not legally binding, however. The first binding international legal instrument to address the issue was the regional Convention of Belém do Pará, an inter-American treaty adopted in 1994.¹⁸ International human rights law on violence against women developed mainly through case law. The European Human Rights Court (ECtHR) interpreted VAW as a violation of several rights protected under the European Convention on Human Rights (ECHR), although the ECHR does not mention violence against women, and only prohibits discrimination concerning rights within its own ambit. The ECtHR case law held states responsible for not taking action to prevent crimes of violence against women, such as rape and domestic violence, by defining the due diligence required by States Parties.¹⁹ The CEDAW Committee²⁰ and the Inter-American Court of Human Rights also interpreted what the proper state response to violence against women should be.²¹

By now it is the established position in human rights law that governments have an obligation to address violence against women by *prosecuting* acts of violence with due diligence, *protecting* and assisting its victims and *preventing* such violence by addressing the underlying causes (the three 'P's). A fourth P is often added to the list, namely the *provision* of adequate resources for the three 'P's. Due diligence requires not only that states penalize acts of violence against women, but also take effective measures of prosecution and protection.²² The due diligence standard may be considered as an important development towards positive human rights duties in international law.²³ International law considers VAW as a form of discrimination, committed by persons or institutions that perpetrate acts of such violence.

Istanbul Convention – the regional European convention on VAW

In 2002, a CoE soft law instrument for protecting women from violence was adopted,²⁴ and in 2005 a Council summit agreed on a three-year programme against violence against women and domestic violence. In 2006, the ministers of justice of the CoE Member States decided to assess the need for a binding European instrument. Action plans and reports on the impact of the recommendation were produced between 2006 and 2010. The latest report²⁵ stated that the legislation in the States Members had not prospered, and that cases of violence against women remained underrepresented in the courts. Victim services had not been established as the recommendation required. The inactivity indicated that a binding instrument was needed. A committee²⁶ established to prepare a binding general treaty found in its interim report²⁷ that a broad convention was needed to prevent violence against women, to protect the victims of such violence, and to punish the perpetrators. The CoE State Members agreed in Istanbul in April 2011 on what is known as the Istanbul Convention.²⁸ The Convention entered into force in August 2014.

The Istanbul Convention reiterates former human rights instruments and the case law of human rights bodies. Violence against women is described as a manifestation of the unequal power relations between women and men, similar to the DEVAW. The aim of the Convention is substantive equality,²⁹ and gender

18 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, Belém do Pará, 6 September, 1994.

19 Concerning rape, see *M.C. v. Bulgaria* (Appl. No. 39272/98) 4 December 2003, and as to domestic violence, see cases *Kontrová v. Slovakia* (Appl. No. 7510/04) 31 May 2007; *Bevacqua and S. v. Bulgaria* (Appl. No. 71127/01) 12 June 2008; *Opuz v. Turkey* (Appl. No. 33401/02), 9 June 2009.

20 E.g., *A.T. v. Hungary*, Comm. No. 2/2003, 26 January 2005; *Fatma Yildirim (deceased) v. Austria*, Comm. o.6/2005, August, 2007, CEDAW/C/39/D/6/2005; *Şahide Goecke v. Austria*, Comm. No. 5/2005, 6 August, 2007, CEDAW/C/39/D/5/2005.

21 E.g. *González et al. ('Cotton Field') v. Mexico*, 16 November 2009, (Preliminary Objection, Merits, Reparations, and Costs); *Jessica Lenahan v. United States*, Report No. 80/11, Case 2.626, 21 July 2011.

22 ECtHR developed these requirements in *Opuz v. Turkey*.

23 Fredman, S. *Human Rights Transformed: Positive Rights and Positive Duties* Oxford University Press 2008.

24 Recommendation Rec(2002)5 of the Committee of Ministers to member States on the protection of women against violence adopted on 30 April 2002.

25 CDEG(2010)12.

26 Ad hoc committee on preventing and combating violence against women and domestic violence (CAHVIO).

27 CAHVIO (2009)e FIN.

28 Council of Europe Convention on preventing and combating violence against women and domestic violence, CETS No. 210.

29 Article 1 (b) Of the Convention.

equality and combating violence against women are linked together. The Istanbul Convention consistently stresses the State's responsibility to prevent violence against women, to punish perpetrators of such violence, and to compensate its victims. The Convention is somewhat divided in its approach, however, as it covers not only gendered violence against women but also 'domestic violence.' Domestic violence is defined as 'all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim.'³⁰ Women victims are to be paid special attention also when addressing domestic violence.

The Istanbul Convention gives a broad definition of the terms 'violence against women,' 'domestic violence,' 'gender,' and 'gender-based violence against women.'³¹ The Convention definition of 'gender' refers to socially constructed roles, behaviours, activities and attributes considered appropriate for women and men, and gender-based violence against women refers to violence that is 'directed against a woman because she is a woman or that affects women disproportionately.' Similarly, it has been suggested that violence against children and violence against gay or lesbian persons should be defined as specific crimes that are caused by and lead to the continuation of discrimination.³²

The definition of VAW resembles that of discrimination, direct discrimination meaning harm caused to a person on the ground of sex ('being a woman'), and indirect discrimination meaning harm caused disproportionately to one sex, unless a justification can be given. The EU prohibits sex discrimination in a symmetrical manner (discrimination against men as well as women). The CEDAW uses a non-symmetrical approach, by prohibiting discrimination against women only. The Istanbul Convention approach is more complicated, as it contains both non-symmetrical and symmetrical elements. The Convention preamble, the definitions used and the substantive provisions all stress the need to pay attention to women victims in particular, however.

Under the Istanbul Convention, the States Parties have the obligation not only to refrain from acts of violence, but to take necessary legislative and other measures to exercise due diligence concerning the 'four P's'.³³ The Explanatory Report of the Convention explains that by refraining from internationally wrongful acts, the state fulfils its negative duties, while protecting individuals from other non-state actors is required for fulfilling the positive state duties under the Convention.³⁴

When the CEDAW Convention was prepared in the 1970s, the focus was on discrimination against women, and the Convention pays little attention to situations where a woman is discriminated against because she is a woman, but also on other discrimination grounds (for example, her ethnic origin or sexual orientation). Such multiple or intersectional discrimination often has severely harmful effects, and is therefore now paid special attention in many jurisdictions.³⁵ The Istanbul Convention prohibits discriminatory implementation of the Convention provisions, on discrimination grounds enumerated in an open-ended list. The Istanbul Convention thus pays explicit attention to forms of intersectional discrimination that include gender, and differs here from the much earlier CEDAW Convention.

30 Article 3 (a) of the Convention.

31 Article 3 of the Istanbul Convention.

32 *Feasibility study to assess the possibilities, opportunities and needs to standardise national legislation on violence against women, violence against children and sexual orientation violence*, Publications Office of the European Union, 2010, pp. 27-29.

33 Article 5 of the Istanbul Convention.

34 Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, CETS No. 210, *supra* 57.

35 Intersectional discrimination was discussed first in academic writing, see Crenshaw, K. (1991), 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Colour', 43 *Stanford Law Review*, pp. 1241-1299. On the developments in the EU, see Schiek, D., Lawson, A. (eds) (2013), *European Union Non-Discrimination Law and Intersectionality: Investigating the Triangle of Racial, Gender and Disability Discrimination*, Asgate, and for EU case law see Monaghan, C. (2011), 'Multiple and intersectional discrimination in EU law', 13 *European Anti-Discrimination Law Review*, pp. 20-32.

The Istanbul Convention has a broad material scope. It contains provisions that are presented in chapters that relate to the ‘four P’s’, that is on the prevention of violence (Chapter III), on the protection and support of victims (Chapter IV), on substantive law requirements that involve an obligation to penalize several acts of VAW, as well as some civil law provisions (Chapter V), on investigation, prosecution, procedural law and protective measures (Chapter VI) and provisions needed for the monitoring of and amending the Convention.

As all EU Member States are parties both to the ECHR and to the CEDAW Convention, they are already under a positive duty to exercise due diligence concerning VAW, as defined in the case law of the monitoring bodies. The Istanbul Convention expresses the existing duty in a more coherent and comprehensive manner.

International standards in EU and national law, and the EU competence to act

Demands to address violence against women first emerged in European national jurisdictions in the 1970s and 1980, but few policies against VAW were then introduced by governments. In most European Community Member States, criminal law provisions on sexual crimes were amended in the following decade.³⁶ International law developments made an impact on both EU and national policies on the issue – it is indeed difficult to consider national policies against VAW without taking into account their international and transnational context. European NGOs and EU institutions followed UN policies on VAW, and the EU responded with non-binding instruments,³⁷ which reflected human rights ideas, standards and agendas. The most effective EU measure so far may have been the Daphne funding programme,³⁸ initiated by Parliament and Council decisions in 1997 and followed by later ones that distributed funding and promoted cooperation, supported Commission action and transnational projects, as well as NGO activities. The programme covered research, data collection, victim services, training and the exchange of good practices.

In the 2000s, the European Parliament took a number of resolutions on VAW,³⁹ either calling on the Member States to improve national laws and policies, or pushing for EU policies on the issue. The Commission’s policy documents on gender equality in the 2000s refer to eradicating VAW as an aim. Since 2010, EU policy documents refer also to ‘gender-based violence.’⁴⁰ Both violence against women and gender-based violence are defined in EU documents by references to definitions used by the UN and the CoE.⁴¹

36 Montoya, C. (2009), ‘International Initiative and Domestic Reforms: European Union Efforts to Combat Violence against Women,’ *5 Politics and Gender*, pp. 325-348, and Montoya, C. (2010), *From Global to Grassroots: The European Union, Transnational Advocacy, and Combating Violence against Women*, Oxford University Press.

37 Kantola, J. (2010), *Gender and the European Union*, Palgrave MacMillan, Rolandsen Agustin, L. (2013), Montoya, C. (2013).

38 In 1997, the Commission started a three-year pilot programme, the Daphne Initiative, aiming at a comprehensive approach to combating violence against women and children, and ran in phases (Daphne I, II and III) until 2013, Montoya, C. (2010), *From Global to Grassroots: The European Union, Transnational Advocacy, and Combating Violence Against Women*, Oxford University Press, pp. 169-202. At present, the Daphne Programme is run under DG Justice’s Rights, Equality and Citizenship Programme, 2014-2020.

39 Either general ones, such as Resolution of 26 November 2009 on the elimination of violence against women OJ C 285 E, 21 October 2010, p. 53. and Resolution of 5 April 2011 on priorities and outline of a new EU policy framework to fight violence against women OJ C 296 E, 2 October 2012, p. 26, Violence Against Women (2013/2004(INL)); Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law, COM/2011/0573 final, or ones focusing on specific crimes, such as Resolution of 24 March 2009 on combating female genital mutilation in the EU, OJ C 117 E, 6 May 2010, p. 52 and Resolution of 14 June 2012, on ending female genital mutilation, OJ C 332 E, 15 November 2013, p. 87.

40 At present, EU policies against VAW are presented on the EU gender equality web page under the title of ‘ending gender-based violence’; see http://ec.europa.eu/justice/gender-equality/gender-violence/index_en.htm, accessed 15 May 2016.

41 For example, the Commission’s gender equality strategy for years 2010-2015, adopted 2010, p. 24-25 contains a chapter on ‘Dignity, integrity and an end to gender-based violence’; enumerating forms of violence experienced by women because they are women.

The reception of the EU policies in Member States has differed depending on the government willingness to adopt them, and national NGO activity in promoting them.⁴² The EU enlargement in 2004 and 2009 by nine new Member States coincided with the increase in EU policies against VAW. The monitoring of domestic violence was a part of the accession procedure for some candidates, while others were not similarly monitored.⁴³ After two decades of international law-inspired EU policies on VAW, it is difficult to separate national from EU or international human rights policies.

In spite of the common human rights-based policies, European convergence of national legislation is far from complete. A comparative study ordered in 2010 by the European Commission to assess the standardization of national legislation on VAW showed that Member States still addressed violence differently.⁴⁴ Only a minority of them defined rape in terms of consent, for example, although international human rights law prefers such a definition. All of them had integrated the prohibition of sexual harassment into equality or labour law, but lacunae of penalization existed outside employment and goods and services contexts. Specific provisions on stalking were introduced in many Member States, but female genital mutilation, forced marriage and honour-based violence were seldom brought under a specific provision in criminal law. The study proposed minimum standards for the EU, but noted that some of the measures implied in the standards go beyond the legal competence of the EU.⁴⁵

As already noted, the EU has limited powers in the area of criminal law, and the subsidiarity principle concerning criminal law is guarded rather jealously by the Member States. The Lisbon Treaty extended the EU competence in criminal law, but the mandate still remains restricted. The EU competence of mandatory approximation (which corresponds to the harmonization of laws in the criminal law area) is limited to certain types of legislation.

The European Protection Order Directive stipulates that protection provided to a person in one Member State can be maintained in another Member State. The availability of the protection orders depends on Member State legislation, not on EU law. The legal basis for the Directive was TFEU Article 82(1), which provides judicial cooperation in criminal matters. Regulation on the mutual recognition of protection measures in civil matters⁴⁶ establishes the mutual recognition of measures to protect a person's life. The Regulation applies to all victims, but mentions gender-based violence or violence in close relationships as examples of cases where serious grounds exist for believing that the rights of a person are at risk.⁴⁷ There is a considerable variation in the national legislation of the Member States, and thus there is no common EU standard for the protection of victims of violence. Mere judicial cooperation does not seem to provide a common basis for the protection of victims.

The EU has the power to introduce legislation that is necessary for carrying out the requirements of mutual recognition and judicial cooperation in criminal matters having cross-border dimensions, under Article 82(2) TFEU. The provision allows setting binding minimum rules, but such rules must take into account differences in legal traditions and systems. Article 82(2) TFEU provided the legal basis for the Victims' Directive.⁴⁸ The Victims' Directive contains provisions that have much in common with the requirements

42 For studies on the EU politics on violence against women, see Kantola, J. (2010), *Gender and the European Union*, Palgrave MacMillan, Montoya, C. (2009), 'International Initiative and Domestic Reforms: European Union Efforts to Combat Violence against Women,' *5 Politics and Gender*, pp. 325-348, and Montoya, C. (2010), *From Global to Grassroots: The European Union, Transnational Advocacy, and Combating Violence against Women*, Oxford University Press.

43 Krizsan, A., Popa, R. (2010), 'Europeanization in Making Policies against Domestic Violence in Central and Eastern Europe,' *17(3), Social Politics*, pp. 379-406.

44 *Feasibility study to assess the possibilities, opportunities and needs to standardise national legislation on violence against women, violence against children and sexual orientation violence*, Publications Office of the European Union, 2010.

45 *Feasibility study to assess the possibilities, opportunities and needs to standardise national legislation on violence against women, violence against children and sexual orientation violence*, Publications Office of the European Union, 2010, 13-22.

46 Regulation (EU) No. 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters, OJ L 181/4.

47 Regulation (EU) No. 606/2013, Preamble, at (6).

48 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards for the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315/57.

of the Istanbul Convention concerning support services to victims of crime, and on meeting the specific protection needs of victims of gender-based violence. The Preamble to the Directive refers to victims of gender-based crime as well as victims of violence in close relationships requiring special support and protection in terms that resemble those under the Istanbul Convention.⁴⁹ The duty to protect the victims of VAW under the Istanbul Convention is thus within the mandate of the EU, and the obligations of the Istanbul Convention on the protection of victims of VAW would be applied.

Article 83 TFEU sets the limits of the approximation of substantive criminal law. Article 83(1) TFEU gives the EU competence to set minimum rules on crime definitions and sanctions, but only in the area of ‘particularly serious crimes with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.’ The crime types are listed under the article, including terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting money, computer crimes and organized crime. The EU has already proceeded to legislate on acts of VAW named in the list (with EU minimum provisions on trafficking and sexual abuse and the exploitation of children).⁵⁰

Under Article 83(2), the Council may, acting unanimously and with the consent of the European Parliament, identify other areas of crime that meet the criteria specified in the list. Even so, the requirement that such crimes have a ‘cross-border’ dimension could exclude many typical forms of violence against women. The subsidiarity principle thus seems to preclude the approximation of criminal law concerning other forms of VAW, however serious and common across Member States.

With the increasing attention to VAW, the question of EU competence to set minimum standards on criminal provisions has become a prominent issue. The 2010s resolutions by the European Parliament increasingly stress the need for legislative instruments in combating violence against women. The European Parliament has actively pushed for criminal law provisions concerning ‘cross-border’ VAW crimes, such as trafficking, female genital mutilation, and sexual exploitation. In 2014, the Parliament requested a Council decision based on Article 83(2) TFEU that would make it possible to include VAW in the list under Article 83(1) as an area of crime where the harmonization of EU law is possible.⁵¹ The Parliament also asked the Commission to promote national ratifications of the Istanbul Convention and the accession of the EU.

Identifying new areas of crime that merit harmonization within the EU could, with innovative interpretation, extend the limits of EU law at least somewhat further. That the EU has a mandate under Article 19 TFEU to combat discrimination should weigh in favour of such interpretation, as VAW is defined as a form of discrimination against women and, moreover, is considered an extreme form of such discrimination. Taking into account the cross-cutting Article 8 TFEU, which requires that the Union in all its activities aims to eliminate inequalities, and to promote equality between men and women, it would be deplorable if the competence to act for the elimination of the most extreme form of discrimination with criminal law measures were given a narrow interpretation.

A Commission Communication⁵² clarified where EU criminal policy under Article 83(2) TFEU is particularly warranted. The Communication stresses the use of EU criminal law where the goal cannot be attained more effectively at the national level, but due to the scale or effects can be better achieved at Union

49 Directive 2012/29/EU Preamble *supra* 3, 17 and 18.

50 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA OJL 35/1 and Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA OJL 101/1.

51 European Parliament Resolution of 25 February 2014 with recommendations to the Commission on combating Violence against Women (2013/2004(INL)).

52 COM(2011) 573 final Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 20 September 2011, Towards an EU Criminal Policy – Ensuring the effective implementation of EU policies through criminal law.

level. Fundamental rights guaranteed in the EU Charter of Fundamental Rights, and human rights under the ECHR must be respected by EU criminal law. The *ultima ratio* principle – that criminal law remains the measure of last resort to address an existing problem – still applies. Even then, EU law is limited to minimum rules.

The case law of the ECtHR has already stated a positive state obligation to penalise sexual violence,⁵³ intentional bodily harm to the person,⁵⁴ and trafficking in human persons.⁵⁵ The Istanbul Convention now presents further obligations to criminalise acts of VAW. These international obligations show the need to establish international standards, and human rights law already seems to have settled the need for last resort measures to address the acts of VAW in question. The Istanbul Convention requires the setting of minimum rules, which is in line with EU criminal law.

When it comes to establishing measures to promote and support the action of Member States in the field of crime prevention which does not involve the harmonization of laws, the EU has a mandate to act under Article 84 TFEU. The prevention of VAW is one of the three aims of the Istanbul Convention, and thus Article 84 opens a way to, for example, model codes and unified preventive measures.

By acceding to the Istanbul Convention as States Parties, EU Member States become bound by all Convention obligations, excepting where reservations are made. The Convention is expressly open for signature by the European Union.⁵⁶ The Union's obligations under the Convention depend on the EU competence to act. Where such a competence is at hand, the EU would be required to act with due diligence. Thus, the EU obligations would not depend on whether all Member States have acceded to the Convention or not. The EU accession would be binding on Member States, within the limits of EU competence.

The monitoring mechanism of the Istanbul Convention consists of reporting to GREVIO, a body consisting of experts on VAW and domestic violence. Reports are to be based on a questionnaire prepared by GREVIO on select Convention provisions to be monitored in the reporting round in question.⁵⁷ The reporting duty also concerns the EU, if the possible EU accession takes place. Both the Member States and the EU would thus be required to prepare reports for the GREVIO. The Istanbul Convention has no individual complaints system, which may decrease its effectiveness as a tool for monitoring the individual rights of persons. From the point of view of the EU accession, there is little reason to expect a conflict in the interpretation of EU law by the GREVIO and the European Court of Justice, as no individual complaints mechanism is available.

Conclusion: EU accession to the Istanbul Convention – what would be the value added?

The EU already has a long tradition of measures aiming at preventing VAW. The soft law measures that have been undertaken so far are clearly designed so as to be in line with the evolving human rights standards. Mandatory legislation, the Victims' Directive in particular, also reflects international human rights development. Accession of the EU to the Istanbul Convention would continue the logic of convergence to human rights standards, by giving these measures a coherent content and by helping to create a converging European legal framework. The history of policies against VAW in Europe, both by the CoE and the EU, shows a tradition of international and European interaction, to which the accession of the EU to the Istanbul Convention would give more effective tools.

⁵³ *M.C. v. Bulgaria* supra 18.

⁵⁴ *Sandra Jankovic v. Croatia*, (Appl. No. 38478/05), 5 March 20.

⁵⁵ *Rantsev v. Cyprus and Russia*, (Appl. No. 25965/04), 7 January 2010.

⁵⁶ Article 75 (1) of the Convention.

⁵⁷ Article 68 of the Convention.

The main legal argument against EU accession to the Convention seems to be that as the EU competence in the area of criminal law is relatively limited, accession to the Istanbul Convention would be either futile, as the EU cannot fulfil the Convention requirements, or endanger Member State sovereignty through an involvement in the power to legislate on criminal law.

EU ratification of the Istanbul Convention does not require that the Union legislates on criminal law measures, where there is no competence to do so. It is commonplace in international human rights law to require more than penal law measures in combating VAW, and it has also been repeatedly stressed that criminal law provisions cannot achieve social change by themselves, and that a broad set of measures are needed for real results. The EU is in many ways capable of a broad approach to combat VAW.

EU accession, even without a mandate to legislate on criminal law standards required by the Istanbul Convention, would promote the aims of the prevention of VAW, the protection of its victims and the provision of resources for these aims. The EU has shared competence concerning many Convention obligations. The comparative part of the thematic report on EU accession⁵⁸ showed scarce resources for support services to victims of VAW in practically all Member States, and a lack of legislation to back up the provision of such services. The comparative analysis also revealed that while Member States have introduced policies and services to victims of domestic violence, the provision of services is not necessarily gender sensitive. The provision of services for victims of sexual crimes (mostly women) is even less developed than that for victims of domestic violence. The gender-sensitive approach of the Istanbul Convention would thus be needed. The prevention of violence also rests on information that needs to be gathered systematically, as the Istanbul Convention requires. EU accession could bring more effective preventive policies in these issues. Articles 82 and 84 TFEU would provide the legal basis to develop convergence on EU policies more indirectly than by mandatory criminal law. The provision of services to victims of crimes, of research and data, and various forms of crime prevention would be areas where the EU would be able and could be required to act, if the decision to accede to the Convention were made. The EU already has a tradition of action in these respects.

It cannot be denied that the accession would bring even further added value, if the EU mandate to legislate was extended to criminal law obligations under the Istanbul Convention. As international human rights law has elaborated minimum standards for criminal law that are to be followed in the context of VAW, as discussed above, it is difficult to see why these obligations should not be used as EU minimum standards.⁵⁹ Where human rights law has come to the conclusion that certain acts of VAW need to be punished by criminal law, why should the *ultima ratio* or subsidiarity (in the criminal law sense) principles be evoked to prevent EU legislation on these issues?

Taking into account the ambition and commitment of the EU to combat sex discrimination and the damage that VAW and domestic violence causes, as well as the economic consequences of such violence,⁶⁰ an approximation of criminal law on these issues in the future would seem like a natural step to take, provided the political will to do so could be found. The specific nature of VAW as, on one hand, a violation of international human rights and a form of discrimination speaks for the need for international and transnational measures against it. Many forms of VAW are considered domestic in two senses of the word: many acts of VAW are not cross-border crimes in the sense that they take place at home or otherwise within intimate relations, and are thus held to be in the domestic legislative competence of the Member States. That the boundaries of EU competence in criminal law should be conceived to allow

58 Supra 8.

59 Statement by Ms. Rashida Manjoo, Special Rapporteur on Violence against women, its causes and consequences. UN Commission on the Status of Women, Fifty-ninth session, 9 March 2015. The lack of mandatory norms here refers to the lack of a UN human rights convention on VAW, but the argument is that it is even a lack of mandatory EU law.

60 For the global economic costs of VAW, see Day, T., McKenna, K., Bowlus, A. (2005), *The Economic Costs of Violence against Women: an Evaluation of the Literature*, UN, at <http://www.un.org/womenwatch/daw/vaw/expert%20brief%20costs.pdf>, accessed 9 May 2016, and for the costs in the EU, (2014), *Estimating the costs of gender-based violence in the European Union*, European Institute for Gender Equality.

criminal law measures only for 'cross-border' acts of VAW where the perpetrators and victims cross borders in person, is to close one's eyes to VAW as a widespread, global phenomenon, which seriously narrows down women's life choices, achievements and enjoyment of rights. The painfully slow history of the recognition of and policies against VAW of the past decades shows that an international framework is important for addressing it effectively. Both VAW and policies against it cross borders, even though not all persons involved in the acts of violence do so.

Age Discrimination in the light of CJEU case law

Declan O'Dempsey*

Introduction

This article examines the case law on age discrimination covering the horizontal direct effect of Directive 2000/78 as a vehicle for the general principle of non-discrimination on grounds of age, Article 21 Charter on Fundamental Rights, and the use of derogations in Article 2(5) and Article 4. The cases concentrate on justification under Article 6(1).

1. Direct effect between individuals?

Do the principles in the Directive have horizontal direct effect? The debate regarding *Mangold* and *Kücükdeveci* has escalated.¹

In *Rasmussen* the CJEU² considered the general principle prohibiting discrimination on grounds of age ('the general principle') in deciding if state legislation can deprive employees of a severance payment when they are entitled to claim an occupational pension. The CJEU considered the general principle embedded in the recitals (1 and 4) and present in Article 21 Charter. The Directive gives concrete expression to it in employment and occupation and is a more precise framework facilitating the practical implementation of the principle of equal treatment. In particular, it specifies various potential exceptions to the principle, circumscribing them by using a clearer definition of their scope.

The referring court wanted to know whether, if it is established that a domestic law conflicts with the general principle, they might balance the general principle against legal certainty and protection of legitimate expectations and conclude that these take precedence over the general principle. The CJEU held that the national courts ('the courts') must provide the legal protections which individuals derive from EU law and must ensure that those provisions are fully effective.

So, whilst directives do not impose duties on individuals, there is a duty on the courts to achieve the result envisaged by them. Courts must take all appropriate measures (general or particular) to achieve that result. This principle cannot be the basis for interpretation of national law against general principles of law ('*contra legem*'), but consistent interpretation of national law in one way is no basis for refusing to apply EU law. Even if the courts think it impossible to arrive at a national-law interpretation consistent with the Directive, they must provide that full and effective individual legal protection and, if necessary, disapply any provision of national law contrary to EU law.³

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1 *Mangold v. Helm* C-144/04 [2005] ECR I-9981, Paragraph 74 and *Kücükdeveci v. Swedex GmbH & Co KG*, Case C-555/07, [2011] 2 CMLR 33 Paragraphs 20 and 21.

2 C441/14. *Dansk Industri (DI), acting on behalf of Ajos A/S v. Estate of Karsten Eigil Rasmussen*.

3 *Rasmussen* [35].

The general principle confers an individual right which persons may invoke as such. The fact that litigants may have legitimate expectations of the continued application of the inconsistent law is irrelevant, and would create illegitimate temporal limitations on CJEU judgments. The existence of claims against the state for non-implementation also makes no difference.

Thus, even in disputes between private persons, the courts must disapply non-compliant national law provisions.⁴

In *Lindorfer*⁵ AG Sharpston suggested that the comparability of situations is less rigorous in cases in which the general principle of equal treatment is relied upon, as opposed to the rules defined in the Directive.⁶ The CJEU has now stated that the Directive is a more specific expression of the general principle. Therefore, its application is a consistent subset of the general principle. Comparability cannot be different. The CJEU's suggestion in *Rasmussen* concerning the Directive's exclusory role is a better approach. The same principle is at work and the same concept of comparability is used, but the Directive creates clear derogations.

2. Justification (Article 6(1))

2.1 Aims

To justify direct age discrimination, the aim cited must relate to 'employment policy, the labour market or vocational training', and not 'purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness'.⁷ Consistency with employment policy aims is insufficient. There are fewer aims which can justify direct discrimination than those justifying indirect discrimination.

Employee flexibility is not a legitimate aim in itself. It might be a means to other aims.⁸ Legitimate objectives must have a public interest nature. Mere flexibility of the workforce does not.

Courts should always clarify what is meant by the Defendant's stated aim. Case law has identified two main types of aim alleged by employers into which aims generally fall:⁹

- (i) *inter-generational fairness*. This means, depending upon the circumstances of the employment:
 - a. facilitating youth access to employment;
 - b. enabling older people to remain in the workforce;
 - c. fairly sharing limited opportunities to work in a profession between the generations;
 - d. promoting diversity and the interchange of ideas between younger and older workers.
- (ii) *dignity*, e.g. avoiding the need to dismiss older workers on the grounds of incapacity or underperformance (preserving their dignity and avoiding humiliation); or avoiding the need for costly and divisive disputes about capacity or underperformance.

In *Age Concern England*, the CJEU held that states are not required to draw up a list of differences in treatment which might be justified by a legitimate aim.¹⁰ Being able to identify the aim in order to

4 See *Rasmussen*, (Paragraph 36) citing C 176/12 *Association de médiation sociale v. Union locale des syndicats CGT, Hichem Laboubi, Union départementale CGT des Bouches-du-Rhône, Confédération générale du travail (CGT)*, [2014] EUECJ C-176/12.

5 Opinion of AG Sharpston 30 November 2006, Case C-227/04 *P Maria-Luise Lindorfer v. Council of the European Union*.

6 *Lindorfer* [21-23 and 60 et seq.].

7 *R (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform*, Case C-388/07 [46] (below).

8 See AG Bot in *Küçükdeveci* AG 44-49.

9 This synthesis is from [50] of the UK Supreme Court's decision in *Seldon v. Clarkson Wright and Jakes* [2012] UKSC 16 (25 April 2012) URL: <http://www.bailii.org/uk/cases/UKSC/2012/16.html> and see Paragraphs 32 and following of that decision.

10 *Age Concern England* [43].

review whether it is legitimate and the means of achieving it are appropriate and necessary is all that is necessary.¹¹ It stated:

‘It is apparent from article 6(1) of Directive 2000/78 that the aims which may be considered ‘legitimate’ within the meaning of that provision ... are social policy objectives, such as those related to employment policy, the labour market or vocational training. By their public interest nature, those legitimate aims are distinguishable from purely individual reasons particular to the employer’s situation, such as cost reduction or improving competitiveness, although it cannot be ruled out that a national rule may recognise, in the pursuit of those legitimate aims, a certain degree of flexibility for employers.’¹²

Noting that the scope of indirect discrimination and Article 6(1) is not identical, it continued:

‘... it is important to note that [article 6(1)] is addressed to the member states and imposes on them, notwithstanding their broad discretion in matters of social policy, the burden of establishing to a high standard of proof the legitimacy of the aim pursued.’¹³

Cases have identified aims whose public interest nature resulted from their status as collective bargains.¹⁴

The CJEU in *Petersen*¹⁵ considered legislation relating to a specific profession which prohibited practice as a public panel dentist after 68. Its aims, of protecting the health of patients (and controlling public health expenditure), were legitimate. The CJEU considered the exception in Article 2(5) for measures ‘necessary ... for the protection of health’. It held that prohibiting such practice but not private practice after 68 was inconsistent with protecting patients’ health.¹⁶

The other possible aim was sharing out employment opportunities between the generations. This could be regarded as an employment policy aim under Article 6(1).¹⁷

In *Küçükdeveci* the CJEU considered the justification of a law which calculated the length of the (service related) notice of termination to which employees were entitled. The law disregarded all service pre-25. Facilitating the recruitment of young people (who it was said could react more easily to the loss of their jobs) by increasing the flexibility of personnel management did ‘belong to employment and labour market policy’ within the meaning of Article 6(1),¹⁸ and appears to have been considered legitimate. The flexibility aimed at was not flexibility as an end in itself, but as a means to encourage recruitment of young people.

In *Rosenblatt*¹⁹ a clause in a collective agreement for a sector provided for automatic termination upon entitlement to a retirement pension or, at the latest, the end of the month in which the age of 65 was reached. Legislation supported such agreements, which were listed as justifiable when appropriate and necessary.

11 *Age Concern England* [44, 45].

12 *Age Concern England* [46].

13 *Age Concern England* [65].

14 See *Rosenblatt* (below), and e.g. *Félix Palacios de la Villa v. Cortefiel Servicios SA*, Case C-411/05 European Court Reports 2007 page I-08531 where legislation permitted collectively agreed compulsory retirement. The encouragement of recruitment was legitimate. The states (and social partners) enjoyed a broad discretion in the choice both of the aims and means to pursue them. The measure did not unduly prejudice the legitimate claims of the workers because it was based not only on a specific age, but also on having qualified for a pension.

15 *Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*, Case C-341/08, [2010] 2 CMLR 31.

16 *Petersen* [63, 64].

17 *Petersen* [68].

18 *Küçükdeveci* [35, 36].

19 *Rosenblatt v. Oellerking GmbH*, Case C-45/09, [2011] 1 CMLR 32.

The legislation's aims included sharing employment between the generations; making it easier for younger workers to find work, particularly in a time of chronic unemployment; protecting the rights of older workers whose pensions serve as replacement income; and not requiring employers to dismiss older workers on grounds of incapacity, which may be humiliating.²⁰

In *Ingeniørforeningen i Danmark v. Region Syddanmark*,²¹ a Danish law facilitating severance allowances resulted in differential treatment. It did not apply to people dismissed when they had qualified for a retirement pension. The severance allowances were aimed at facilitating transition to new employment for those finding it difficult to obtain new employment because of the length of time they had been with their old employer. (The aim therefore was integration of older workers into the workforce with dignity).

A case which might (but does not) suggest a broader set of aims is *Georgiev v. Tehnicheski Universitet Sofia, Filial Plovdiv*.²² Professors were justifiably compulsorily retired when they reached the age of 68 and could only work beyond 65 on one-year fixed-term contracts (renewable twice), if retirement pursued an aim such as the mix of different generations of teaching staff and researchers to promote an exchange of experiences and innovation, thereby promoting development of the quality of teaching and research at universities as well as the best possible allocation of posts for professors between the generations. This should be analysed as a case concerning intergenerational fairness as the 'delivery of quality teaching', is in fact an aim relating to intergenerational mix. In *Georgiev*, there was evidence of a need to create a more age-balanced workforce. The average age of Bulgarian professors was 58 and younger people were generally not interested in entering academia. There was therefore an apparent real need to encourage younger entrants. It was left to the national court to decide whether these actually were the aims of the Bulgarian legislature.

The need for a public interest *employment policy* aim was emphasised starkly in *Prigge and Others*.²³ The Grand Chamber found that a collective agreement providing for the employment of Lufthansa pilots to terminate automatically at the age of 60 could not be justified.

The justification did not fall to be considered under Article 6(1) because the suggested aims had to do with the safety and security of air travel. As these were not related to employment policy etc., they needed to be considered either within Article 2(5), or (in relation to the physical capabilities required for flying a plane) within Article 4(1). Neither international nor national legislation considered that an absolute ban at the age of 60 was necessary to achieve these aims, so the rule could not be justified under these derogations either.

In *Dansk Jurist- og Økonomforbund, v. Indenrigs- og Sundhedsministeriet*,²⁴ the employer refused to grant 'availability pay' to the claimant because he was aged 65 and in an Occupational Pension Scheme ('OPS'). It was paid for three years to civil servants who had been dismissed because their post had ceased to exist. It was conditional on them being available to take up any suitable post which they might be offered during that period. It was not paid to those aged 65 and over. At that age civil servants became entitled to draw their pension although they were not obliged to retire until the age of 70. The CJEU held that Article 6(2) only exempts occupational social security schemes defined in Article 6(2). Even if availability pay was part of an occupational social security scheme, it was not a retirement benefit, nor an invalidity benefit. The derogation under Article 6(2) did not apply because the list of exceptions under it is supposed to be exhaustive.

There was a difference of treatment based on age. Both civil servants who wished to retire and civil servants who wished to pursue their professional career in the public administration beyond the age

20 Rosenblatt [43-45].

21 *Ingeniørforeningen i Danmark v. Region Syddanmark*, Case C-499/08 [2011] 1 CMLR 35.

22 *Georgiev v. Tehnicheski Universitet Sofia, Filial Plovdiv*, Joined Cases C-250/09 & C-268/09 [2011] 2 CMLR 7.

23 *Prigge and others v. Deutsche Lufthansa AG*, Case C-447/09 ECLI:EU:C:2011:573.

24 [2013] EUECJ C-546/11 (26 September 2013).

of 65 were excluded from receiving availability pay. The aim of the measure was to prevent availability pay being claimed by persons who were not seeking to take up a new post but who would receive a replacement income in the form of a retirement pension.

In *Fuchs and another v. Land Hessen*,²⁵ the aims of the retirement age scheme²⁶ were

1. intergenerational balance,
2. efficient planning of the departure and recruitment of staff,
3. encouraging the recruitment or promotion of young people,
4. avoiding disputes about older employees' ability to perform their duties [47]; and also
5. promoting interchange between the experience of older colleagues and the recently acquired knowledge of younger ones. All of these could constitute legitimate aims.²⁷

Finally, in *Commission v. Hungary*²⁸ the CJEU noted that aims such as standardisation of retirement ages (ensuring the elimination of inequalities), and the creation of age balance in a sector were legitimate aims. The case law does not appear therefore to have broadened the two general types of legitimate aims identified by the earliest cases. For example, standardisation of retirement ages is a means to the aim of ensuring that opportunities are shared fairly between the generations in a consistent way (i.e. intergenerational fairness).

Summary of cases on aims

So, to justify differences of treatment directly based on age, the aims of a measure must

- (a) include social policy objectives, such as those related to employment policy, the labour market or vocational training.
- (b) be of a public interest nature and not 'purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness'.

The aims which have emerged appear to be capable of analysis in terms of intergenerational fairness and dignity.

2.2 Appropriate and necessary (proportionality)

Palacios set the rule: The states (and social partners) have broad discretion in the choice both of the aims and the means to pursue them. The Spanish law did not unduly prejudice the legitimate claims of the workers because it was based, not only on a specific age, but also on having qualified for a pension.

The aims in *Hütter*²⁹ were contradictory and so the law was not 'appropriate' to achieve them.³⁰ Aims should not be self-contradictory.

In *Petersen* risk avoidance was a legitimate aim. Retirement might be necessary if there were too many panel dentists or a 'latent risk' of such excess (a matter for the national court).³¹

In *Küçükdeveci* the law was not 'appropriate' because it applied to all employees who joined before the age of 25 irrespective of their age at dismissal. Nor was it appropriate to the aim of strengthening the protection of workers according to their length of service.³²

25 C-159/10 and C-160/10 *Fuchs and another v. Land Hessen* [2011] 3 CMLR 4.

26 Permanent civil servants retired at the end of the month in which they reached the age of 65 (age limit) but could have a yearly further employment up to a maximum age of 68 if it was in the interests of the service.

27 *Fuchs* [49-50].

28 C-286/12 *Commission v. Hungary* [59].

29 *David Hütter v. Technische Universität Graz*, Case C-88/08.

30 *Hütter* [46-50].

31 *Petersen* [73-77].

32 *Küçükdeveci* [40-41].

In *Rosenbladt*³³ legalizing collective agreements on retirement did not prejudice the legitimate interests of the workers concerned. They were based not only on age but also on entitlement to a replacement income. The collective agreement was an important justification factor:

‘That allows not only employees and employers, by means of individual agreements, but also the social partners, by means of collective agreements – and therefore with considerable flexibility – to opt for application of that mechanism so that due account may be taken not only of the overall situation in the labour market concerned, but also of the specific features of the jobs in question (*Palacios de la Villa*, [74]).’

So the CJEU upheld the national law, but emphasised that the collective agreement implementing it must itself pursue a legitimate aim in an appropriate and necessary manner.³⁴

The clause offered stability of employment and the promise of foreseeable retirement while offering employers ‘a certain flexibility’ in the management of their staff, thus reflecting ‘a balance between diverging but legitimate interests, against a complex background of employment relationships closely linked to political choices in the area of retirement and employment’ It was not unreasonable for social partners to regard the clause as appropriate.³⁵

In determining necessity, the CJEU considered the significant financial hardship caused to workers in the commercial cleaning sector, where poorly paid part-time employment is typical. It considered whether there were less onerous measures. After their retirement age, people could continue to work, and whilst finding work were protected against age discrimination. They were not forced to withdraw from the labour market. So the Directive permitted the measure.³⁶

In *Syddanmark*³⁷ it was said that it was not inappropriate to exclude persons from claiming a severance allowance aimed at assisting workers with more than 12 years of service in the undertaking in finding new employment because they had qualified for a pension and actually intended to retire. However, it was not necessary to exclude those who wished to waive their pension claims in order to try to continue working. So the measure was precluded.

In *HK Danmark v. Experian A/S*,³⁸ the Court of Justice considered that OPS contributions were within the scope of the Directive because they constitute part of pay. Article 6(2) excludes only occupational social security schemes covering risks of old age and invalidity but which are not pay. This exclusion is interpreted strictly.

The CJEU therefore considered if the differences which could result in such pay were capable of being justified under Article 6(1).

The aim of the scheme was to enable older workers, who entered the service of the employer at a later stage in their working life, to build up reasonable retirement savings over a relatively short contribution period. Young workers in the same scheme could at an early stage have at their disposal a larger proportion of their wages. The scheme took account of the lower rate of employee contribution that was applied to them. It therefore gave a means for all employees to amass reasonable retirement savings, to use when they retired.

33 *Rosenbladt* [47-49].

34 *Rosenbladt* [53].

35 *Rosenbladt* [68-69].

36 *Rosenbladt* [71-75].

37 *Syddanmark* [34-35] and [44-47].

38 *HK Danmark v. Experian A/S* C-476/11.

Aims which take account of the interests of all employees, in the context of social, employment and labour market policy concerns, with a view to ensuring retirement savings of a reasonable amount when an employee retired, can be regarded as legitimate aims. They have the necessary public interest nature. Proportionality was left to the national court.

In *Dansk Jurist* the CJEU noted that the law deprived those wanting to remain in the labour market of the entitlement to availability pay simply because they could, because of their age, draw a pension.

The rule might force them to accept a retirement pension which was lower than the pension to which they would be entitled if they were to remain in employment for more years. This would particularly happen if they had not made contributions for a sufficient number of years to be entitled to draw a full pension. The aims could be achieved by less restrictive, but equally appropriate, measures and as civil servants who were eligible to draw a retirement pension were automatically excluded from receiving availability pay, the legislation went beyond what was necessary to ensure the objectives.

The CJEU in *Fuchs* referred to the non-frustration of the aims of the Directive emphasising that this must be read in the light of the fundamental right to engage in work. Particular attention must be paid to the participation of older workers in the labour force. Keeping older workers in the labour force promotes diversity, and contributes to realising their potential and to their quality of life. This interest must be taken into account in respecting the other, potentially divergent, interests.

‘Therefore, in defining their social policy on the basis of political, economic, social, demographic and/or budgetary considerations, the national authorities concerned may be led to choose to prolong people’s working life or, conversely, to provide for early retirement (see *Palacios de la Villa*, [68] and [69]). The Court has held that it is for those authorities to find the right balance between the different interests involved, while ensuring that they did not go beyond what is appropriate and necessary to achieve the legitimate aim pursued (...*Palacios de la Villa* ... [69], [71] ... *Rosenbladt* ... [44]).’³⁹

Budgetary considerations might underpin the chosen social policy, but they could not in themselves constitute a legitimate aim within Article 6(1).⁴⁰ The retirement age scheme⁴¹ might be appropriate to the aim of facilitating access to employment by younger people, in a profession where the number of posts is limited. Nor did it go beyond what was necessary to achieve its aims, given that the prosecutors could retire at 65 on generous pensions, continue working until 68, and practise as lawyers after leaving.⁴²

In *Hennigs v. Eisenbahn-Bundesamt; Land Berlin v. Mai*⁴³ the CJEU held that determining pay grades by reference to age at first appointment could not be justified. Rewarding experience was a legitimate aim (see *Hütter*), but while length of service was appropriate to achieve that aim, age did not always correlate with experience.

2.3 Proportionality – practical approaches & indirect discrimination

The approach to justification in indirect discrimination can assist in direct age discrimination cases. AG Kokott considered the use of stereotypical ‘knowledge’ by courts (see *Valeri Hariev Belov*⁴⁴):

39 *Fuchs* [62-65].

40 *Fuchs* [74].

41 Permanent civil servants retired at the end of the month in which they reached the age of 65 (age limit) but could have a yearly further employment up to a maximum age of 68 if it was in the interests of the service.

42 *Fuchs* [68].

43 *Hennigs v. Eisenbahn-Bundesamt; Land Berlin v. Mai*, Joined Cases C-297/10 and C-298/10, see [74-76].

44 *Valeri Hariev Belov v. CHEZ Elektro Bulgaria AD and Others* C-394/11 and see C-83/14 *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia*.

1. The fact that the reasons for a measure are 'generally known' does not release the Defendant from having to prove that the principle of equal treatment has not been breached; how well known the motives for the undertaking's conduct are does not say anything about their justification and in particular their proportionality;
2. A measure is appropriate if it is suitable for achieving the legitimate aim pursued; this means that the measure *can actually* achieve the aim.⁴⁵
3. 'It should be noted that the suitability of a measure must always be assessed having regard to the aim pursued by it'. It will be suitable, for example, if it contributes in an appreciable way to the achievement of the aim;
4. If suitable then ask the question whether it is also necessary for the identified purpose. 'A measure is necessary where the legitimate aim pursued could not have been achieved by an equally suitable but more lenient means. It must therefore be explored whether or not there were less restrictive means of... [achieving the aim]' (i.e. whether the equally suitable means have less detrimental effects);⁴⁶
5. The cost of alternative means can be taken into account, when considering whether the alternative means are equally suitable. The question will be whether those means can be adopted at a financially reasonable cost.

A careful analysis must be carried out. It is insufficient for an employer simply to assert that after a particular age 'everyone knows' that a particular ability declines. There must be evidence.

*Tyrolean Airways Tiroler Luftfahrt Gesellschaft*⁴⁷ concerns the importance of comparability of situations.⁴⁸ It considered a provision in a collective agreement relating to group companies in the airline industry. The Agreement took into account experience acquired as a cabin crew member from the date of recruitment by airline company 1 for pay grading. It was alleged that this was *indirect age discrimination* because the agreement did not take account of the skills and knowledge of older workers acquired with airline 2. Cabin crew who had acquired experience with airline 1 obtained advancement at an earlier stage than those who had experience from airline 2. There was no indirect discrimination as there was no evidence of a link between the starting age of employees at the airline 1 and the criteria. The difference is neither directly nor indirectly based on age or on an event linked to age.

'It is the experience which may have been acquired by a cabin crew member with another airline in the same group of companies which is not taken into account for grading, irrespective of the age of that cabin crew member at the time of his or her recruitment'.

The court's language may suggest that there must be an inextricable or indirect link to the age of employees. However, it identified a difference in circumstances between the comparative groups that made the difference which did not relate to age, and was material to the analysis. What made the difference was not the length of experience, but the length of service with the airline 1. This is not a length of experience rule, but a length of service-with-an airline rule.

2.4 Transitional schemes, budgets and acquired rights

An aim arguably relating to dignity is the aim of protecting the acquired rights of persons derived from a system which is being phased out. In *Schmitzer v. Bundesministerin für Inneres*⁴⁹ the CJEU held that the Directive precluded a transitional law aimed at ending age-based discrimination in civil-service pay.

⁴⁵ *Belov AG Opinion* [108].

⁴⁶ *Belov* [116].

⁴⁷ *Tyrolean Airways Tiroler Luftfahrt Gesellschaft* C-132/11, see [29].

⁴⁸ The CJEU has encouraged courts to be specific about comparability: 'it is required not that the situations be identical, but only that they be comparable and' ... 'the assessment of that comparability must be carried out not in a global and abstract manner, but in a specific and concrete manner in the light of '[the subject matter of the case]'. Case 432/14 *O v. Bio Philippe Auguste SARL* [32].

⁴⁹ *Schmitzer v. Bundesministerin für Inneres* Case C-530/13.

The claimant benefited from the previous pay progression scheme which progressed those in his job for every two years of service. However, that system did not take account of training before the age of 18. The amendment extended the progression period to three years for civil servants who had their training before 18 excluded under the old law. Moreover, they had to apply for a review of reference dates. This, and the rule relating to the extension, ‘serve objectives of procedural economy, of respect for acquired rights and of the protection of legitimate expectations.’

The rule also had budgetary aims and

‘... EU law does not preclude Member States from taking account of budgetary considerations at the same time as political, social or demographic considerations, provided that in so doing they observe, in particular, the general principle of the prohibition of age discrimination.’

Further,

‘respect for the acquired rights and the protection of the legitimate expectations of ‘[those]’ favoured by the previous system with regard to their remuneration, ... constitute legitimate employment-policy and labour-market objectives which can justify, for a transitional period, the maintenance of earlier pay and, consequently, the maintenance of a system that discriminates on the basis of age’⁵⁰

These cannot justify a measure that maintains definitively, if only for certain persons, the age-based difference in treatment which the reform of a discriminatory system, of which such a measure forms part, is designed to eliminate. Such a measure, even if it is capable of ensuring the protection of acquired rights and legitimate expectations with regard to civil servants favoured by the previous system, is not appropriate for the purpose of establishing a non-discriminatory system for civil servants who were disadvantaged by that previous system.

In *Specht*⁵¹ a civil servant’s length of service based pay system was challenged. Seniority was calculated from when the person reached the age of 21 but a new law excluded certain periods. Established civil servants were treated differently to the way in which new civil servants were in relation to pay. Established civil servants were gradually being moved onto a less discriminatory pay system.

The legitimate aim of the scheme was to reward previous professional experience in a standard manner whilst guaranteeing a uniform administrative practice, as the aim of rewarding experience enabling a worker to perform duties better is a legitimate aim. The criterion of length of service was generally an appropriate means of achieving that aim. The civil servants could move up the steps of a grade as their age advances and length of service increases. At the time of appointment, however, age was the sole criterion by which a position in a particular grade is allocated. Therefore, the old system went beyond what was necessary to achieve the stated aim.

The claimant argued that the transitional law perpetuated the discrimination because the reclassification of the established civil servants was by reference to their basic pay. The new law no longer laid down age bands or seniority: an experience step was initially allocated. Then pay progressed by length of service. However, there was a difference of treatment which was aimed at ensuring that the civil servants received a reference pay point yielding an equivalent to that received under the old system. This perpetuated the age discrimination. However, the transition scheme was justified. Protecting acquired rights, and legitimate expectations, as to future progress of pay was a legitimate aim. The unions had insisted on the preservation of these. The law would not have their support without this concession and the law would have failed. Protection of acquired rights of a category of persons constitutes an overriding reason

50 Schmitzer [41-42].

51 C 501/12 *Specht v. Land Berlin*.

in the public interest. Simply placing the established civil servants in the new scheme would cause them a loss. The CJEU found that the means adopted were appropriate.⁵²

The transitional law did not go further than what was necessary. Although the civil servants could have been placed on the same, favoured, level of pay until they had gained the experience required to qualify for higher pay under the new scheme, it was not enough to identify an alternative. The transitional measure must be placed in context. The damage liable to be caused for those concerned must be considered.⁵³ The state repealed the old law to eliminate the age discrimination and adopted the transitional law which was a transitional derogation aimed at achieving a non-discriminatory pay structure. The reform had to be made at neutral cost, and without excessive use of administrative resources. They had to avoid case-by-case consideration.

More recently in *Unland*,⁵⁴ there was a measure under which existing judges were placed on a step under a new pay system solely according to the amount of the basic pay they received under the old (discriminatory) remuneration system on the date of transition to the new system. Further progression to higher steps was subsequently calculated essentially according to the periods of experience acquired since the entry into force of the transitional law, irrespective of the judge's total period of experience. Under the transitional scheme the previous pay level (tainted with age discrimination) was taken into account. This perpetuated the previous age discrimination. However, the aim of protecting acquired rights of a category of persons can constitute a legitimate aim. These are the rights of persons benefited by a previous scheme which is being phased out over time. A scheme which permanently had this effect would not be justified. Plainly, over time the discriminatory effect would reduce in these transitional cases.

In *Commission v. Hungary*⁵⁵ the CJEU found that the retirement law was found to be disproportionate because it had the effect of very abruptly and significantly lowering the retirement age. The transitional provisions did not give people adequate time to make financial provision for the future. There was no evidence that the same aim could not have been achieved by less discriminatory measures. Thus it might be achieved by staggering the change over a number of years. So too long a transitional period may be disproportionate and too short a period may also be disproportionate.

2.4.1 Budgets

In *Specht* the CJEU reaffirmed that justification cannot be based on increased financial burdens or potential administrative difficulties.⁵⁶ However, a transitional scheme must remain technically and economically viable. In that case the complexities were relevant:

- (a) high numbers of employees with diverse periods and backgrounds for consideration;
- (b) difficulties that could arise concerning the determination of earlier periods of activity the employees could validly claim;
- (c) individual examination of cases (excessively complex and entailing a high risk of error).

Therefore, the domestic law did not exceed the limits of a state's discretion.

*Starjakob*⁵⁷ concerns the lawfulness of the occupational remuneration system adopted by the Austrian legislature with a view to ending discrimination based on age. After *Hütter* (C 88/08) Mr Starjakob litigated against the ÖBB Personenverkehr AG for the pay remaining from 2007 to 2012 he would have received if the calculation of his reference date for the purposes of advancement had taken into account the period of apprenticeship completed before his 18th birthday.

⁵² Specht [67-8].

⁵³ Specht [79].

⁵⁴ C 20/13 *Daniel Unland v. Land Berlin*.

⁵⁵ C-286/12.

⁵⁶ Specht [77].

⁵⁷ Case C 417/13 *ÖBB Personenverkehr AG v. Starjakob*.

The CJEU considered Article 21 of the Charter, and Articles 7(1), 16 and 17 of the Directive, to determine whether the Directive precluded the state from legislating to permit an incorrect and discriminatory increment reference date to be used for accreditation of previous periods of service. Does the state have the option of eliminating the age-based discrimination by way of a non-discriminatory accreditation, but without financial compensation? Can it set a new increment reference date and extend the period for advancement to the next salary step? The state argued this was permissible if it had a neutral effect on pay and was intended to preserve the employer's liquidity and avoid unreasonable expense resulting from recalculation.

The CJEU said⁵⁸ that the extension to each relevant advancement period was applicable only to a group defined by age (i.e. with pre-18 service). The difference in treatment was directly based on age.

Was it justifiable? The CJEU noted the broad discretion for states in the choice of aims and means.

Establishing a non-discriminatory pay advancement scheme and requiring the employee to apply for a review of the reference date served objectives of fiscal neutrality, procedural economy, respect for acquired rights and the protection of legitimate expectations. The CJEU pointed out that EU law does not preclude states from taking account of budgetary considerations at the same time as political, social or demographic considerations, provided that in so doing they observe, in particular, the general principle of the prohibition of age discrimination.⁵⁹

While budgetary considerations may underpin a state's chosen social policy and influence the nature or extent of the measures that that Member State wishes to adopt, they cannot be the aim. Administrative considerations also cannot be the aim.

However, the means were not appropriate. While a transitory legitimate aim, protection of acquired rights cannot justify a measure that maintains definitively, if only for certain persons, the age-based difference. The measure was not appropriate for the purpose of establishing a non-discriminatory system for employees who were disadvantaged by that previous system.

2.4.2 Remedies

Article 16 of the Directive requires states to ensure that any laws, regulations or administrative provisions contrary to the principle of equal treatment are abolished. But it does not prescribe a specific measure to be taken by the states or private employer in the event of a breach. These can choose between different solutions suitable for achieving the Directive's aim, depending on the situation. The CJEU, in *Starjakob*, considered whether the legislation must allow an employee whose periods of pre-18 service (which were not taken into account in the calculation of his advancement) to obtain compensation for the pay lost due to discrimination.

For as long as measures reinstating equal treatment are not adopted, re-establishing equal treatment entailed granting employees disadvantaged by the previous system the same benefits as those enjoyed by the employees favoured by that system, as regards the recognition of periods of service completed before the age of 18 but also advancement in the pay scale.⁶⁰ The arrangements for the favoured category are the only valid point of reference in those circumstances.

Nothing precludes a provision for an obligation of cooperation requiring the employee to give the employer evidence relating to the periods of pre-18 service so that they can be taken into account. EU law cannot be relied on for abusive or fraudulent ends. However, there is no abuse of law if (i) he refuses

58 [31] and see *Schmitzer* [35].

59 *Starjakob* [36].

60 *Starjakob* see [49].

to cooperate for the purpose of the application of discriminatory national legislation, and (ii) if he seeks to obtain payment intended to re-establish equal treatment with employees favoured by the previous system.

3. Article 6(2) Justifications

Article 6(2) states that Member States may provide that the fixing, for occupational social security schemes ('OSSS'), of ages for admission or entitlement to retirement or invalidity benefits does not constitute discrimination on the grounds of age. This exception to the principle of non-discrimination on grounds of age must be interpreted restrictively. It applies only to occupational social security schemes that cover the risks of old age and invalidity, and not all aspects of an OSSS covering such risks come within the exception. It is only those that are expressly referred to in Article 6(2). In *Lesar v. Telekom Austria AG*⁶¹ the CJEU took a definition of 'Occupational Social Security Scheme' from a gender Directive.⁶² OSSS are 'schemes not governed by Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security whose purpose is to provide workers, whether employees or self-employed, in an undertaking or group of undertakings, area of economic activity, occupational sector or group of sectors with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them, whether membership of such schemes is compulsory or optional'.

The scheme in *Lesar* fixed the age from which members began to pay contributions to the civil service pension scheme and acquired the right to receive a full retirement pension in order to guarantee, inter alia, equal treatment of civil servants in that respect. The CJEU held that the legislation sought to ensure the 'fixing ... of ages for admission or entitlement to retirement or invalidity benefits' within the meaning of Article 6(2), and was therefore within the exception created by Article 6(2).

4. Genuine and Determining Occupations Requirements (GDOR)

Article 4 of the Directive permits states to legislate to permit age-based differential treatment, where, because of the nature of the occupational activity or its context a characteristic related to age constitutes a genuine and determining occupational requirement, if the objective is legitimate and the requirement is proportionate.

In *Wolf v. Stadt Frankfurt am Main*,⁶³ a regulation set firefighters' maximum recruitment at the age of 30. This could be justified under Article 4(1), as the physical capabilities required for the job were related to age. Note that there was evidence offered for the link between the characteristic and age.

Perez v. Ayuntamiento de Oviedo concerned maximum recruitment ages and Article 4. Spanish laws permitted setting a maximum age for access to the police force, and some authorities set it at the age of 30. The CJEU held that the courts must identify a characteristic related to age which constitutes the GDOR in Article 4. If there is evidence of a link between age and a particular physical capacity, it could be regarded as a 'genuine and determining occupational requirement' within the meaning of Article 4(1) for the purposes of employment as a local police officer. Further ensuring the operational capacity and proper functioning of the police service constitutes a legitimate objective in Article 4. However, Recital 23 of the Directive states that Article 4 applies in 'very limited' circumstances: as a derogation it is strictly interpreted.

⁶¹ C-159/15 *Lesar v. Telekom Austria AG*, [27]. This case deals with a point first raised but not answered in Case C-529/13, *Felber v. Bundesministerin für Unterricht, Kunst und Kultur*.

⁶² Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

⁶³ *Wolf v. Stadt Frankfurt am Main*, Case C-229/08.

Evidence must show that the characteristic is inevitably related to a particular age and is not found in persons (over or under) that age.⁶⁴

Proportionality could then be considered: Different authorities had different ages and some had none, as did the national police force. The CJEU noted that *Wolf* was based on a finding ‘on the basis of scientific data submitted to it, that some of the tasks of persons in the intermediate career of the fire service, such as fighting fires, required ‘exceptionally high’ physical capacities and that very few officials over 45 years of age have sufficient physical capacity to perform the fire-fighting part of their activities’.⁶⁵ The national court had found in *Perez* that the physical capacities required were not of that high capacity. Therefore, the local law was disproportionate under Article 4.⁶⁶

Article 6 provided no justification. The legitimate aims were ‘based on the training requirements of the post in question and the need for a reasonable period of employment before retirement or transfer to another activity.’ However, the broad discretion in the choice of measures capable of meeting state objectives could not frustrate implementation of non-discrimination. The objective concerning training requirements was not evidenced. Nothing showed that the age limit for recruitment was appropriate and necessary for that aim.

A maximum recruitment age of 30 could not be considered necessary to ensure that officers have a reasonable period of employment before retirement.

5. Article 2(5) exceptions

Article 2(5) of the Directive allows a Member State to make laws permitting differential treatment because of one of the Article 1 characteristics, including age. However, its use is very circumscribed. It aims to prevent and ‘arbitrate’ a conflict between the principle of equal treatment and the need to ensure public order, security and health, the prevention of criminal offences and the protection of individual rights and freedoms, which are necessary for the functioning of a democratic society.⁶⁷

The article was considered in *Petersen*.⁶⁸ There the CJEU held that because there was no maximum practice age under the national law for private dentists it could not be argued that the maximum age of 68 for public (panel) dentists was permitted by Article 2(5) if the sole aim of that legal requirement was to protect the health of patients against the decline in performance of those dentists after that age. The maximum age could not be said to be necessary with such a gap in the legislation.

Similarly, in *Prigge* the CJEU held that Article 2(5) was to be interpreted as meaning that states can authorise, through rules to that effect, the social partners to adopt measures within the meaning of Article 2(5) in the areas referred to in it falling within collective agreements. However, those rules of authorisation must be sufficiently precise so as to ensure that the adopted measures fulfil the Article 2(5) requirements. The measure adopted in *Prigge* concerning the age from which pilots may no longer carry out their professional activities (at 60) was not a measure necessary for public security or protection of health. The court looked at different national and international legislation which fixed that maximum age

64 *Perez v. Ayuntamiento de Oviedo* C-416/13 [48].

65 *Perez* [52-3].

66 The CJEU will have another opportunity to deal with Article 4(1) in C-258/15 *Salaberria Sorondo v. Academia Vasca de Policia y Emergencias* in which the question referred states: ‘Is the setting of a maximum age of 35 years as a condition for participation in the selection process for recruitment to the post of officer of the police force of the Autonomous Community of the Basque Country (Policia Autónoma Vasca) compatible with the interpretation of Article 2(2), Article 4(1) and Article 6(1)(c)?’

67 Most recently see the AG Opinion in C-157/15 *Achbita v. G4S Secure Solutions NV* [131] citing C-447/09 *Prigge* [56].

68 *Petersen v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*, Case C-341/08, [2010] 2 CMLR 31.

at 65. Article 2(5) establishes an exception to the principle of the prohibition of discrimination, so it must be interpreted strictly.⁶⁹

To apply the exception in Article 2(5) the national court must identify a measure laid down by national law which is necessary in a democratic society for one of the following aims:

- public security,
- the maintenance of public order and the prevention of criminal offences;
- the protection of health; or
- for the protection of the rights and freedoms of others.

So it is submitted that it will rarely give the basis for an exception to the principle of equal treatment save in the clearest cases of the state intervening on such grounds in a proportionate way or permitting the social partners to do so in a proportionate way.

Conclusions

Each of the cases appears to turn on its own facts, but a useful decision template exists:

1. Is there less favourable treatment? (Claimant to prove)
 - a. Is it less favourable than the treatment of an actual comparator (who?) or a hypothetical comparator? (Gained from evidence of similar but different situations suggesting the employer would have treated someone of a different age more favourably).
 - b. Is that comparator in the same (or not materially different) circumstances as the Claimant? (These differences should not include differences that are in fact linked to age.)
2. Do any of the particular exceptions apply?
 - a. Does Article 2(5) apply?
 - i. Is there a measure laid down by national law?
 - ii. In a democratic society, is it necessary for one of the following aims:
 - public security;
 - the maintenance of public order and the prevention of criminal offences;
 - the protection of health; or
 - for the protection of the rights and freedoms of others?
 - b. Does Article 4(1) apply?
 - i. Is there a difference of treatment which is based on a characteristic related to age?
 - ii. Is it a genuine and determining occupational requirement by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out?
 - iii. Is the objective legitimate?
 - iv. Is the requirement proportionate? (See below.)
 - c. Is the treatment related to an occupational social security scheme?
 - i. Is it the fixing of ages for admission or entitlement to retirement or invalidity benefits?
 - ii. Is it the use, in the context of such schemes, of age criteria in actuarial calculations? (If neither i nor ii, Article 6(2) does not apply.)
 - iii. Does the use of this treatment result in discrimination on the grounds of sex? (If so it does not fall under Article 6(2).)
3. If none of the particular exceptions apply, and there has been less favourable (differential) treatment on the grounds of age, the burden of proof is on the employer to show that the treatment is justified under the Article 6(1) scheme of derogation:

69 *Prigge* [56] and *C 267/12 Hay v. Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres* [46].

- a. What is the aim pursued by the treatment? (Consider whether the measure in question pursues a defined, specific, legitimate aim. Justification must be considered in relation to that specific aim.);
- b. Is the aim legitimate? (It must be an employment policy aim, not just one with a public interest to them.) It must be necessary in the circumstances of the Defendant;
- c. Are the means adopted appropriate to the specific aim?
- d. Are the means reasonably necessary to the achievement of that aim? (Does the employer satisfy the *Valeri Hariev Belov* approach?)

In the light of *Rasmussen*, the next debate at CJEU level may be whether a private employer must also have to be able to point to a public interest aim to justify direct age discrimination or can rely on private reasons underpinned by public interest aims of state legislation.

Gender Stereotyping in the case law of the EU Court of Justice

Alexandra Timmer*

1. Introduction

Stereotyping is an enduring concern for equality scholars, including members of the European Equality Law Network. The national legal gender experts from the Network regularly report that the persistence of stereotypes hampers the realization of gender equality in their country. The European Commission also shows concern with regard to the impact of gender stereotyping on equality between men and women. For example, in the Commission's current work on addressing the work-life balance, following the tabling of the proposed Maternity Leave Directive, it is recognized that 'the current system entrenches the role of women as primary care-givers for children and elderly or frail relatives'.¹

This article explores gender stereotyping on the European level, more particularly in the Court of Justice of the EU (CJEU)² case law. The first aim of this article is to assess whether the Court contests or reinforces stereotypes. This entails studying the CJEU gender equality case law transversally through a stereotype lens. Stereotypes have appeared in the case law of the Court ever since the first gender equality cases. In the 1972 judgment in *Sabbatini*, for example, a regulation was at issue that assumed that men were the breadwinner and head of the household.³ This article will show that the Court is not consistent in addressing stereotypes across its gender equality jurisprudence. It argues that the Court has both reinforced traditional gender stereotypes and included effective anti-stereotyping reasoning in its judgments. The second aim of this article is to start exploring what the Court should do to contest stereotypes more effectively, and what challenges the Court would face in this endeavour.

The article proceeds as follows. Section 2 provides the conceptual framework by delineating the concept of stereotypes and their connection to discrimination and inequality. Section 3 assesses the case law of the CJEU and shows that the Court both reinforces and contests gender stereotypes. Section 4 discusses what challenges the Court faces in developing anti-stereotyping. Section 5 concludes.

2. Stereotypes and discrimination

Conceptualizing stereotypes

Stereotypes are beliefs about groups of people. More precisely, they are preconceptions about the characteristics, roles and attributes of groups of people.⁴ These characteristics, roles or attributes are

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1 http://ec.europa.eu/smart-regulation/roadmaps/docs/2015_just_012_new_initiative_replacing_maternity_leave_directive_en.pdf.

2 In this article the term CJEU also includes the European Court of Justice.

3 *Case 20/71 Sabbatini (Nee Bertoni) v European Parliament*.

4 Cf. the definition of a stereotype by Rebecca Cook and Simone Cusack: "a generalized view or preconception of attributes or characteristics possessed by, or the roles that should be performed by, members of a particular group". Cook, R., Cusack,

then attributed to all individual members of the group in question, regardless of the individual's actual situation.⁵ Rebecca Cook and Simone Cusack have explained that 'gender stereotypes are concerned with the social and cultural construction of men and women, due to their different physical, biological, sexual and social functions.'⁶

It is a common mistake to think that stereotypes (including those based on gender) are necessarily negative or statistically unsound. Stereotypes can be positive, negative or ambivalent in content.⁷ However, also seemingly positive stereotypes such as 'women are caring,' or 'African-American women are good dancers,' can have deleterious consequences as they serve patronizing approaches to the groups in question. Drawing on earlier research into ECHR, Canadian and U.S. equal protection law, it is suggested that stereotypes come in four forms: role-typing, false, statistical and prescriptive stereotypes.⁸

Role-typing stereotypes are assumptions about the proper roles or behaviour of people who belong to a certain group.⁹ The quintessential example, which – as the next section will explore further – has surfaced frequently in the CJEU case law is the idea that women are homemakers and men are breadwinners.¹⁰ *False stereotypes* include stereotypes that are based on prejudice, whether consciously or unconsciously held, as well as stereotypes that are less clearly negative but are empirically/statistically unsound. An example from the case law is the idea that women are incapable of handling firearms.¹¹ *Statistical stereotypes* are the kind that reflect a statistical truth about a group as a whole, but which does not necessarily accurately reflect the situation of the individual. In other words, these are largely accurate but overly broad assumptions. The CJEU has encountered this sort of stereotype many times in cases in which it was assumed that women do much of the care work at home.¹² *Prescriptive stereotypes* require a certain form of behaviour or standard of appearance from certain groups of people. The case of *Defrenne*, for example, concerned an airhostess whose employment was automatically terminated when she reached the age of 40.¹³ This kind of rule is based on the stereotype that women should be attractive (and that women over 40 become less attractive).

Two things are important to note here. Firstly, many stereotypes can be classified under multiple forms simultaneously. Gender role-typing stereotypes, such as the idea that women are homemakers and men are breadwinners, are simultaneously role-types, prescriptive, and statistically sound. That is because, as the next section will explain further, stereotypes have a self-reinforcing quality: because role-types are also strongly prescriptive (the idea is that women *ought to be* homemakers) they become true in a statistical sense. They are self-fulfilling prophecies.¹⁴ Secondly, all four forms of stereotypes can be intersectional. For the purposes of this article that means that gender then intersects with other systems of oppression to produce certain stereotypes. In the case of *Defrenne*, for example, gender intersected with age: the stereotype at issue was that only young women are attractive.

S. (2010), *Gender Stereotyping Transnational Legal Perspectives*, University of Pennsylvania Press, p. 9.

5 Cook, R., Cusack, S. (2010), *Gender Stereotyping Transnational Legal Perspectives*, University of Pennsylvania Press, p. 9.

6 Cook, R., Cusack, S. (2010), *Gender Stereotyping Transnational Legal Perspectives*, University of Pennsylvania Press, p. 20.

7 See for example Fiske, S., Cuddy, A., Glick, P., Xu, J. (2002), 'A model of (often mixed) stereotype content: Competence and warmth respectively follow from perceived status and competition,' *Journal of Personality and Social Psychology*, Vol. 82, No. 6, p. 878; Cuddy, A. et al. (2009), 'Stereotype content model across cultures: Towards universal similarities and some differences,' *British Journal of Social Psychology*, Vol. 48, pp. 1-33.

8 Timmer, A. (2015), 'Judging Stereotypes: What the European Court of Human Rights Can Borrow from American and Canadian Equal Protection Law,' *American Journal of Comparative Law*, Vol. 63, No. 1, pp. 239-284.

9 See also Cook, R., Cusack, S. (2010), *Gender Stereotyping Transnational Legal Perspectives*, University of Pennsylvania Press, pp. 28-29 (describing sex role stereotypes).

10 E.g. Case 20/71 *Sabbatini (Nee Bertoni) v European Parliament*.

11 Case 222/84 *Johnston v. Royal Ulster Constabulary* [1986] ECR 1651; Case 285/98 *Kreil v. Bundesrepublik Deutschland* [2000] ECR 0069. For analysis see Cook, R., Weiss, C. (2016), 'Gender Stereotyping in the Military. Insights from Court Cases' in: Brems, E., Timmer, A. (eds.), *Stereotypes and Human Rights Law*, Intersentia, p. 175.

12 See e.g. *Danfoss*, Case 109/88, para. 21 ('female employees, who, because of household and family duties for which they are frequently responsible, are not as able as men to organize their working time flexibly').

13 Case 149/77 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, Judgment of the Court of 15 June 1978.

14 See e.g. Schneider, D. (2004), *The Psychology of Stereotyping*, New York, Guilford Press, pp. 215-224.

Linking stereotyping to discrimination and inequality

The preceding part showed that stereotypes come in different guises. They can be harmful in all these guises. What stereotypes do is to fixate identities and rationalize inequality.¹⁵ They thereby serve as control mechanisms. They also create hierarchies of ‘in’ and ‘out’ groups, ‘us’ and ‘them’.¹⁶ Zanita Fenton has explained that the acquisition and preservation of social power drives the formulation of stereotypes.¹⁷ The effects of stereotypes can be felt in all areas of life. Research shows that they have effects on social standing and recognition; effects on the distribution of material resources; and effects on the psychological well-being of individuals.¹⁸

The link between stereotyping and discrimination has engrossed social psychologists.¹⁹ The connections are complex, and cannot be fully explained in the short space of this article. Drawing again on previous research, it is submitted that the link between gender stereotyping and discrimination can be conceived of as a self-reinforcing circle.²⁰ Gender stereotyping can appear as a form of discrimination and inequality (such as, for example, when legal rules or policies discourage fathers from taking childcare-related leave). Next, gender stereotypes can be used to justify discrimination (for example, when States claim that these rules are justified on the basis of the special relationship between the mother and her child). And lastly, this reinforces further inequality (in this example because mothers are forced to continue in their position of primary care-givers).

Because stereotypes reinforce discrimination and inequality, it is submitted that courts, including the CJEU, need to incorporate an anti-stereotyping approach in their legal reasoning in order to achieve substantive equality.²¹ It is suggested that judicial anti-stereotyping reasoning should consist firstly in naming and secondly in contesting harmful stereotypes.²² This draws on the feminist insight that one cannot change a reality without naming it.²³ The next section will investigate to what extent the CJEU contests or reinforces gender stereotypes. The section after that will identify what challenges the Court faces in incorporating anti-stereotyping reasoning more thoroughly in its case law.

3. CJEU case law: between reinforcing and contesting gender stereotypes

This section will show that the Court has both reinforced and contested gender stereotypes, and that these two attitudes continue to coexist in the case law.

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- 15 Kay, A.C. (2007), ‘Panglossian Ideology In The Service Of System Justification: How Complementary Stereotypes Help Us to Rationalize Inequality’, *Advances in Experimental Social Psychology*, Vol. 39, pp. 305-358.
 - 16 See e.g. Schneider, D. (2004), *The Psychology of Stereotyping*, New York, Guildford Press, pp. 229-265.
 - 17 Fenton, Z.E. (1998-1999), ‘Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence’, *Columbia Journal of Gender and Law*, Vol. 8 (1998-1999), pp. 1- 66 at 15.
 - 18 E.g. Cook, R., Cusack, S. (2010), *Gender Stereotyping Transnational Legal Perspectives*, University of Pennsylvania Press, pp. 59-68; Steele, C. (2010), *Whistling Vivaldi: And Other Clues to How Stereotypes Affect Us*, New York, W.W. Norton & Company.
 - 19 See e.g. Schneider, D. (2004), *The Psychology of Stereotyping*, New York, Guildford Press, pp. 266-320.
 - 20 Timmer, A. (2015), ‘Judging Stereotypes: What the European Court of Human Rights Can Borrow from American and Canadian Equal Protection Law’, *American Journal of Comparative Law*, Vol. 63, No. 1, pp. 281-282; Peroni, L., Timmer, A. (2016), ‘Gender Stereotyping in Domestic Violence Cases: An Analysis of the European Court of Human Rights’ Jurisprudence’, in: Brems, E., Timmer, A. (eds.) (2016), *Stereotyping and Human Rights Law*, Antwerp, Intersentia, pp. 39-65.
 - 21 Timmer, A. (2011), ‘Toward an Anti-Stereotyping Approach for the European Court of Human Rights’, *Human Rights Law Review*, Vol. 11, pp. 707-738. This is also in line with international human rights law, particularly Article 5(a) CEDAW. See e.g. Cook, R., Cusack, S. (2010), *Gender Stereotyping Transnational Legal Perspectives*, University of Pennsylvania Press.
 - 22 Timmer, A. (2011), ‘Toward an Anti-Stereotyping Approach for the European Court of Human Rights’, *Human Rights Law Review*, Vol. 11; Peroni, L., Timmer, A. (2016), ‘Gender Stereotyping in Domestic Violence Cases: An Analysis of the European Court of Human Rights’ Jurisprudence’, in Brems, E., Timmer, A. (eds.) (2016), *Stereotyping and Human Rights Law*, Antwerp, Intersentia.
 - 23 ‘[Y]ou can’t change a reality you can’t name’; see MacKinnon, C. (2005), *Women’s Lives Men’s Laws*, Belknap Press, p. 89. See also on naming Cook, R., Cusack, S. (2010), *Gender Stereotyping Transnational Legal Perspectives*, University of Pennsylvania Press, pp. 39-70.

Reinforcing stereotypes in pregnancy and maternity protection

Pregnancy and maternity protection has long been an area where the Court has been criticized for reinforcing stereotypes.²⁴ The 1984 judgment in *Hofmann* concerned a father who applied for a maternity leave allowance in order to take care of his child when the mother went back to work after the eight weeks of her mandatory maternity leave had ended.²⁵ The CJEU held that it was legitimate to protect ‘a woman’s needs.’²⁶ Two types of protection were mentioned: ‘the protection of a woman’s biological condition during pregnancy and thereafter’ and the protection of ‘the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment.’²⁷ This reasoning has since become a regular feature of EU sex equality law on pregnancy, maternity and parenting.²⁸ This reasoning encases several descriptive and normative stereotypes about motherhood. It privileges the mother-child relationship, suggesting that this is the primary relationship (similar reasoning does not exist concerning fathers). The result is a ‘paternalistic’ approach, aiming at the ‘protection’ of women.²⁹ McGlynn has pointed out that this protective language taps into images of women as the delicate sex,³⁰ which is also confirmed in the Court’s idea that mothers are ‘burdened’ if they work next to their role as care-givers.³¹

What is more, the Court took what can nearly be qualified as a ‘pro-stereotyping’ approach in *Hofmann*. It namely held that Directive 76/207,³² concerning equal treatment of men and women in employment, was not ‘designed to settle questions concerned with the organization of the family, or to alter the division of responsibility between the parents.’³³ In other words, the Court took care to point out that EU law was not meant to challenge traditional gender-role stereotypes as regards parenthood. Much has changed since *Hofmann*, however, as the next section, discussing the recent cases of *Roca Álvarez* and *Maistrellis*, will show.³⁴

Elements of anti-stereotyping in the case law

This section will provide an overview of the most salient anti-gender-stereotyping reasoning in the CJEU jurisprudence.

Positive action in employment

One line of case law where gender stereotypes are clearly at issue concerns positive action in employment. The 1984 Council Recommendation on the promotion of positive action for women (84/635/EEC) in

24 McGlynn, C. (2000), ‘Ideologies of Motherhood in European Community Sex Equality Law,’ *European Law Journal*, Vol. 6, pp. 29-44.

25 Case 184/83 *Hofmann* [1984] ECR 3047.

26 Case 184/83 *Hofmann* [1984] ECR 3047, para. 25.

27 Case 184/83 *Hofmann* [1984] ECR 3047, para. 25.

28 See for example Case C-32/93 *Webb* [1994] ECR I-3567, para. 20; Case C-394/96 *Brown* [1998] ECR I-4185, para. 17; Case C203/03 *Commission v Austria* [2005] ECR I-935, para. 43; Case C-104/09 *Roca Álvarez* [2010] ECR I-08661, para. 27.

29 McGlynn, C. (2000), ‘Ideologies of Motherhood in European Community Sex Equality Law,’ *European Law Journal*, Vol. 6, p. 35.

30 McGlynn, C. (2000), ‘Ideologies of Motherhood in European Community Sex Equality Law,’ *European Law Journal*, Vol. 6, p. 35.

31 Mandatory maternity leave has also been criticized as being paternalistic. See for a discussion e.g. Suk, J.C. (2012), ‘From Antidiscrimination to Equality: Stereotypes and the Life Cycle in the United States and Europe,’ *American Journal of Comparative Law*, Vol. 60, pp. 75-98.

32 Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

33 Case 184/83 *Hofmann* [1984] ECR 3047, para. 24. See also *Bilka-Kaufhaus GmbH v Weber von Hartz* (1986) C-170/84, question 2.b.

34 In between the cases of *Hofmann* (1984) and *Roca Álvarez* (2010), the Court delivered judgment in the *Hill* case, where it held that ‘Community policy in this area is to encourage and, if possible, adapt working conditions to family responsibilities. Protection of women within family life and in the course of their professional activities is, in the same way as for men, a principle which is widely regarded in the legal systems of the Member States as being the natural corollary of the equality between men and women, and which is recognized by Community law.’ Case C-243/95 *Hill* [1998] ECR I-3739, para. 42.

essence referred to stereotypes by recommending Member States 'to eliminate or counteract the prejudicial effects on women in employment or seeking employment which arise from existing attitudes, behaviour and structures based on the idea of a traditional division of roles in society between men and women.'³⁵ However, the Court has by no means addressed stereotypes in all positive action cases. In some judgments references to stereotypes have been rather veiled, as for example when the Court alluded to 'instances of inequality which may exist in the reality of social life' in its first positive action case.³⁶

In a well-known positive action case from 1997, *Marschall*, the issue of stereotyping was foregrounded.³⁷ The Court explicitly addressed the gender stereotypes that women can face in the workplace. The case concerned a male teacher who complained that a woman was promoted instead of him. According to the applicable North-Rhine Westphalian regulation, 'women are to be given priority for promotion in the event of equal suitability' 'unless reasons specific to an individual [male] candidate tilt the balance in his favour.'³⁸ The Court pointed out that:

'it appears that even where male and female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and capacities of women in working life and the fear, for example, that women will interrupt their careers more frequently, that owing to household and family duties they will be less flexible in their working hours, or that they will be absent from work more frequently because of pregnancy, childbirth and breastfeeding.'³⁹

In many ways this is exemplary anti-stereotyping reasoning: the Court explicitly pointed out that women face gender stereotypes in the workplace, and the Court also named the content of these stereotypes (e.g. women will interrupt their careers, they are not flexible, and they will be absent a lot). Next, the Court discussed the harm of these stereotypes: because of these beliefs, women have fewer possibilities than men to be hired or promoted. In other words, the Court recognized that because of the existence of gender stereotypes concerning the capacities of men and women, women have fewer opportunities in the labour market.

The difficulty in positive action cases is that there can be a thin line between reinforcing traditional gender role stereotypes, and taking *de facto* inequalities into account when devising law and policy.⁴⁰ This issue will be further taken up in Section 4.

Recent parenting and reconciliation cases

In a few recent judgments concerning the reconciliation of work and family life, the Court has also included explicit anti-stereotyping reasoning. *Roca Álvarez* concerned a father who applied for a reduction in his working time, because he wanted to be able to care for his child.⁴¹ The type of leave he requested was originally meant as breastfeeding leave, but – as the national court held – the legislation had since then been detached from the biological fact of breastfeeding, so that it can be considered as time purely

35 Recommendation 1(a). See also the Recital: 'Whereas existing legal provisions on equal treatment, which are designed to afford rights to individuals, are inadequate for the elimination of all existing inequalities unless parallel action is taken by governments, both sides of industry and other bodies concerned, to counteract the prejudicial effects on women in employment which arise from social attitudes, behaviour and structures;' 84/635/EEC: Council recommendation of 13 December 1984 on the promotion of positive action for women.

36 Case 312/86 *Commission v France* [1988] ECR 6315, para. 15; Later repeated e.g. in C-450/93 *Eckhard Kalanke v Freie Hansestadt Bremen* ECR [1995] I-03051, para. 18.

37 *Marschall* C-409/95. For further discussion see Selanec, G., Senden, L. (2012), *Positive action measures to ensure full equality between men and women, Including on company boards*, pp. 10-11, available at: http://ec.europa.eu/justice/gender-equality/files/gender_balance_decision_making/report_gender-balance_2012_en.pdf.

38 *Marschall* C-409/95, paras 3 and 5.

39 *Marschall* C-409/95, para. 29.

40 See Case C-476/99, *Lommers*, para. 41.

41 Case C-104/09, *Pedro Manuel Roca Álvarez v Sesa Start España ETT SA* [2010] ECR I-8661.

devoted to the child.⁴² Mr. Roca Álvarez' request was refused because the mother of his child was self-employed. Mothers who are employed always have a right to the leave in question, but fathers only had a derived right.

The CJEU pointed out that this case did not concern the protection of the biological condition of women following pregnancy, nor did it concern the protection of 'the special relationship between a mother and her child.'⁴³ The Spanish Government had attempted to make a substantive equality argument, namely that the rule in question pursued the objective of compensating young mothers for the disadvantages they suffer in their working life (according to the Government it is more difficult for women to keep their job or to re-enter the world of work than for men with young children). The Court noted that the aim of the applicable EU rule (Article 2(4) of Directive 76/207) is indeed to achieve substantive equality.⁴⁴ However, the Court noted that the Government's argument is:

'liable to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties.'⁴⁵

The same wording has since been repeated in the 2015 judgment in *Maistrellis*.⁴⁶ This case concerned a male Greek judge who applied for paid parental leave in order to raise his child. His request was refused because the Greek Civil Service Code stipulated that if the wife of a civil servant is not employed, he cannot claim parental leave. AG Kokott, in her opinion on this case, referring to the Parental Leave Directive,⁴⁷ had stated that 'the traditional distribution of the roles of men and women in the raising of children – in particular that of fathers – is to be overcome.'⁴⁸

In terms of anti-stereotyping reasoning, the Court takes a significant step forward in these cases as compared to *Marschall*. Whereas *Marschall* – and many other EU sex discrimination cases – emphasized the importance of facilitating the careers of women/mothers, the Court now tackles the other side of the coin, namely the importance of fathers taking their equal share in parenting. The stereotypes that are at issue in *Marschall*, on the one hand, and *Roca Álvarez* and *Maistrellis*, on the other, in essence all spring from the same source. That source is the ubiquitous separate spheres ideology, which assigns women to the private sphere and men to the public sphere.⁴⁹ But only in *Roca Álvarez* and *Maistrellis* has the Court started to address the importance of men's role in the private sphere, i.e. in raising children.⁵⁰

Unfortunately, as Susanne Burri has pointed out, the Court is not consistent in taking the *Roca Álvarez/ Maistrellis* line.⁵¹ In the recent case of *Betriu Montull* the Court again relied on the protection of women argument, rather than on the idea that both men and women should be able to balance work and private life.⁵² Burri argued that '[i]n the *Betriu Montull* case, considerations on reconciliation issues are lacking.'⁵³

42 Case C-104/09, *Roca Álvarez*, para. 14.

43 Case C104/09, *Roca Álvarez*, para. 31.

44 Case C-104/09, *Roca Álvarez*, para. 34.

45 Case C-104/09, *Roca Álvarez*, para. 36.

46 Case C-222/14, *Maistrellis*, para. 50.

47 Directive 2010/41/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity.

48 Case C-222/14, *Maistrellis*, Opinion of Advocate General Kokott delivered on 16 April 2015.

49 See e.g. Pateman, C. (1983), 'Feminist Critiques of the Public/Private Dichotomy,' in Benn, S.I., Gaus, G.F. (eds), (1983), *Public and Private in Social Life*, New York, St. Martin's Press, pp. 281-303. See for a clear example in the case law *Oesterreichischer Gewerkschaftsbund*, Case C-220/02.

50 See also Carracciolo di Torella, E. (2014), 'Brave New Fathers for a Brave New World? Fathers as Caregivers in an Evolving European Union', *European Law Journal*, Vol. 20, No. 1, pp. 88-106.

51 Burri, S. (2015), 'Parents who want to reconcile work and care: which equality under EU law?' in: Brink, M., Burri, S., Goldschmidt J. (eds.), (2015), *Liber Amicorum Titia Loenen*, SIM/Utrecht University, pp. 261-277.

52 C-5/12 *Marc Betriu Montull v Instituto Nacional de la Seguridad Social (INSS)*, Judgment of the Court (Fourth Chamber) of 19 September 2013.

53 Burri, S. (2015), 'Parents who want to reconcile work and care: which equality under EU law?' SIM/Utrecht University, p. 272.

Silence on gender stereotypes in other cases

There are many sex equality cases where the Court encountered gender stereotypes without addressing them.

In this respect, one line of relevant cases concerns women in traditionally male jobs.⁵⁴ The Court has delivered several judgments related to women working in 'male' professions, such as the police,⁵⁵ and the military.⁵⁶ The *Johnston* case, for example, concerned a female police officer whose contract was not renewed following a new rule that only male police officers could carry firearms.⁵⁷ Johnston complained that this violated Directive 76/207, then in force, concerning equal treatment between men and women in access to employment. The UK Government attempted to justify the prohibition on policewomen using firearms on the basis of gender stereotypes, namely that women have less physical strength and 'the probable reaction of the public to the appearance of armed policewomen.'⁵⁸ Thus, the Government argued that the sex of the person carrying out the work constituted a determining factor within the meaning of Article 2(2) of Directive 76/207. The Court did not address the stereotypes. Admittedly this is an old case, so the Court's approach could be different today.

Related to this topic is the strand of cases concerning women doing night work.⁵⁹ In the past, many countries prohibited women from doing night work.⁶⁰ These prohibitions were based on the idea that female workers required protection, which in turn was based on gender stereotypes about the delicateness of women and their place in the home. Thus for example in the case of *Stoeckel*, the French and Italian governments claimed that a prohibition on night work for women was necessary due to social considerations, such as 'the risks of attack and the heavier domestic workload borne by women.'⁶¹ In its judgment, the CJEU did not name the stereotypes or really contest them. It just held that women are not inherently exposed to different risks than men when doing night work, and that considerations concerning women's domestic workload did not fall under the purpose of Directive 76/207. Thus these considerations could not justify the difference in treatment between men and women.

In several other areas of EU sex equality law, gender stereotypes appear not to have been mentioned at all. Take, for example, the cases concerning the use of gender-based actuarial factors in occupational pension schemes, private insurance schemes or statutory social security.⁶² It is submitted that gender-based actuarial factors can be viewed as a specific kind of instantiation of statistical gender stereotypes: in some ways actuarial decision-making is a form of systematic stereotyping.⁶³ The idea that women live longer is a statistically correct stereotype. The *Test-Achats* and *X* judgments do not mention anything related to stereotypes.⁶⁴ AG Kokott, however, in her opinion in the *Test-Achats* case did point out that life expectancy is related to economic and social conditions, and to habits.⁶⁵ She submitted that: 'In

54 In some of these cases, the opinion of the AG did refer to stereotypes. See the opinion of AG La Pergola delivered on 26 October 1999, Case C-285/98 *Tanja Kreil v Federal Republic of Germany*, para. 24 ('women would continue to be marginalised by being confined to certain sections of the Bundeswehr only – with the risk that the old stereotypical division between the sexes would be perpetuated').

55 Case 222/84 *Johnston v. Royal Ulster Constabulary* [1986] ECR 1651.

56 Case 285/98 *Kreil v. Bundesrepublik Deutschland* [2000] ECR 0069 and Case 273/97 *Sirdar* [1999] ECR I-07493.

57 Case 222/84 *Johnston v. Royal Ulster Constabulary* [1986] ECR 1651.

58 Case 222/84, *Johnston*, para. 31.

59 *Commission v France* (197/96); Case C-345/89; 312/86; 207/96 *Stoeckel* [1991] ECR I-4066.

60 See also ILO Convention concerning Night Work of Women Employed in Industry (Revised 1948) (Entry into force: 27 February 1951) Adoption: San Francisco, 31st ILC session (9 July 1948). Article 3 states, for example, 'Women without distinction of age shall not be employed during the night in any public or private industrial undertaking, or in any branch thereof, other than an undertaking in which only members of the same family are employed.'

61 Case C345/89 *Stoeckel* [1991] ECR I4066, para. 14.

62 This topic is analyzed in Jacquemain, J., Wuïame, N. (2015), 'Gender based actuarial factors and EU gender equality law', *European Equality Law Review* 1, available at: <http://www.equalitylaw.eu/downloads/2935-european-equality-law-review-1-2015-pdf-1-579-kb>.

63 See Schauer, F. (2003), *Profiles, Probabilities and Stereotypes*, Cambridge, MA, Harvard University Press, pp. 4-6.

64 Case C-236/09, *Test-Achats*, ECLI:EU:C:2011:100; and Case C-318/13, *X*, ECLI:EU:C:2014:2133.

65 Opinion of Advocate General Kokott in *Test-Achats*, ECLI:EU:C:2010:564, para. 62.

view of social change and the accompanying loss of meaning of traditional role models, the effects of behavioural factors on a person's health and life expectancy can no longer clearly be linked with his sex.⁶⁶ As an example, she dismantled a few gender stereotypes about women nowadays also doing demanding and stressful work, and participating in sport.

4. Challenges in developing anti-stereotyping reasoning

Naming stereotypes

Gender stereotypes make inequalities appear 'natural' and inevitable. Naming gender stereotypes makes them visible, and thereby challenges their normalcy. If the CJEU would wish to challenge gender stereotypes, the first requisite is to notice them and name them in its judgments. This will not be a simple matter as gender stereotypes are deeply rooted in society. The fact that the Court frequently reinforces gender stereotypes suggests that it is often unaware of them. This has to do with the phenomenon that in feminist legal theory has been termed the dominant standard:⁶⁷ legal norms are (often implicitly/covertly) gendered in a way that devalues the feminine. A clear example is the case of *Sirdar*, a judgment concerning women's exclusion from the UK Royal Marines, where the Court did not even question that combat effectiveness requires marines to be male.⁶⁸ The criterion of 'combat effectiveness' was automatically male. Another example can be found in labour law, where the full-time worker is the dominant standard and where part-time workers (*de facto* often women) are seen as deviating from the norm.⁶⁹

For this reason, some scholars rightly view the idea that judges could apply anti-stereotyping reasoning with scepticism.⁷⁰ As human beings, judges harbour their own unacknowledged biases. What is more, judges are part of dominant groups – in the case of the CJEU most judges are male, are all highly educated, and are all white – and will 'therefore have the luxury of seeing their perspectives mirrored and reinforced in major social and political institutions.'⁷¹ This raises particular concerns as regards the judges' ability to 'see' and subsequently name and contest stereotypes. Intersectional stereotypes are even harder to make visible and dismantle.

Distinguishing harmful stereotypes

Another reason why contesting stereotypes is a difficult task for judges is that not all instances of stereotyping are harmful let alone legally wrongful. Stereotyping neither can nor should be completely eliminated, as law is per definition based on generalizations and categories. In naming and contesting stereotypes, the Court thus faces the challenge of distinguishing between wrongful and 'acceptable' forms of stereotyping.⁷² Section 2 claimed that all forms of stereotyping, be they descriptive or prescriptive, false or statistically true, can be harmful. False stereotypes are of course always harmful, but how can the Court assess whether other forms of stereotyping are harmful?

A related challenge immediately emerges, namely that there can be a fine line between, on the one hand, reinforcing harmful stereotypes and, on the other, taking current realities into account in order to achieve substantive equality. For example, the stereotype that 'women care for children' is frequently deployed

66 *Test-Achats*, ECLI:EU:C:2010:564, para. 63.

67 See e.g., Lunneman, K.D., Loenen, M.L.P., Veldman, A.G. (1999), *De onzichtbare standaard in het recht*, Deventer, Gouda Quint.

68 Cf. Case C-273/97, *Sirdar*, para. 30.

69 See e.g. Case 170/84, *Bilka – Kaufhaus GmbH v Karin Weber von Hartz* ECLI:EU:C:1986:294 concerning a department store that had a policy of employing as few part-time workers as possible.

70 E.g. Young, M. (2010), 'Unequal to the Task: Kapping the Substantive Potential of Section 15,' *Supreme Court Law Review*, Vol. 50, pp. 207-08.

71 Minow, M. (1991), *Making All the Difference: Inclusion, Exclusion and American Law*, Ithaca, Cornell University Press, p. 62.

72 See also Timmer, A. (2015), 'Judging Stereotypes: What the European Court of Human Rights Can Borrow from American and Canadian Equal Protection,' *American Journal of Comparative Law*, Vol. 63, No. 1.

to keep women confined to traditional roles. But this stereotype can also be deployed to design measures that will help women in achieving a work-life balance (think of maternity, paternity and parental leave measures). In its positive action case law, the Court itself recognized this difficulty. In *Lommers*, the Court noted: 'A measure ... whose purported aim is to abolish a *de facto* inequality, might nevertheless also help to perpetuate a traditional division of roles between men and women.'⁷³

It is submitted that a contextual analysis is required to determine whether a specific instance of stereotyping is invidious. Only by taking into consideration in what context a specific instance of stereotyping occurred can the Court assess whether it was wrongful in the sense of causing or reinforcing gender inequality. It goes beyond the scope of this article to theorize what contextual factors the Court should exactly take into account.⁷⁴ The Court could conceivably find inspiration in the case law of other Courts, such as the European Court of Human Rights and the Canadian Supreme Court.⁷⁵

Contesting stereotypes

It appears that many EU equality law authorities,⁷⁶ including AG Kokott, assume that the presence of stereotypes indicates direct discrimination. In her recent opinion in the *Achbita* case, and referring to the case of *CHEZ*,⁷⁷ Kokott claims that this is the position of the CJEU:

'the Court considers a measure taken on the basis of stereotypes and prejudices in relation to a particular group of individuals to be an indication of direct discrimination.'⁷⁸

When gender stereotyping explicitly occurs, the Court should indeed analyze the case from the perspective of direct sex discrimination. However, it should bear in mind that much stereotyping occurs implicitly or unconsciously. As a result, also facially neutral norms can be based on gender stereotypes. And facially neutral norms and practices can likewise reinforce existing gender stereotypes.⁷⁹ In other words, gender stereotypes can lead to indirect as well as direct discrimination. For example, there are cases concerning part-time workers where the arguments provided as objective justification for the indirect discrimination of women were stereotypical (maintaining in essence that part-timers were less committed to their work).⁸⁰

5. Conclusion

The CJEU's approach to gender stereotyping is fragmentary. While the Court does not consistently take issue with gender stereotypes, in some areas of EU equality law the Court has certainly addressed gender stereotypes. This article has shown that in some cases concerning positive action the Court has foregrounded the problem of stereotyping. More recently, reconciliation between work and family commitments is the area of gender equality law where developments in anti-stereotyping reasoning

73 Case C-476/99, *Lommers*, para. 41.

74 If done thoroughly, such an exploration would require a full theory of what makes inequality of treatment amount to discrimination. Others have done this: see, e.g. Hellmann, D. (2006), *When is Discrimination Wrong?*, Boston: Harvard University Press.

75 Timmer, A., (2015), 'Judging Stereotypes: What the European Court of Human Rights Can Borrow from American and Canadian Equal Protection,' *American Journal of Comparative Law*, Vol. 63, No. 1.

76 See e.g. Selanec, G., Senden, L. (2012), *Positive action measures to ensure full equality between men and women, Including on company boards*, p. 12, available at: http://ec.europa.eu/justice/gender-equality/files/gender_balance_decision_making/report_gender-balance_2012_en.pdf. ('The measure went beyond eliminating concealed prejudice and stereotypes, which are tightly related to direct sex discrimination.').

77 *CHEZ Razpredelenie Bulgaria* (C-83/14, EU:C:2015:480, para. 82).

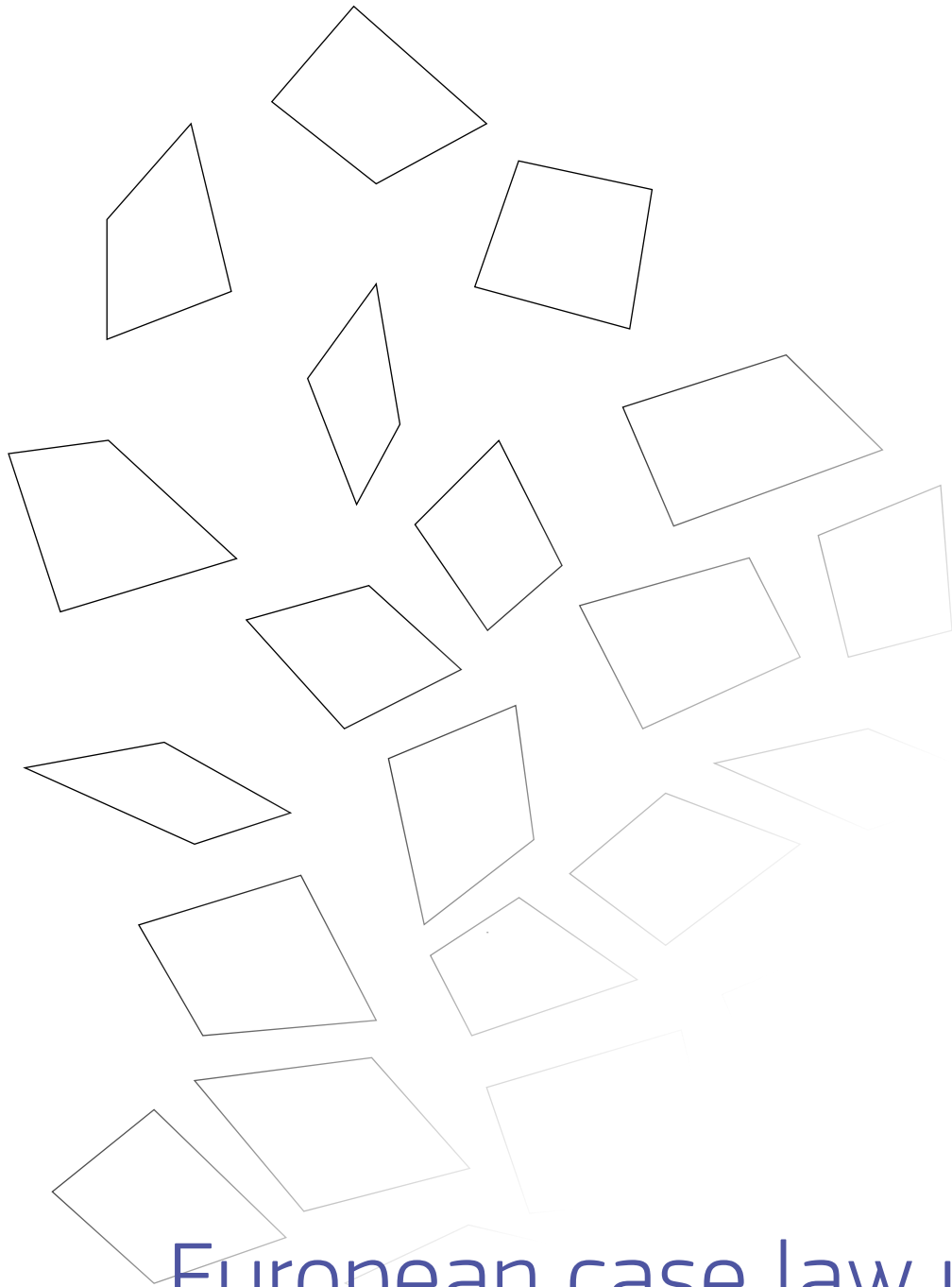
78 Case C-157/15, *Achbita*, opinion of AG Kokott, n. 30.

79 Cook, R., Cusack, S. (2010), *Gender Stereotyping Transnational Legal Perspectives*, University of Pennsylvania Press, pp. 115-116.

80 See e.g. *Bilka-Kaufhaus GmbH v Weber von Hartz* (1986) C-170/84, para. 33; *Ingrid Rinner-Kühn v FWW Spezial-Gebäudereinigung GmbH & Co.* (1989) C-171/84, para. 13.

have been most marked. While in *Hofmann* the Court was careful not to challenge gender roles in the household, in *Roca Álvarez* and *Maistrellis* it wanted the traditional roles to be disrupted.

Gender stereotypes make the traditional roles of men and women still appear natural and inevitable. By naming and contesting stereotypes, the Court can challenge their stranglehold. This is no easy task. The Court faces many challenges, such as distinguishing harmful forms of stereotyping from acceptable ones. But this complexity should not induce the Court to be passive.



European case law update

This section provides, as far as possible, an overview of the latest main developments in gender equality and non-discrimination cases pending or decided by the Court of Justice of the EU and the European Court of Human Rights, from 1 July to 31 December 2015.

Court of Justice of the European Union

REFERENCES FOR PRELIMINARY RULINGS – JUDGMENTS

**Case C83/14 *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia*,
Judgement of 16 July 2015, ECLI:EU:C:2015:480¹**

Racial or
ethnic origin

Ms Nikolova ran a grocer's shop in the Gizdova mahala district in Dupnitsa, Bulgaria, a district mainly inhabited by persons of Roma origin. In 1999 and 2000, the CHEZ RB electricity company installed electricity meters in the district at a height of 6-7 meters on the concrete pylons part of the overhead electricity supply network, while in other districts these meters were placed at the height of 1.70 meters in the consumer's property, on the façade or on the wall around it.

Ms Nikolova lodged an application with the Commission for Protection against Discrimination (KZD), complaining that the reasons for this practice was that most of the inhabitants of this district were of Roma origin and thus she was discriminated on the grounds of nationality. She particularly complained that she was unable to follow her electricity consumption and check if the bills were correct.

The KZD found that this practice amounted to prohibited indirect indiscriminate on the grounds of nationality. This was annulled by the Supreme Administrative Court that found that KZD did not indicate the other nationality in relation to the holders of which Ms Nikolova suffered discrimination. It sent the case back to KZD, which then found that Ms Nikolova was directly discriminated on the grounds of her personal situation. She was in a more disadvantageous situation compared to other CHEZ RB costumers.

Chez RB appealed to the Administrative Court of Sofia, which then put forward 10 questions for a preliminary ruling.

Before replying to these questions, the Court examined if the installation of an electricity meter is covered by the scope of Article 3(1)(h) of the Racial Equality Directive. It found that as the electricity supply does fall within this scope, the installation of the electricity meter which is essential to this supply is also covered by this Article.

The first question concerns the interpretation of 'ethnic origin' and if it can cover a 'compact group of Bulgarian citizens of Roma origin,' as the practice in question is carried out in a district inhabited mainly, but not exclusively, by persons of Roma origin. The Court first examined first the wording of Article 2(1), 2(2)(a) and 2(2)(b), and pointed out that due to language differences this does not in itself answer the question. It then continued by examining the context, general scheme and aim of the Directive. It found that in the light of the objective and of the rights it aims to safeguard, the scope of the Directive cannot be interpreted restrictively. This interpretation is further supported by recital 16 of the preamble to and Article 3(1) of the Racial Equality Directive, Article 19 TFEU and Article 21 of the Charter of Fundamental Rights of the EU. Although Ms Nikolova explicitly stated that she is not of Roma origin, the factor on the basis of which she has suffered less favourable treatment (together with other inhabitants of the District) remains Roma origin. The Directive protects not only persons who are themselves a member of a particular race or ethnic group, but also those who are not members of such a group but suffer particular disadvantage or less favourable treatment on one of those grounds.

¹ See above, page 1 for an in-depth analysis of this decision, by Christopher McCrudden. See also *European Equality Law Review* issue 2015/2 for an analysis of the Opinion of A.G. Kokott on the case, pp. 52-54.

The fifth question was related to the permissibility of a national provision under the Racial Equality Directive, namely that the Bulgarian Law on the protection against discrimination defines 'unfavourable treatment' as any act, action or omission which directly or indirectly prejudices rights or legitimate interests. The Court pointed out that the Directive aims to prohibit any kind of direct or indirect discrimination based on racial or ethnic origin with regard to the grounds covered and highlighted again that its scope cannot be defined restrictively. While the objective of the Directive is to set out minimum requirements and more favourable provisions are permitted, the Court found that such a national provision actually restricts the scope of the Directive, as it reduces the meaning of 'less favourable treatment' and a 'particular disadvantage' to acts that prejudice rights or particular interests.

The Court then examined questions 2 to 4 together. These questions concerned the interpretation of Article 2(2)(a) of the Directive and aimed to seek if the practice in the current case is liable to create a situation in which persons are subject to less favourable treatment than other persons in a comparable situation on the grounds of ethnic origin, so that the practice would amount to direct discrimination. The Court underlined that the mere fact that the district is inhabited also by people of non-Roma origin does not preclude that the practice in question was introduced in view of Roma ethnic origin shared by most of the inhabitants of the district. It is sufficient to prove that ethnic origin was the determining factor to introduce such a treatment (without prejudice to the exceptions under Articles 4 and 5 of the Directive). It is the referring court which needs to examine all the circumstances of the case to establish whether there is sufficient evidence that there has been direct discrimination on the grounds of ethnic origin and that a refusal of disclosure by the respondent is not liable to compromise the achievements of the Directive. However, the CJEU provided some elements which may be taken into account by the referring court. These include: 1.) the fact that it is common ground and not disputed by CHEZ RB that the practice in question is established only in districts inhabited mainly by Bulgarian nationals of Roma origin; 2.) Chez RB asserted that unlawful connections were made by persons of Roma origin, which assertion might suggest that the practice in question results from ethnic stereotypes or prejudices; 3.) with regard to the burden of proof, CHEZ RB failed to present evidence of the alleged damage, meter tampering or unlawful connections; 4.) the practice at issue was of a compulsory, widespread and lasting nature, extended to all inhabitants of the district without distinction. Finally, the Court noted that should the referring court conclude that there is a presumption of discrimination, then the burden of proof falls on the respondent, CHEZ RB, to prove that the practice in question is based exclusively on objective factors unrelated to the any discrimination on the grounds of racial or ethnic origin. The Court then continued by examining the terms 'less favourable treatment' and 'comparable' and found that the practice in question shows such characteristics. It cannot be denied that the practice is offensive and stigmatizing and that it makes it impossible for the district's inhabitants to monitor their electricity consumption, thus creating unfavourable treatment. As to the comparability of the situations, the Court stated that all final consumers of electricity in the same urban area, supplied by the same provider, should be regarded as being in a comparable situation to be able to monitor their consumption. Hence the Court replied to these referral questions that under Article 2(2)(a) of the Directive the practice in question constitutes direct discrimination if it was introduced and/or maintained due to the ethnic origin most common to the district's inhabitants, which is a matter to be defined by the referring court.

Questions 6 to 9 were also analysed together as they are related to the interpretation of Article 2(2)(b) of the Directive. The Court first examined the meaning of the term 'apparently neutral practice' and by referring to its jurisprudence underlined that it needs to be interpreted as a practice which is neutral only apparently or at first glance, and not as one whose neutrality is particularly obvious. Then, it recalled that indirect discrimination does not require the measure to be based on protected characteristics, therefore this Article needs to be interpreted in a way that it precludes the Bulgarian Law on the protection against discrimination to require that the measure needs to be adopted for reasons of racial or ethnic origin. It continued with the interpretation of the term 'particular disadvantage' and highlighted that this does not exist only when there is a serious, obvious and particularly significant case of inequality. This condition means that it is particularly persons of a certain ethnic origin who are at a disadvantage due to the measure in question. Finally, the Court provided some guidance as to the facts that the referring

court might take into account when assessing if the practice in question might amount to indirect discrimination. It stated that should the referring courts find that the practice does not amount to direct discrimination, the criterion in question might still be liable to constitute an apparently neutral practice putting the inhabitants of the district, mostly of Roma origin, at a particular disadvantage compared with other persons.

Finally, the Court answered question 10, which seeks to find out if the practice in question can be objectively justified under Article 2(2)(b) of the Directive to ensure the security of the electricity network, having regard to its obligation to give access to final users to monitor their consumption and even though other financially and technically feasible means exist to ensure this aim. The Court stated that the aims of the practice, namely preventing fraud, protecting individuals' life and health and ensuring the quality and security of electricity distribution, are legitimate ones under EU law. To find out whether these aims can be objectively justified, it is for CHEZ RB to establish the existence and the extent of unlawful conduct and that, after 25 years, there is still a major risk in the district that damage and unlawful connections will continue. It is not enough to refer to 'common knowledge' with regard to the conduct and risk. If the objectivity of the measure can be established, CHEZ RB needs to justify also that the practice is appropriate and necessary in order to achieve these legitimate aims. As the practice in question is able to prevent unlawful conduct, the criteria for appropriateness are fulfilled. The referring court will need to assess the necessity of the measure and assess if other appropriate and less restrictive measures exist. If the referring court finds that no other effective measures exist, it will have to pay attention to the legitimate interests of the final consumers of having access to the electricity meters in conditions that are not stigmatizing or offensive and assess if the disadvantage caused by the practice is disproportionate to the aim.

Case C-222/14 of 16 July 2015, Judgment of the Court (Fourth Chamber) in the case of *Konstantinos Maïstrellis v. Ypourgos Dikaïosynis, Diafaneias kai Anthropinon Dikaïomaton*, ECLI:EU:C:2015:473²

Gender

Mr Maïstrellis, a judge in Greece, submitted an application on 7 December 2010 to the Greek Minister for Justice, Transparency and Human Rights for paid parental leave of nine months for the purpose of taking care of his child, who was born on 24 October 2010. The application was rejected in accordance with Article 44(21) of the Code on the Status of Judges, whereby the leave is granted only to a mother exercising the profession of a judge. Mr Maïstrellis brought an action against the decision before the Council of State, which by a judgment of 4 July 2011 upheld the action and referred the matter to the administrative authorities.

On 26 September 2011, the Greek Minister for Justice, Transparency and Human Rights rejected the application for a second time. This time, it was on the ground that under Article 53(3) of the Civil Service Code, he was not entitled to paid parental leave if his wife did not work or exercise a profession. At the time, his wife was not in work and thus his application was rejected. The Greek Council of State, hearing the case, asked the Court of Justice whether denying the benefit in this situation is compatible with Directive 96/34 and the Framework Agreement on Parental Leave and the Recast Directive (Directive 2006/54/EC), referring the following question for a preliminary ruling:

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

² See *European Equality Law Review* issue 2015/2 for an analysis of the Opinion of A.G. Kokott on the case, pp. 54-55.

In its judgment, the Court noted from the outset that Directive 96/34 and the Framework Agreement are intended to apply to public officials. Under Clause 2.1 of the Framework Agreement, parental leave is an individual right granted to men and women workers. To promote equal opportunities and equal treatment between men and women, this right is in principle non-transferable. Moreover, the Court recalled that the Framework Agreement is designed to facilitate the reconciliation of parental and professional responsibilities for working parents. Thus the Court concluded that it follows from the wording of the Framework Agreement and from its objectives and context that each parent is entitled to parental leave. This means that Member States cannot adopt provisions under which a father exercising the profession of a civil servant is not entitled to parental leave in a situation where his wife does not work or exercise any profession.

Reasoning under the Recast Directive, the Court noted that, according to Greek law, the mere fact of being a parent was not sufficient for a male civil servant to be entitled to parental leave whereas it was for women of identical status. Thus the provision at issue in the proceedings was found likely to 'perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties.' The Court held that the Greek provision constitutes direct discrimination on grounds of sex contrary to the Recast Directive.

In answer to the preliminary question, the Court ruled that 'the provisions of Directives 96/34 and 2006/54 must be interpreted as precluding national provisions under which a civil servant is not entitled to parental leave in a situation where his wife does not work or exercise any profession, unless it is considered that due to a serious illness or injury the wife is unable to meet the needs related to the upbringing of the child.'

Case C-432/14, *O v. Bio Philippe August SARL*, Judgement of 1 October 2015, ECLI:EU:C:2015:643

This case concerns the interpretation of the principle of non-discrimination on grounds of age. A university student was engaged with a fixed-term employment contract of four days during his school holiday. The French Labour Code prescribes that people on a fixed-term contract are entitled to an end-of-contract payment if they are not offered an indefinite contract, compensating for the insecurity of their situation. However, there are some exceptions, including contracts with young persons who work during the period of school holidays or university vacations. Consequently, at the end of his contract, the student was not paid the end-of-contract compensation. Considering that this was against the provisions of the French Constitution guaranteeing equal treatment and non-discrimination on the grounds of age, the student brought an action before the Paris Labour Tribunal and next to the end-of-contract payment he was requesting the reclassification of his contract to indefinite and compensation for dismissal for real and substantial cause. He also lodged preliminary objections that the national provision was against the Constitution, which was referred to the Constitutional Council. The Constitutional Council held that the complaint that the law did not define the concept of young people was unfounded, as the provisions were applicable to pupils and students compulsorily affiliated to the national social security scheme by virtue of their school/university enrolment and falling within the prescribed age-limit of 28 years. Then it found that the legislature established a difference in treatment due to the fact that students working under a fixed-term contract during school holidays are not in the same situation as either students who work parallel to their studies or as other employees on fixed-term contracts. The end-of-contract payment is paid to compensate insecurity, while students working during the university vacation cannot claim to be in this insecure situation, as they know they will return to university after the expiry of the contract.

Against this background the Paris Labour Tribunal referred its question for a preliminary ruling, seeking to know if EU law, especially the general principle of anti-discrimination on grounds of age preclude such national legislation.


 Age

The Court first examined if the student in these particular circumstances can be classified as a ‘worker’. Although the contract was only for a very short term, which can be a sign of the fact that the performed activities are marginal and ancillary, following an overall assessment it found that it cannot be excluded that the activities performed can be considered by national authorities as real and genuine. Next to the number of working hours or the level of remuneration, the assessment needs to take into account the rights to paid leave, to the continued payment of wages in the event of sick leave, if the contract falls under relevant collective agreements, the payment of contributions and the nature of such contributions.

If the referring court finds that the student can be regarded as a worker, it needs to be assessed if he can rely on the principle on non-discrimination on grounds of age. The Court first invoked its interpretation of the principle of equal treatment and underlined that in particular the comparable nature of the situations must be analysed in the light of the overall situation in order to determine if there is an infringement of the principle of equal treatment. Therefore, the Court continued with the assessment of whether the situation of the student in this case is comparable to that of other workers entitled to an end-of-contract payment. The Court noted that, indeed, the situation of students working during university vacation cannot be characterized by the insecurity for which the national legislation aims to compensate, as these students intend to return to university by the end of the vacation period. Hence, their situation cannot be comparable to that of other categories of workers eligible for end-of-contract payments and the state has acted within its allowed discretion in the field of social policy. The difference in treatment between these two groups does not amount to discrimination on grounds of age.

Case C-407/14, *María Auxiliadora Arjona Camacho v Securitas Seguridad España SA*, judgment of the Court (Fourth Chamber) of 17 December 2015, ECLI:EU:C:2015:831

Gender

The request for a preliminary ruling concerns Article 18 of the Recast Directive. The applicant, Ms Arjona Camacho, was dismissed from her job as a security guard in a juvenile detention centre by her employer, Securitas Seguridad España, on 24 April 2014. Ms Camacho submitted an application for conciliation with her employer before the centre for mediation, arbitration and conciliation of Cordoba but the application was unsuccessful. The applicant brought an action before the Social Court No. 1, Cordoba, contesting the dismissal and asking it be declared invalid. Ms Camacho claimed the dismissal constituted discrimination on grounds of sex and sought punitive damages.

The referring court, accepting that the dismissal constituted discrimination on grounds of sex and noting that the concept of ‘punitive damages’ does not exist in Spanish law, referred the following question to the Court of Justice for a preliminary ruling:

‘May Article 18 of Directive 2006/54, which refers to the dissuasive (in addition to real, effective and proportionate) nature of the compensation to be awarded to a victim of discrimination on grounds of sex, be interpreted as meaning that it enables the national court to award the victim reasonable punitive damages that are truly additional, that is to say, an additional amount which, although going beyond the full reparation of the actual loss and damage suffered by the victim, serves as an example to others (in addition to the person responsible for the damage), provided that the amount in question is not disproportionate, that also being the case even when the concept of punitive damages does not form part of the legal tradition of that national court?’

Pursuant to Article 18 of Directive 2006/54, Member States are required to introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation as they so determine for the loss and damage sustained by a person injured as a result of discrimination on grounds of sex, in a way which is dissuasive and proportionate to the damage suffered, and that compensation is not being restricted by the fixing of a prior upper limit, except in the case of a refusal to take that person’s job application into consideration. The provision reproduces the wording of Article 6(2) of Directive 76/207, as amended by Directive 2002/73.

Recalling the case law of the Court, the Court noted that Article 6 of Directive 76/207 does not prescribe a specific measure to be taken by Member States in the event of discrimination, but leaves them free to choose between the different solutions suitable for achieving the objective of the directive. The solution must be appropriate to restore genuine equality of opportunity and must guarantee real and effective judicial protection and have a genuine deterrent effect on the employer. In addition, Article 25 of Directive 2006/54 allows but does not require Member States to take measures providing for the payment of punitive damages. It does not provide that a national court can on its own require the person responsible for discrimination to pay such damages.

In answering the question, the Court concluded that 'Article 18 of Directive 2006/54/EC must be interpreted as meaning that the Member States are free to choose the means to be adopted in order to guarantee that the reparation or compensation provided to victims of discrimination on grounds of sex within the scope of that directive is dissuasive, provided that it is ensured that the objective of that directive is achieved.' The interpretation of Article 18 of Directive 2006/54 requires Member States that choose the financial form of compensation to introduce into their national legal systems measures providing for payment to the person injured of compensation which covers in full the loss and damage sustained.

European Court of Human Rights

***Oliari and others v. Italy*, application Nos 18766/11 and 36030/11, Judgement of 21 July 2015**

Sexual
orientation

This judgement is a ground-breaking one in the Court's jurisprudence relating to sexual orientation. The applicants, three same-sex couples, complained that Italian legislation did not allow them to marry or enter into civil unions and claimed that they were thus discriminated against on the basis of their sexual orientation. They referred to Articles 8, 8 in conjunction with 14, 12 and 12 in conjunction with 14 in their complaint.

The Court started its judgment by examining the breach under Article 8 and by making reference to the fact that Article 8 might also entail positive obligations, such as adopting various measures by the State to ensure effective respect for the rights protected by it. It evoked its recent judgement in the case of *Schalk and Kopf v. Austria*, in which it established that the legal recognition of same-sex couples is an evolving area of rights with no established practice. Hence, States enjoyed a margin of appreciation as to the timing of such measures introduced. It pointed out, however, that in this case, contrary to *Schalk and Kopf v. Austria*, there is still no legal possibility to enter into a civil union or a registered partnership.

The Court has previously established that same-sex couples are in need of legal recognition and protection of their relationship. It acknowledged that a local register for civil unions does exist in Italy, but it underlined that this is available in less than 2 % of the municipalities, has only a statistical relevance and confers no rights on same-sex couples. Private cohabitation agreements might have been accessible, but they fail to give proper protection to couples in a stable and committed relationship. Additionally, they are linked to the requirement of cohabitation, which in fact is independent from the existence of a stable union.

The national legal context with regard to the rights of same-sex couples was found in general to be uncertain. Italian courts have expressly and consequently recognized some rights, but concerning others findings were made on a case-by-case basis. The ECtHR found that the fact that same-sex couples needed to regularly refer to domestic courts, taken together with the large degree of legal uncertainty, in itself already amounted to a non-significant hindrance to obtain respect for private and family life. Hence, available protection is lacking both in content and in stability.

When assessing the existence of a prevailing community interest, the Court underlined that the government of Italy referred to the different sensitivities on such a social issue and relied on its margin of appreciation as to the choice of times and modes to introduce a specific legal framework. Nevertheless, it found that the State has a narrower margin of appreciation in the present case, as it concerns the existence of a core protection. Additionally, it noted that Italy's Constitutional Court has also put the issue high on its agenda and has repeatedly called for the legal recognition of same-sex unions. Despite some attempts, this has not been enacted to date. Hence, the Court found that the Italian government failed to fulfil its positive obligation to provide for a specific legal framework protecting same-sex unions.

Following its finding under Article 8, the ECtHR found it unnecessary to examine the case under Article 14 in conjunction with Article 8.

The Court also examined if Article 12 alone and Article 12 in conjunction with Article 14 were breached. It referred back to its recent cases *Schalk and Kopf* and *Hämäläinen*, when it found that Article 12 alone cannot be interpreted as imposing an obligation on the State to grant access to marriage to same-sex

couples. Despite the recent developments in this area, the Court upheld this view. In *Schalk and Kopf* it also rejected the reasoning that Article 14 in conjunction with Article 8 could constitute such an obligation, as the latter is more general in its purpose and scope, and it also kept this approach for Article 14 in conjunction with Article 12. Therefore, complaints under these Articles were found inadmissible.

***Vrontou v. Cyprus*, application No. 33631/06, judgment of 13 October 2015**

The applicant, Ms Maria Vrontou, is a Cypriot national. The applicant lodged a complaint with the European Court of Human Rights on 25 July 2006, alleging that she suffered discrimination due to not being eligible for a refugee card, part of a scheme of aid approved by the Council of Ministers of the Republic of Cyprus in 1974 to aid displaced persons and war victims. This was on account of the fact that the scheme did not allow children whose mothers were displaced but whose fathers were not displaced to qualify for the card. The applicant, whose mother holds a refugee card, alleged that the failure to grant her a refugee card, hence denying her benefits, in particular housing assistance, constituted discrimination on grounds of sex.


 Gender

In 2003, the applicant applied to the Civil Registry and Migration Department of the Ministry of the Interior for a refugee card. She was informed that though her mother was a displaced person, her father was not, and thus she did not qualify. Ms Vrontou filed a recourse before the Supreme Court of Cyprus challenging the decision and claiming that it constituted a violation of the principle of equality enshrined in Article 28 of the Constitution. The Supreme Court dismissed the claim, noting that the extension of the term 'displaced' had been discussed by the House of Representatives' Committee for Refugees and a proposal to change the law had never been approved. In 2004, the applicant filed an appeal before the Supreme Court. A five-judge panel dismissed the appeal on the basis that the non-existence of a legislative provision cannot be remedied by a judicial decision.

In her application to the European Court of Human Rights, the applicant complained that the refusal of the authorities to grant her a refugee card constituted a violation of her property rights under Article 1 of Protocol No. 1 of the Convention. Furthermore, she complained that the denial of the refugee card on the basis that she was the child of a displaced woman rather than a displaced man was discriminatory on the grounds of sex and was therefore a violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1. Relying on the Court's findings in *Wessels-Bergervoet v. The Netherlands*, she argued that the traditional role of men as breadwinners did not provide an objective and reasonable justification for differences in treatment based on gender.

The Government argued that at the time the law was created men were the breadwinners of the family. The children of displaced men were thus worse affected and the limited availability of funds had to be prioritized in this manner. The respondent further argued that proposals to extend the scheme had been rejected, primarily on the basis that the financial expense of extending the scheme to children whose mother had been displaced was considerable and would give eligibility to a large portion of the population (80 % by 2047). In regard to Article 1 of Protocol 1, the respondent claimed that housing assistance was not provided as of right to persons with refugee cards. To hold that the applicant had a pecuniary interest falling within the scope of the Article was thus holding that the state was not free to prioritize needs in determining who is eligible to receive social assistance.

The Court rejected the argument by the respondent that the child of a displaced woman is not in an analogous position to that of a man, noting that the only difference between them is the sex of their displaced parent. The Court, in its judgment, noted the importance of gender equality and stated 'traditions, general assumptions or prevailing social attitudes' are insufficient justification for a difference in treatment on grounds of sex. Thus, the general nature of economic life in Cyprus in 1974 did not justify regarding all displaced men as breadwinners and all displaced women as incapable of being so, nor did the continuation of the scheme for 40 years fall within the margin of appreciation afforded to the state.

The Court found that there had been a violation of Article 14 in conjunction with Article 1 of Protocol 1 of the Convention. It also found a violation of Article 13 due to the fact that no domestic remedy was available to the applicant to challenge the discriminatory nature of the aid scheme. The Court found no need to examine the merits of the complaint under Article 1 of Protocol 1 alone or of Article 1 of Protocol 12. The Court awarded EUR 21 500 in pecuniary damages for the housing assistance that the applicant would have received if not for the discriminatory treatment, EUR 4 000 in non-pecuniary damages, and EUR 6 981 for costs incurred by the applicant in domestic proceedings.

***Balázs v. Hungary*, application No. 15529/12, Judgement of 20 October 2015**

The applicant, János Krisztián Balázs, alleged that the authorities had failed in their obligation to conduct an effective investigation into a racist attack against him, in breach of Article 14 read in conjunction with Article 3 of the Convention.

Mr Balázs and his girlfriend were insulted by three strangers upon leaving a club early in the morning, who made degrading comments about their Roma origin. A fourth person emerged later, presenting himself as a police officer (in fact, a penitentiary officer) and using vulgar and offensive language against Mr Balázs, calling him a 'dirty Gypsy'. This led to a fight between them. The penitentiary officer then called the police, who took him, Mr Balázs and his girlfriend to the police station. Both men had visible injuries, but only the officer went through a medical examination. Both of them were released the next day. Mr Balázs was examined a few days later by a general practitioner who recorded his injuries. He then lodged a criminal complaint against his attacker on the basis of which the Public Prosecutor's Office opened an investigation for the offence of 'violence against a member of a group.' The complaint was supported with posts from the Internet, where the penitentiary officer commented that he 'had kicked a gypsy lying on the ground in the head.' At the same time, the Public Prosecutor's Office opened ex officio a parallel investigation into the same facts on the charge of 'disorderly conduct.' A few months later, it discontinued the investigation on 'violence against a member of a group.' as it found that there was no evidence that the attack happened out of racial hatred. Mr Balázs's complaint against this was dismissed as was his lawyer's request to hear the penitentiary officer as a suspect or witness, on the grounds that he had already been heard as a suspect in the parallel proceedings. Later, the officer was convicted of disorderly conduct.

The Court examined if the attack reached the minimum threshold of severity and then if there was an effective, thorough investigation on the motive behind the attack. Concerning the first criterion, it found that the violent attack aggravated by the perceived racist motive indeed falls within the scope of Article 3. Concerning the second element, the Court rejected the reasoning that racist motives could not undoubtedly be established and that the attack might have had other motives than racial hatred. The attackers might have had mixed motives, influenced strongly by the circumstances. The prosecution also did not take into account the fact that the penitentiary officer admitted that the posted message was linked to the incident, and contested only the severity of the injuries, as well as his further overly intolerant comments. This all points to a manifestly unreasonable assessment of the case, which puts in question the effectiveness of the investigation and the State's obligation to conduct vigorous investigations.

Hence, the Court found that there was a violation of Article 14 in conjunction with Article 3 and awarded EUR 10 000 in respect of non-pecuniary damage.

***Ebrahimian v. France*, application No. 64846/11, Judgement of 26 November 2016**

The applicant alleged that the fact that her contract was not renewed as a hospital social assistant because she refused to stop wearing her veil constituted a violation of Article 9 of the ECHR.

Ms Ebrahimian was recruited on a fixed-term contract, firstly for three months, which was then renewed for one year. However, this contract was not prolonged, as Ms Ebrahimian refused to stop wearing her veil and as patients' complained. To her complaint that this decision was based against her religious affiliation, the Director of Human Resources stated that her religious affiliation was not reproached and sent her a reminder of the French State Council's opinion that the principle of the secular State prevented public officials from wearing a visible symbol of their religious affiliation while acting in their public function. Ms Ebrahimian then turned to the Paris Administrative Court and asked for the decision to be repealed. In parallel, she was accepted by the same employer to take part in a competition to become a social assistant, which she decided not to enter. The Administrative Tribunal later found that the decision was in compliance with the principles of secularism and the neutrality of public services. She appealed which was followed by a decision to set aside the decision on the basis of procedural safeguards, as she was not able to consult her file before the decision was taken. Following this decision, she was invited to consult her files and she received a reasoned decision from the Director of Human Resources which confirmed that her contract would not be renewed. She then turned to the Versailles Administrative Court, which rejected her complaint. This decision was upheld on appeal. Her appeal to the State Council was found inadmissible.


 Religion or belief

The Court firstly examined and found the clear existence of an interference, as wearing a veil clearly constitutes a visible manifestation of a religion, falling under the scope of Article 9. It went on to analyse if this interference can be justified.

This interference was prescribed by law. The applicant complained that there is no text on the interdiction of wearing religious signs under French legislation and that the opinion of the French State Council was with regard to teachers, and was not given specifically with regard to her profession. However, the Court found that Article 1 of the French Constitution and the jurisprudence of the French State Council and Constitutional Court were a sufficiently strong legal basis to allow national authorities to restrict her religious freedom. The Court noted that when she started her job, Ms Ebrahimian might not have been aware of these restrictions, but at the latest when the State Council opinion was published – more than six months before her discharge – the religious neutrality requirement for public officials was foreseeable and accessible.

Then the Court turned to examine if there was a legitimate aim to this restriction and by making reference to its previous case law, especially the *Leyla Şahin* case, it found that the interference in question had pursued the legitimate aim of protecting the rights and freedoms of others.

The question arose if this interference is necessary in a democratic society to protect the rights and freedoms of others. The Court found that it was clear from the reasoning of the decision not to renew the contract that the source of this decision was not the religious belief of the applicant, but that of protecting the religious rights and freedoms of others, namely the hospital patients who were often in a fragile, dependent situation. It underlined that it has already recognized that the State can invoke the principles of secularism and neutrality to restrict public officers from wearing visible religious signs in public buildings, as their role as state agents clearly differentiates them from other citizens.

The question remained if this interference was proportional to the aim pursued. The Court here underlined that secularism and the neutrality of the State are in the current circumstances recognized as founding principles of the State and a strict implementation can be approved. The applicant was the subject of a disciplinary process not because of her professional skills, but due to the fact that even though she knew after the publication of the State Council's opinion that her clothing needs to reflect neutrality and even

though the hospital administration reminded her and requested her to reconsider her choice, she still refused to comply with these requirements. During her disciplinary process and then later during appeals, she was given all the necessary procedural safeguards. Against this background, the Court found that the national authorities did not exceed their margin for appreciation when they found that there was no possibility to reconcile her religious convictions with the obligation to refrain from manifesting them and then decided to give priority to the requirement of the neutrality and impartiality of the State.

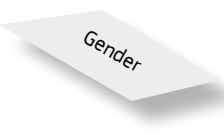
Hence, the Court concluded that there had been no violation of Article 9 of the Convention.



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

This section provides, as far as possible, an overview of the latest main developments in gender equality and non-discrimination law (including case law) and policy on the national level in the 28 EU Member States, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Montenegro, Norway, Serbia and Turkey, from 1 July to 31 December 2015.

LEGISLATIVE DEVELOPMENT

Final Act of Parliament for extensive amendments to maternity leave and parental leave regulations


A public review process and extensive parliamentary deliberations took place at the end of 2015 concerning a legislative initiative for the amendment of parental leave regulations of the Federal Ministry for Labour, Social Affairs and Consumer Protection. The Maternity Protection Act and the Fathers' Parental Leave Act were voted on in Parliament and they entered into effect on 1 January 2016. As the personal scope of the relevant Acts covers all workers and employees as well as civil servants and teachers, the amendments have a broad impact on the Austrian workforce.

The legal change with the broadest impact on the workforce is the adaptation of parental part-time work. For children born from 1 January 2016 onwards, the admissible reduction of working time has to amount to at least 20 % of working hours according to labour law or an applicable collective agreement (in general between 37 and 42 hours per week) or of the contractual working time in cases of part-time work and at least 12 hours per week. Applications to the employer for parental part-time work that vary from this framework can be agreed upon by the employer and employee but cannot be subject to the formal legal procedure requirements that can result in a court decision. There are no changes to the possibilities for legally changing working time arrangements (e.g. the beginning and end of daily work) without working time reductions.

Under the new legislation, foster parents who take care of non-biological children, without the intent of adoption and under the supervision of the competent child welfare authorities, are to be included in the material scope of parental leave statutes in the same way as adoptive parents. 'Free contractual employees' (*freie Dienstnehmer/innen*) will under the new legislation be included in the scope of maternity leave and the protection against dismissal until four months after the date of confinement. However, they will still not be included in forms of special occupational safety protection for pregnant women and will not be granted parental leave. Protection against dismissal in the Maternity Protection Act will be extended to women who suffer miscarriages (defined as still births of foetuses under 500 g weight) for four weeks.

The parliamentary motions of resolution added two further amendments. First, it is now legally defined that in a female same-sex partnership, the partner who is not the birth mother may take parental leave under the rules of the Fathers' Parental Leave Act. Additionally, a part of historical legislation concerning continued pay during maternity leave periods, which had caused disarray over mandatory maternity leave benefits for younger children, was repealed.

Internet sources:

http://www.parlament.gv.at/PAKT/VHG/XXV/ME/ME_00167/index.shtml

https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2015_I_149/BGBLA_2015_I_149.pdf

Last accessed 24 June 2016.

CASE LAW

Austrian complaint to the CRPD Committee on the Rights of People with Disabilities’ published views on the first Austrian Individual Complaint

The initial complaint (under the Optional Protocol to CRPD) was brought before the Committee by Mr F, a blind citizen of Linz/ Upper Austria and the Litigation Association of NGOs against Discrimination. The complaint argued that Mr F was (and still is) discriminated against on the basis of his disability.

Disability

In its communication regarding the case the Committee saw that the State Party had failed to fulfil its obligations under Article 5, paragraph 2, and Article 9, paragraph 1 and paragraph 2, (f) and (h) of the Convention. Austria was consequently requested to review its legislation and monitoring systems in place in order to further approximate the situation with the standards enshrined in the Convention on the Rights of People with Disabilities.

Also, the CRPD stated that the State party is under an obligation to take measures to prevent similar violations in the future and provided some guidance through examples.

Internet source

http://www.klagsverband.at/dev/wp-content/uploads/2015/09/UN-Empfehlungen_Mr_F_engl_110915.pdf

Last accessed 2 October 2015.

First ruling on discrimination by association

A group of eight persons were denied access to a club in Vienna in 2013 as the doorman identified three of them as migrants and refused them entry as ‘they are persons who lead to problems.’ With the support of the Litigation Association of NGOs against Discrimination, they all filed complaints – three of them for direct discrimination and five for discrimination by association on the ground of race/ethnic origin. Six of them were seeking EUR 1 000 as compensation for the damage they suffered. Two of the claimants had already entered the club and were told to leave after the club officials found out they were part of the group. They were seeking EUR 1 025 (including the entrance fee already paid).

Racial or ethnic origin

The competent Vienna District Court awarded those persons who were directly addressed (as being of ‘migrant origin’) EUR 600 each and those discriminated on the basis of their association with them EUR 350 each.¹ The two women who had already entered the club also received compensation of their EUR 25 entrance fees. The club lodged an appeal to the Regional Civil Court of Vienna that upheld the judgement, which is now binding.

The ruling does not clarify the significant difference in the amount of compensation awarded to the victims ‘by association’ as opposed to the ‘direct’ victims.

Internet source:

http://www.klagsverband.at/dev/wp-content/uploads/2016/01/Urteil-ZRS36R292_15f_anonym.pdf

Last accessed 28 January 2016.

1 Regional Civil Court of Vienna, No. 36 R 292/15f, issued 10 December 2015.

LEGISLATIVE DEVELOPMENT

Amendments to the Anti-discrimination Decree of the French Community regarding positive action measures

Article 6 of the Anti-discrimination Decree of the French Community provides that a direct or indirect difference in treatment is not discriminatory when it takes the form of a positive action measure. Article 6, paragraph 2, further defines the conditions under which such positive action can be adopted, while paragraph 3 provides that it belongs to the Government (of the French Community) to define through executive regulations the conditions to implement positive action measures. However, as no executive regulation has yet been adopted to this end, no such measures could be adopted.

Thus, on 13 November 2015, the legislator of the French Community Government adopted an amendment to the Anti-discrimination Decree by adding a fourth paragraph to Article 6. This new paragraph provides that, in the absence of an executive regulation of the Government, the judge is competent to scrutinize the validity of positive action measures on a case-by-case basis, except in the field of employment. Public and private actors are thus at liberty to design such measures, subject to the examination of the courts.

Internet source:

http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&table_name=loi&cn=2015111315

Last accessed 24 May 2016.

Use of gender-neutral actuarial factors

A Royal Decree (R.D.) of 30 November 2015 amended the R.D. of 24 December 1987 so that gender-neutral actuarial factors must now be used for the calculation of a lump sum due as compensation for an accident at work. This amendment applies to both private sector and public sector schemes. This development results from the judgment of the CJEU in Case C-318/13 X., and the subsequent letter addressed by the Commission to Member States. In Case X., the CJEU found that while Article 7(1) of Directive 79/7/EEC offered an exhaustive list of grounds for 'derogations' that Member States could opt to permit, the use of gender-based actuarial factors (GBAF) in the calculation of a statutory social security benefit did not appear on that list. Thus, in Finland, when the male victim of an accident at work applied for the conversion of the annual compensation into a lump sum, the CJEU ruled that the application of GBAF constituted gender discrimination.

The Belgian legislation concerning accidents at work was similar to the Finnish, except that the victim might only apply for the conversion of one-third of the aggregate value of the compensation into a lump sum (private sector: Article 45 of the Accidents at Work Act of 10 April 1971; public sector: Article 12(1) of the Accidents at Work and Occupational Diseases Act of 3 July 1967). In order to calculate the amount of the lump sum, gender-based actuarial factors were used (private sector: Article 6 of the ancillary Royal Decree of 24 December 1987; public sector: Article 21 of the ancillary Royal Decree of 24 January 1969 referring to the private sector scheme).

The replacement of GBAF with gender-neutral actuarial factors is applicable retrospectively to accidents at work which occurred as early as 1995, but the R.D. of 30 November 2015 came into force on 1 January 2016 and only applies to lump sums to be paid as from the same date, which raises a question of general interest for all Member States.

CASE LAW

No discrimination found in a case featuring an employer's offensive emails on the religion of an employee

The case concerns a Muslim man who was laid off by his employer on 23 July 2013, with six months' notice. By the end of July, the applicant was absent due to illness. In August, the employer did not pay his salary because the applicant allegedly had not brought a medical certificate within two days of his absence. The company also refused to pay the salary due for September. Furthermore, tensions arose between the two parties concerning the applicant's holiday. In addition, the employer did not grant the applicant his right to take days off to look for a job, claiming that the applicant's absences were unjustified. In this context, as of early August, the applicant received a series of offensive emails from the employer relating to his religion.

Religion
or belief

Taking all of this into account the applicant decided to end the contract immediately on serious grounds² and brought an action before the Labour Court of Antwerp. He asked for compensation for damages (corresponding to the remainder of the notice period i.e. four months and 21 days). Moreover, he claimed that he had been discriminated against on the ground of his beliefs and asked the Court to order the company to pay him compensation amounting to EUR 17 065.30 for non-pecuniary damages.

The Labour Tribunal ruled that, given the circumstances and the offensive emails sent to the applicant, the latter had legally terminated the contract on serious grounds. The Tribunal ordered the defendant to pay damages (four months and 21 days of the salary) to the applicant. In addition, the Tribunal dealt with the question of discrimination. The Tribunal ruled that the applicant had established a presumption of discrimination by providing the offensive emails and acknowledged that the employer did not provide any consistent explanations about the considerable delay in the payment of the applicant's salary. However, the Tribunal finally ruled that the applicant had not provided the required evidence that he had been treated differently compared with the other employees of the company on the basis of his religion.

Internet source:

<http://www.diversite.be/tribunal-du-travail-danvers-17-mars-2015>

Last accessed 11 May 2016.

Prohibiting an employee from wearing a headscarf at work is not discriminatory: a decision in line with the previous national case law

The claimant is a Muslim woman who worked as a cashier in a supermarket during summer holidays and weekends. On 13 September 2013, the claimant called her employer to tell him that she had decided to wear the Islamic headscarf during working hours. Her employer replied that this would not be tolerated. As a consequence, the claimant did not go to work the next Sunday and never came back.

Religion
or belief

On 5 December 2013, the claimant asked her former employer to pay compensation for damages because of the termination of the contract. In January 2014, the Inter-federal Centre for equal opportunities wrote to the defendant to ask for explanations about the situation. The Centre did not receive any reply despite numerous reminders.

The claimant brought the action before the Labour Tribunal of Brussels. She notably claimed that she had been discriminated against on the ground of her religion/belief and asked for EUR 3 470.88 compensation for pecuniary damages.

2 'Dringende reden'/'Motifs graves.'

The Labour Tribunal of Brussels dismissed the action. Firstly, the Tribunal noted that the claimant did not go to work the week after the litigious call. According to the case law, the claimant should have gone to work and tried to find an agreement with her employer. It also noted that the attempt at conciliation by the Inter-federal Centre for equal opportunities occurred more than four months after the call.

In addition, the Tribunal ruled that there was no direct or indirect discrimination. Regarding direct discrimination, it considered that the claimant did not bring any evidence that she had been treated differently from the other employees on the ground of her religion/belief. Regarding indirect discrimination, it noted that the work regulations enshrined a 'neutrality policy' and requested employees to wear clothing bearing the name of the company. Therefore, the Tribunal concluded that even though this neutrality policy could have disadvantaged the claimant, this was considered as proportionate and reasonably justified.

In its reasoning, the Tribunal referred to previous case law, including a decision of the Labour Court of Appeal of Antwerp of 23 December 2011. In this decision, the Court held that laying off an employee wearing a headscarf, in order to preserve the neutral image of the company, was not unreasonable and that there was no indirect discrimination against Muslim employees. It also concluded that there was an absence of direct discrimination. The applicant brought the case before the Court of cassation which submitted a preliminary ruling to the Court of Justice of the European Union (CJEU) on 9 March 2015.³

Internet source:

<http://unia.be/fr/jurisprudence-alternatives/jurisprudence/tribunal-du-travail-de-bruxelles-18-mai-2015>
Last accessed 24 May 2016.

The dismissal of an employee suffering from multiple sclerosis constitutes direct discrimination and violates the obligation to reasonably accommodate the employee

The claimant was employed by a funeral company under an indefinite employment contract.

In January 2013, the claimant gave the respondent a medical certificate requesting modifications to his schedule and the nature of his tasks because of medical problems. On 24 January 2013, a meeting was held between the two parties in order to find an agreement. On this occasion, the claimant explained to the manager of the company that he suffered from multiple sclerosis. No agreement was found. On 29 January, the defendant dismissed the applicant. A few weeks later, the claimant asked for explanations about his dismissal. The respondent explained that the claimant's work quality had been insufficient for several months. The claimant brought his case before the Labour Tribunal of Mons and Charleroi. He claimed that he had been discriminated against and asked for compensation for damages corresponding to six months' salary.

The Labour Tribunal of Mons and Charleroi ruled in favour of the claimant, concluding that the respondent had directly discriminated against the claimant and had failed to reasonably accommodate him.

First, the Tribunal acknowledged that the burden of proof shifted to the respondent as the claimant adduced some evidence that discrimination had occurred. The Tribunal also concluded that multiple sclerosis could be considered as a disability.

Concerning the question of direct discrimination, on the basis of the explanations by the respondent, the Tribunal ruled that it could not be excluded that the claimant's dismissal was linked to his illness. In this context, it concluded that the respondent did not demonstrate that the claimant had been treated differently without discrimination. Furthermore, it considered that the respondent did not justify to which

³ For further information, see *European equality law review*, issue 2015/2, p. 67.

extent the modifications of the claimant's schedule and working tasks were not reasonable and constituted a disproportionate burden. Therefore, the respondent had failed to reasonably accommodate the claimant. As a consequence, the Tribunal ordered the respondent to pay EUR 17 319.48 in compensation for damages corresponding to six months' salary.

Internet source:

<http://www.diversite.be/tribunal-du-travail-de-mons-et-charleroi-9-mars-2015>

Last accessed 18 May 2016.

Conditions for paid maternity leave

Ms Rosselle, a tenured teacher at a school in the Flemish Community, took unpaid furlough (the only form of leave available) in order to answer a call for a native Dutch speaker in a school in the French-speaking Community. As she was considered as being at the beginning of her career, she was engaged as a temporary staff member. Five months later she gave birth to a child and applied for maternity benefits, which are allowed in lieu of remuneration under the social security system for paid workers. Her chosen Sickness Fund (the institution competent to pay such benefits) dismissed her application because, under the Consolidation Act of 14 July 1994 on Healthcare and Sickness Insurance (Article 128(1)) and its ancillary Royal Decree of 3 July 1996 (Article 203), entitlement to maternity benefits requires that the applicant has been subject to the scheme for at least 120 working days within a period of six months immediately prior to the application.

Gender

When Ms Rosselle challenged the Sickness Fund's decision, with the assistance of the Institute for Equality of Women and Men (the Belgian 'gender equality body' under Article 20 of Directive 2006/54/EC), the Labour Court in Nivelles referred the case to the CJEU for a preliminary ruling. In its decision of 21 May 2015 in Case C-65/14, the Court of Justice found that as Ms Rosselle had been employed without interruption for longer than one year, irrespective of the change of employer and therefore the legal nature of the working relationship, the Belgian social security provisions were not compatible with Article 11(4) of Directive 92/85/EEC concerning the protection of maternity.

Considering the direct effect of Article 11(4) of Directive 92/85/EEC, as pointed out by Advocate General E. Sharpston, the Labour Court of Nivelles will certainly rule that the Sickness Fund must pay the benefits to Ms Rosselle. As to the follow-up to the case, the federal Minister of Social Affairs is preparing the draft of a Royal Decree which, based on the powers granted to the Sovereign by Article 128 (2) of the Consolidated Act of 14 July 1994, would waive the condition of prior subjection to the scheme, but only in cases similar to Ms Rosselle (i.e. a change in the legal nature of the employer and therefore of the working relationship).

Internet source:

<http://www.juridat.be>

Last accessed 24 June 2016.

Pension benefits for frontier workers

Ms Brouwer, a Belgian citizen and resident, was occupied in the Netherlands as a frontier worker from 1960 to 1998. When she became entitled to a Dutch retirement pension, she also applied for a Belgian allowance aimed at compensating for the difference between the Dutch benefit and the benefit she would have been entitled to if she had been occupied in Belgium. This allowance was granted. However, it was calculated on the basis of notional daily wages, which were fixed annually by way of Royal Decrees. Until 1994, the amount of these wages was lower for female workers as compared with their male colleagues.

Gender

When Ms Brouwer complained about gender discrimination in the calculation of the allowance, the Labour Court in Hasselt decided in her favour on 16 June 2006. The Pensions Office appealed and on 18 December 2008 the Labour Court of Appeal in Antwerp referred to the Court of Justice for a preliminary ruling on the compatibility of the Belgian provisions with Directive 79/7/EEC. In case C-577/08 *Rijksdienst voor Pensioenen v. Elisabeth Brouwer*,⁴ the CJEU found that, for the period from 1984 to 1994, Article 4(1) of Directive 79/7/EEC precluded national legislation under which the calculation of retirement pensions was based on different national wages for men and women.

Resuming its examination of the case, the Labour Court of Appeal in Antwerp reached a final judgment on 17 June 2011. It followed the CJEU's ruling as to the period from 1984 to 1994. Concerning the previous period, the CJEU had found that Directive 79/7/EEC was not applicable, nor was Article 119 EEC (now Article 157 TFEU) as the object of the dispute was a statutory social security benefit (see Case 80/70 *Defrenne I*).⁵ However, in this respect the Labour Court of Appeal based its reasoning on Article 14 of Royal Decree No. 40⁶ of 24 October 1967 concerning women's work. According to the RD, any worker was entitled to initiate legal proceedings in order to obtain the enforcement of the principle of equal pay for male and female workers as enshrined in Article 119 EEC.⁷

Consequently, this principle was grounded on a domestic legal provision so that between 1968 and 1984 the successive Royal Decrees which fixed different notional daily wages for men and women were incompatible with such a provision and had to be set aside by the courts in compliance with Article 159 of the Constitution. The Labour Court of Appeal decided that for the period from 1968 up to 1994, the Pensions Office had to calculate Ms Brouwer's benefit anew on the basis of the men's notional daily wages, and to compensate her accordingly.

The Pensions Office immediately appealed against this decision. The Court of Cassation rejected the appeal in its judgment of 14 December 2015. Inexplicably, the Court took four years to reject the appeal, both on a technicality and because the Pensions Office had requested the Court to discuss the factual merits of the case, which the Court was not empowered to do.

Internet source:

<http://www.juridat.be>

Last accessed 24 June 2016.

Sick leave related to maternity

Over a timespan of two years, a female employee experienced a series of events related to maternity. First, she gave birth to a premature baby who died the following day; six months later, she had a miscarriage; and later the same year, she had to terminate a third pregnancy based on medical grounds. Each of these events entailed multiple periods of sick leave, which her employer claimed was disruptive to teamwork, and she was dismissed on these grounds.

The employer's decision was challenged as amounting to gender discrimination before the Labour Court, by both the employee and the Institute for Equality of Women and Men (the 'equality body' under Article 20 of Directive 2006/54/EC), on the grounds of the Act of 10 May 2007 aimed at fighting discrimination between women and men (the 'Gender Act'). Given the circumstances, it was impossible for the employer to refute the *prima facie* evidence of discrimination, as the dismissal was directly connected to the successive pregnancies and miscarriages,⁸ which could not possibly have affected a male employee.

4 [2010-I-7489].

5 [1971-445].

6 Equivalent to an Act of Parliament.

7 That provision was later inserted as Article 47ter in the Protection of Remuneration Act of 12 April 1965.

8 Labour Court in Mons and Charleroi (La Louvière division), 22 May 2015, *Chroniques de droit social*, 2015, p. 335.

Thus, the Labour Court found that there had been direct discrimination, and allowed the employee the fixed damages provided by Article 23 of the Gender Act, equal to six months' pay.

Internet link source:

<http://www.juridat.be>

Last accessed 24 June 2016.

Bulgaria

BG

CASE LAW

Supreme Court's interpretative ruling on jurisdiction to hear discrimination cases against public bodies

On 19 May 2015, the Supreme Court of Cassation (SCC) and the Supreme Administrative Court (SAC) jointly made an interpretative ruling concerning, inter alia, the issue of jurisdiction in court discrimination cases brought against public authorities.

All grounds

For years, 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 whether the respondent is a public or private person/body (Article 71 (1)). Exceptionally, the administrative courts have jurisdiction only to hear claims for damages against public respondents when the claimant has first obtained a favourable ruling from the equality body (Article 74 (2)). However, under general administrative law, the administrative courts are competent to hear all compensation claims against public bodies. As a result, and with the aim of reducing their heavy case load, the civil courts refused to hear anti-discrimination compensation claims in many cases where 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 issues unrelated to PADA) in 2014, the two Supreme Courts initiated ex officio an interpretative case.

Through the interpretative ruling in Case 2/2014⁹ 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 claimant had first resorted to the equality body and obtained a finding of discrimination from it. Thus, following this ruling, the civil courts will only be competent to hear discrimination cases against public authorities where no compensation is sought, as well as all discrimination cases against private parties.

Internet source:

http://www.vks.bg/Dela/2014_02_VKS_VAS_postanovlenie.pdf

Last accessed 11 May 2016.

Supreme Court's referral to the Court of Justice of the EU in a disability case

On 16 July 2015, the Supreme Administrative Court (SAC), as a last instance, referred to the Court of Justice of the EU a set of questions concerning special protection on disability grounds against the

⁹ Bulgaria, Supreme Court of Cassation and Supreme Administrative Court, Interpretative ruling of 19 May 2015 in interpretative case 2/2014.

Disability

dismissal of public servants. The claimant in the case is a person with an intellectual disability who was a public servant working for a governmental body ('the Agency') until February 2014 when she was made redundant by order of the Agency's executive director. She appealed against this order, claiming that due to her disability the Labour Code (Article 333 (1.3)) had imposed a duty on the Agency to ask the Labour Inspectorate for prior permission to make her redundant. The Sofia City Administrative Court (SCAC) held that such special protection under the Labour Code did not apply to public servants whose employment relationships fall within the scope of the Public Servants Act, which does not provide for similar protection. The SCAC confirmed the redundancy order, and the claimant appealed against the ruling before the SAC.

Considering that public servants with disabilities and employees with disabilities (governed by the Labour Code) were treated differently under the legislation in terms of special protection against dismissal for persons with disabilities, the SAC decided to ask the CJEU whether the Convention on the Rights of Persons with Disabilities (Article 5, section 2), the Charter of Fundamental Rights of the EU and Directive 2000/78/EC (Articles 4 and 7) should be interpreted as prohibiting such a difference.¹⁰

Internet source:

<http://www.sac.government.bg/court22.nsf/d038edcf49190344c2256b7600367606/e8204a2d6e811432c2257e8400317137?OpenDocument>
Last accessed 11 May 2016.

HR

Croatia

CASE LAW

Supreme Court decision on discriminatory public statement excluding the recruitment of gay footballers

Sexual orientation

In 2010, four human rights organisations filed a joint action against the executive manager of the most popular football club in Croatia and vice president of the Croatian Football Association, because of his public statement that gay people could not play in his national football team. Zagreb County Court, as a first instance court, ruled that such a hypothetical statement does not amount to discrimination because it does not constitute a decision or conduct which placed or could have placed any person in a less favourable position. The court also referred to the fact that the person who made the statement was not in a position to decide who will play for the national team as he was an official of a football club and not a national selector. Further, the Court held that granting the claim would violate the right of the defendant to publicly express his opinion guaranteed by Article 10 of the European Convention on Human Rights.

The Supreme Court, as an appellate court, upheld that judgment and held that the defendant's statement could not prevent anyone from playing for the national team. In addition, the statements could not lead to an intimidating, hostile, degrading or offensive environment.

In June 2015, following the claimants' appeal on points of law, the Supreme Court, this time as a third instance court, adopted a new decision, finding that due to the defendant's reputation and authority, the statement did constitute direct discrimination.¹¹ The Supreme Court based its latest decision on the 'Feryn case', finding the facts in the two cases to be similar. The Court prohibited the defendant from

¹⁰ Ruling No. 8771 of 16 July 2015 in administrative case No. 12369/2014, *Petya Milkova v. the Privatisation and Post-Privatisation Agency*.

¹¹ Supreme Court of the Republic of Croatia, Rec-300/13, judgment of 17 June 2015.

making any similar public statement in the future and ordered him to apologize publicly as well as to publish the decision in a daily newspaper.

Cyprus

CY

LEGISLATIVE DEVELOPMENT

Access to welfare for persons with intellectual or psychosocial disabilities

Following criticisms from the disability movement and the Equality Body, the law on the minimum guaranteed income (MGI) which required persons with intellectual or psychosocial disabilities to waive their legal capacity in order to claim welfare benefits¹² was amended to provide that claims for welfare benefits can now be submitted through the applicant's representative, without providing a definition of such representative or a procedure for his or her appointment.¹³

Disability

The Ministry of Labour and Social Insurance issued instructions to the Social Welfare Services (SWS) to refrain from demanding 'incapacity' court orders in those cases where the applicant with an intellectual disability had a joint bank account with another person.¹⁴ This policy measure did not address the situation of applicants without such a joint account.

The ministry issued another circular, instructing the SWS¹⁵ to request persons representing applicants with an intellectual disability to sign a statement assuming responsibility for handling the MGI payable to the beneficiary without a court order; following which, a cheque can be issued in favour of the first degree relative who has signed such a statement. Persons with a disability without a first degree relative can be represented by another close relative or another person who signs the statement, provided that the SWS is satisfied that it is in the interest of the beneficiary. The reasoning behind this procedure is to avoid having the applicant with an intellectual disability sign any document whatsoever or deciding who will represent him or her because the legal capacity of such a person is legally questionable.

Internet source:

http://www.cylaw.org/nomoi/enop/ind/2014_1_109/section-sce28b579e-7244-6231-357a-c03c23572dc4.html

Last accessed 24 May 2016.

CASE LAW

Ombudsman decision concerning 24-hour shift for Sergeant who is a single mother

A Permanent Sergeant in the National Army of the Republic of Cyprus, a single mother with full parental responsibility (i.e. as the sole care provider) for her 13-year-old child, lodged a complaint with the Commissioner for Administration and Human Rights (the Ombudsman) concerning the duty to work 24-hour shifts.

Gender

¹² See *European equality law review*, issue 2015/2, pp. 74-75 for further information.

¹³ Cyprus, Law amending the law on minimum guaranteed income and generally on social provisions 118(I)/2015, Article 4(3).

¹⁴ Ministry of Labour, Welfare and Social Insurance, Circular No. EEE-7/2016, 9 June 2015.

¹⁵ Ministry of Labour, Welfare and Social Insurance, Circular No. EEE-12/2015, 25 September 2015.

Based on an Order of the National Army, single parents with full parental responsibility for their children are discharged from the obligation to work a 24-hour shift until their children reach the age of 12. The complainant stated that she had no close relative to take care of her child while working a 24-hour shift.

After the hearing of the case before the Chief of the National Army, even though her case did not fall under the provisions of the Order, directions were given to provide her with a short extension because her child exceeded the age of 12. She was allowed to work morning shifts until the end of the 2015 school year and was thus exempt from the obligation of the 24-hour shift.

The relevant Army authority informed the Ombudsman that based on the Legal/Regulatory framework and the National Army Orders governing the service of permanent army personnel there was no obligation on their behalf to provide a further extension. According to the findings of the Ombudsman, under the same Order under which her complaint was examined, if the complainant was a widowed single parent, she would be entitled to the exception until her child reached the age of 18.

In the decision, published on 21 July 2015, the Ombudsman called for the National Army to comply with their obligations deriving from the provisions of the Convention of the Rights of the Child and to treat all single parents equally. The Ombudsman concluded that there is no justification in the Order to discriminate against unmarried/divorced single parents and widowed single parents, since their duties for balancing their professional and personal life do not change according to the reason which made them single parents. Furthermore, all children have the same rights despite the reason why they belong to a single parent family.

Internet source:

http://www.ombudsman.gov.cy/ombudsman/ombudsman.nsf/page37_gr/page37_gr?OpenDocument

Last accessed 24 June 2016.

Supreme Court defines the limits of administrative authority as regards public sector appointments based on disability quotas

The quotas law adopted in 2009 ('the Law')¹⁶ provides for the appointment in the public sector of those persons with a disability who are listed in a special database of candidates through an application to the appointing body, in this case the Educational Service Committee. Applicants are assessed for compliance with the Law's definition of 'a person with disabilities.' The Law further provides for the creation of a special multi-thematic committee, made up of medical professionals, to give an expert opinion as regards the applicant's disability and suitability for the position.

In the case at hand, a Greek teacher with a visual disability whose application for inclusion in the database of teachers with a disability was rejected, applied to the court for judicial review of the rejecting decision. She had submitted medical certificates showing that she suffered from degenerative macular lesion in both eyes and that her visual acuteness is 1/20 after correction. Her case was referred for examination to the multi-thematic committee and she was found to meet the Law's definition of a person with disabilities. The committee's opinion was communicated to the appointing body which interviewed the applicant but rejected her application. The rejection was subjected to judicial review upon application by the applicant in 2014; the court decided to annul it due to a lack of investigation and justification and as a result of an error of law.¹⁷ This decision was subsequently appealed against and the determination of the appeal was pending at the time of writing.

16 Cyprus, Law on appointment of persons with disabilities in the wider public sector (Special Provisions) [Ο περί Πρόσληψης Ατόμων με Αναπηρίες στον Ευρύτερο Δημόσιο Τομέα (Ειδικές Διατάξεις) Νόμος] 2009 N. 146(I)/2009. Available at http://www.cylaw.org/nomoi/enop/non-ind/2009_1_146/full.html.

17 Supreme Court, *Eleni Paroutsi v. the Republic of Cyprus*, Case No. 1449/2012, 14 March 2014.

Meanwhile, the applicant's vision deteriorated upon which she reapplied for inclusion in the special database and was again rejected. She then *again* applied to the court for judicial review, arguing that the decision of the respondent lacked proper investigation, was not justified and violated the procedure, as the respondent had failed to take into account the opinion of the multi-thematic committee. The respondent claimed that the opinion of the committee was not binding and that it retained the right to carry out its own investigation by conducting the interview with the applicant. The Committee further argued that the mere fact that the applicant met the definition of a 'person with disabilities' did not impose a duty on the administration to include her in the special database of candidates.

The court rejected the respondent's arguments as regards the non-binding nature of the opinion of the multi-thematic committee. Thus, if the committee found that the applicant met the definition of disability foreseen in the Law and found her suitable for appointment, if these findings coincided with the conclusions of the medical certificates submitted by the applicant, and the interview carried out by the respondent did not provide any insights into the applicant's suitability for the job, the appointing body is obliged to rely upon the committee's opinion. The court noted that during the interview, the applicant was asked whether she had been in contact with the National Organisations for the Blind, whether she was a public assistance receiver, whether she had worked in Greece and whether Greece had laws on disability quotas. The court concluded that this line of investigation did not lead to any sound evaluation as to whether she was suitable for employment, adding that the mere fact that the respondent was the body mandated with the appointment decision did not mean that such a decision could be taken with disregard to the findings of the body to whom the legislator assigned the task of giving a medical opinion as to the suitability of the candidate. The Court ruled in favour of the applicant and annulled the rejecting decision in the grounds of not having been properly investigated, lacking justification and relying upon an error of law.

Internet source:

www.cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_4/2015/4-201510-5700-2013.htm&qstring=%EB%EF%E3%F9%20and%20%E1%ED%E1%F0%E7%F1%E9%2A%20and%202015

Last accessed 24 May 2016.

Supreme Court rejects argument that quotas of persons with disabilities go against the equality principle

The claimants applied to the Court seeking to annul a decision of the respondents which had appointed two other parties as teachers in public schools. The claimants had been listed in the database of persons awaiting appointment in public schools in positions 77 and 75 respectively; the two appointed persons were listed in positions 755 and 1261 respectively, but were also listed in a separate database of teachers with disabilities awaiting appointment, under numbers 1 and 2 respectively. This database had been compiled in accordance with a law introducing quotas for persons with disabilities in the public sector.¹⁸

The claimants claimed that the quotas law results in unfair treatment between the candidates competing for a position in the public sector and differentiates on the basis of personal characteristics and not on the basis of the 'correct and single measure of judging candidates, which is their ability to fulfil the duties of the position.' The claimants maintained that the priority given to the appointed persons violated the principle of equality since the decision to appoint them as teachers in spite of the order of priority of the database had breached the order of seniority. They argued that the compilation of the database of persons with disability was in itself unconstitutional and unlawful.

Disability

¹⁸ Law on hiring persons with disabilities in the wider public sector (special provisions) of 2009, No. 146(I)/2009) Article 4.

The Court rejected the argument that quotas are unlawful and disagreed with the submission of the claimants that previous Supreme Court judgements had established that laws providing for quotas were unconstitutional.¹⁹ The Court clarified that the equality principle as established in Article 28 of the Constitution safeguards against arbitrary differentiations but does not exclude reasonable ones which are allowed as a result of the essential nature of the circumstances. In such cases, the Court added, the differential treatment of unequal or exceptional situations does not amount to a deviation from, but on the contrary to a practical implementation of, the equality principle; in this case the priority given to persons with disabilities falls within the boundaries of reasonable differentiation precisely for implementing equality. The Court rejected the claimants' submission that the burden of priority arrangements must be borne by the state and not by individuals, such as the claimants themselves, relying on the principle of proportionality when a legitimate aim is being pursued, as was the case here.²⁰ The Court concluded that the differential treatment is deemed reasonable under the circumstances. The claimants' application was therefore rejected and the decision to appoint the interested parties in the public service was confirmed.

Internet source:

www.cylaw.org/nomoi/enop/non-ind/2009_1_146/full.html

Last accessed 11 May 2016.

POLICY DEVELOPMENT

Implementation of the Framework Convention on National Minorities

In November 2015 the *Advisory Committee on the Framework Convention on National Minorities* published its fourth opinion on Cyprus. The report has a strong discrimination focus and documents a number of gaps and weaknesses in the overall policy framework affecting Cyprus' ethnic minorities. It draws, among other sources, on the Cyprus Country Report and flash reports of the European network of legal experts in gender equality and non-discrimination law regarding discriminatory patterns in both the legal framework and practice. In describing the social landscape, the report expressed concern over the situation of Roma due to the austerity measures and the economic crisis; the problems arising from the strict division of the Cypriot society (regarding self-identification of the citizens); the rigid classification of Greek and Turkish communities; the rise of the xenophobic political discourse; the impossibility of the Turkish Cypriot community to exercise their communal rights which were suspended following the formulation of the 'doctrine of necessity'; the lack of awareness of the new anti-discrimination laws by society in general; the lack of independence of the Ombudsman; the lack of a comprehensive review of the domestic legal framework regarding the implementation of the Directives; the problems deriving from the implementation of the exception to have a Christian orthodox subject in school for pupils of a non-Christian background; the lack of the use of the second official language in Cyprus (Turkish) affecting both the Turkish and Roma communities; the practical lack of implementation of the need for Parliament and the relevant ministries to consult with the representatives of alternative religious communities before a decision is taken; and the fact that access to employment in the civil service as well as the army by members of the Armenian community is still problematic as high-level Greek language examinations continue to function as a gatekeeping device against members of this community.

The report provides a long list of recommendations aiming at remedying the identified gaps and weaknesses but also urging the authorities to pursue flexibility and openness towards any possible other groups, including non-citizens where appropriate, that may wish to claim protection under the Framework Convention and to promote equality and support for minority identities as part of a modern society.

Internet source:

19 *Costas Tsikas et al. v The Republic of Cyprus through the Educational Service Committee*, Supreme Court, Review Jurisdiction, Case Nos 1519/2010 and 1520/10, 3 September 2015.

20 The Court cited the CJEU ruling in *Burden v United Kingdom*, Case No. 13378/05 to support its finding on proportionality and a legitimate aim.

<http://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680483b48>

Last accessed, 25 November 2015.

Annual reports of the Equality Authority and of the Anti-discrimination Authority for 2014

In December 2015 the Ombudsman presented the annual reports for the year 2014 of the two bodies comprising the national equality body. In both reports, the opening statement of the Ombudsman focused on the impact of the economic crisis on vulnerable groups and their access to basic rights. While the Equality Authority (covering the fields of employment and social welfare) noted a decrease in the number of complaints received, the Anti-discrimination Authority did not note a similar trend. The Ombudsman noted that, in practice, employees today appear to be more tolerant towards exploitation and discrimination when faced with the risk of losing their jobs. The Ombudsman regretted the fact that professional organisations and trade unions did not utilise the opportunities offered to them by the equality laws to file discrimination complaints on behalf of victims, noting that only one complaint had been received in 2014 from such an organisation.

All grounds

The Equality Authority received 62 complaints in 2014, out of which 52 % (32 complaints) concerned gender discrimination, 24 % (15 complaints) concerned disability or special needs, 10 % (six complaints) concerned the ground of national origin, 5 % (three complaints) concerned the ground of religion and 1 % concerned 'other grounds.' Out of all the complaints submitted, 87 % were in the field of employment, 6 % in the field of vocational training, 5 % in access to welfare and 2 % in other fields.

The Anti-discrimination Authority, on the other hand, completed the investigation of 81 complaints in 2014, out of which 40 concerned national origin, 12 concerned racial origin, 8 concerned religion, 1 concerned disability, 2 concerned age discrimination, 1 complaint concerned sexual orientation, 2 concerned gender identity, 2 concerned gender discrimination, 3 concerned multiple discrimination and 5 complaints were based on 'other grounds.' A total of 38 complaints were in the field of access to goods and services, 17 in immigration-related issues, 8 in the field of education, 6 in social protection or social provision, 3 in the field of health and 5 in other fields.

The report of the Equality Authority presents summaries of eight reports compiled and published during 2014, four of which concerned gender, three concerned national origin and one concerned race/ethnic origin, involving migrant domestic workers. The differentiation between national origin and race/ethnic origin may seem arbitrary, however the Equality Body takes a liberal approach in interpreting the scope of the Equality Directives and holds the view that national origin is not excluded from the scope of the Directives.

The report of the Anti-discrimination Authority highlights its successful mediation activity involving individuals and governmental organisations, mainly the immigration authorities, the prison authorities, the social welfare services and the Ministry of Education. The report lists a number of complaints investigated by the Authority, which led to the submission of reports with non-binding recommendations and/or to invitations to stakeholders for consultation. As in previous years, no sanctions or binding decisions were issued against any person or organisation who was found guilty of discrimination. During the year, the Anti-discrimination Authority also carried out two self-initiated investigations (on the risk of exploitation of students from third countries; and on the racist insults directed against a footballer on the pitch and the need to address racism in sport) and published three official positions.

Internet sources:

Report of the Equality Authority:

[http://www.ombudsman.gov.cy/Ombudsman/Ombudsman.nsf/All/9B52BD3F8AF79B31C2257F14003F805C/\\$file/1Book%20ISOTITAS%202014%20GR%20Electr%20Edition%20for%20web.pdf](http://www.ombudsman.gov.cy/Ombudsman/Ombudsman.nsf/All/9B52BD3F8AF79B31C2257F14003F805C/$file/1Book%20ISOTITAS%202014%20GR%20Electr%20Edition%20for%20web.pdf)

Report of the Anti-discrimination Authority:

[http://www.ombudsman.gov.cy/Ombudsman/ombudsman.nsf/All/C7DFF67D3CAF7B5EC2257F14003F73A7/\\$file/1Book%20DIAKRISEON%202014%20GR%20Mech%20Electr%20Edition%20for%20web.pdf](http://www.ombudsman.gov.cy/Ombudsman/ombudsman.nsf/All/C7DFF67D3CAF7B5EC2257F14003F73A7/$file/1Book%20DIAKRISEON%202014%20GR%20Mech%20Electr%20Edition%20for%20web.pdf)

Both last accessed 12 May 2016.

Equality Body report on the rights of Jehovah's Witnesses to equal access to healthcare

The claimant is a Jehovah's Witness who filed a complaint with the Anti-discrimination Authority against the Ministry of Health regarding the medical treatment provided to him and to Jehovah's Witnesses in general and the refusal of the Ministry to cover the costs of medical treatment in the private sector, where treatment in accordance with his religious beliefs could be provided. In 2011 the claimant was placed on the waiting list of a public hospital for an operation, and required that, for religious reasons, blood transfusions would not be performed during the operation. He was referred by the Ministry of Health to a public hospital which informed him that they could conduct the required operation without performing blood transfusions, but refused to share any information on the method and equipment to be used. Thus, the claimant was not convinced that public hospitals could adequately respond to his demand for a 'bloodless operation' in accordance with his religious convictions. He again applied to the Ministry to have the costs covered in order to have the operation in the private sector, but his application was rejected at the first and second instance.

In December 2015, the Anti-discrimination Authority issued its report in this case, stating that although it recognised the legal complexity of medical treatments which may endanger a person's life, the right of a person to lead his life in the way he chooses includes the right to choose a treatment that may be risky to his health condition,²¹ referring in this regard to the case law of the European Court of Human Rights.²² The Authority found that the failure to consider and address the complainant's request for 'bloodless treatment' and the refusal to provide him with the requested information amounted to a failure to provide equal access to healthcare to the complainant and led to a serious deterioration of his health condition. The delay of several years and the entire unsatisfactory handling of his case by the health ministry created a reasonable doubt in the claimant's mind that public hospitals were unable to provide a service that would be respectful of his religious convictions. The report concluded that the claimant was denied access to state health services on the ground of his religious convictions. Given the failure of the public hospitals to address the claimant's request, the report found that the state was under an obligation to cover the costs of treatment in the private sector in order to ensure access to health services that complied with his religious beliefs. A list of recommendations as regards the handling of requests for treatment by Jehovah's Witnesses was offered, inviting the Ministry to a consultation.

Internet source:

[http://www.ombudsman.gov.cy/Ombudsman/Ombudsman.nsf/All/7DA7435AA1C3A4E5C2257F1500453DD7/\\$file/%CE%91%CE%9A%CE%A187_2011_17112015.doc?OpenElement](http://www.ombudsman.gov.cy/Ombudsman/Ombudsman.nsf/All/7DA7435AA1C3A4E5C2257F1500453DD7/$file/%CE%91%CE%9A%CE%A187_2011_17112015.doc?OpenElement)

Last accessed 12 May 2016.

21 File No.22/2015, Report of the Anti-discrimination Authority regarding the handling of the Ministry of Health for the provision of suitable healthcare to a Jehovah's Witness, 22 December 2015.

22 ECtHR, *Jehovah's Witnesses of Moscow and others v. Russia* (2010), Application No. 302/02, 10 June 2010.

Czech Republic

CZ

CASE LAW

Constitutional Court decision on the placement of Roma children in former special schools constituting indirect discrimination

The claimant was a Roma person who claimed that in the 1980s he was wrongly assigned to a special needs school for children with intellectual disabilities due to his Roma origin. The claimant attempted to establish indirect discrimination using statistical data processed by the Office for School Information²³ according to which between 1985 and 1991, Roma children accounted for 40 % of the children assigned to special needs schools. Considering that Roma constituted approximately 1.5 to 2 % of the total population in the Czech Republic in 1996, the obvious disproportion between the respective numbers was supposed to support the supposition that Roma children were assigned to special needs schools due to their ethnic origin. The claimant filed an action for the protection of his personal rights and demanded that the Czech Republic apologize and pay damages for discrimination amounting to CZK 500 000 (EUR 18 500).²⁴ The action was rejected by the City Court and the High Court in Prague as well as the Supreme Court.

Racial or ethnic origin

The Constitutional Court agreed with the judgments of both appellate courts. The Constitutional Court asserted that the statistical data presented are not relevant in the applicant's individual case.²⁵ According to the Constitutional Court, the evidence presented by the Ministry of Education before the lower courts show that the mental capabilities of the applicant, and therefore also the reasons for his assignment to a special needs school, were evaluated during the whole course of his studies using psychological testing at different laboratories and observation of his grades throughout his studies. His assignment and stay in special schools was therefore not related to a single examination and obviously was not the result of a routine approach by the authorities.

Internet source:

http://www.usoud.cz/fileadmin/user_upload/Tiskova_mluvci/Publikovane_nalezky/III_US_1136_13_an.pdf

Last accessed 12 May 2016.

Constitutional Court decision on direct discrimination of Roma persons in the area of accommodation services

The claimants argued that they had been discriminated against based on their Roma origin, because a hotel had refused to rent them a room although they had reserved in advance.

The claimants filed an action for the protection of their personal rights and demanded that the hotel apologizes and pays damages for discrimination amounting to CZK 25 000 (EUR 922). During the proceedings it emerged that all the rooms had been reserved by a company but in practice the company did not use any of the rooms.

Racial or ethnic origin

The action was rejected by the Regional Court and the High Court of Prague.²⁶ The High Court held that the operator of the hotel had established that it had treated all guests equally, irrespective of their ethnic origin.

²³ The Office for School Information was part of the Ministry of Education of the Czech Socialistic Republic.

²⁴ It is important to note that the proceedings were initiated in 2009, before the Anti-discrimination law came into force.

²⁵ Constitutional Court judgement No. III. ÚS 1136/13 of 12 August 2015.

²⁶ First the decision of the Regional Court was rescinded by the High Court because of a procedural error. Then the Regional Court rejected the action again, which was confirmed by the High Court.

The Constitutional Court quashed the decision of the High Court of Prague, especially for the reason that the evidence was not evaluated sufficiently.²⁷ Thus, it decided that both previous court rulings had led to a violation of the claimants' rights to judicial protection. The case will now be re-examined by the High Court.

Internet source:

http://www.usoud.cz/fileadmin/user_upload/Tiskova_mluvci/Publikovane_nalezky/III_US_1213_13_an.pdf
Last accessed 24 May 2016.

Constitutional Court ruling on the burden of proof

The Constitutional Court has ruled on a case concerning the dismissal of a man who was the only male member of a collective of educators in an institute for children. Due to legislative changes (introducing stricter requirements for the education level of child educators), the man was deemed to be not suitable for the work, as he did not meet the conditions for the qualification of such workers. He was dismissed, whereas his female colleague, who also did not meet the conditions for qualification, was permitted to remain. The man viewed his dismissal as discriminatory behaviour on the part of his employer based on gender and he went to the court with a discrimination case. The general courts found that the plaintiff had not proved that he was treated in a discriminatory way. To support this argument, the courts used the conclusions of a labour inspection which had not found any discrimination.

The Constitutional Court, in contrast, found that the labour inspection was not done in a proper manner and instead used an opinion of the Czech equality body (Public Defender of Rights), which found that the employee was most likely discriminated against. The Public Defender of Rights labelled the conclusions of the labour inspection and the school inspection as too formalistic and in conflict with the principle of material truth. They further argued that discrimination in the form of persecution had not been taken into account at all.

The Constitutional Court, in its decision, found the conclusions of the inspection offices to be insufficiently reasoned and stated that the plaintiff had the right to define a comparator – a woman in a comparable situation. The definition of a comparator was not taken into account by the general courts, which, according to the Constitutional Court, represented a breach of the plaintiff's right to a just procedure. The Constitutional Court concluded that the burden of proof had to be shifted to the employer. Since this had not happened, the Constitutional Court's decision abolished the judgments of the Supreme Court and the regional court.

It is not exceptional that a national gender discrimination case concludes on procedural aspects and shifting the burden of proof remains an important issue in Czech jurisprudence. In this case, the decision of the Constitutional Court is important because it brought the current practice of the Czech courts into question.

Internet source:

http://www.usoud.cz/fileadmin/user_upload/Tiskova_mluvci/Publikovane_nalezky/III_US_880_15_an.pdf
Last accessed 24 June 2016.

27 Constitutional Court judgement No. III. ÚS 1213/13 of 22 September 2015.

POLICY DEVELOPMENTS

Research report by the Czech Ombudsman: Victims of discrimination and obstacles in access to justice

On 1 July 2015 the Public Defender of Rights (Ombudsman) published the report 'Discrimination in the Czech Republic: victims and obstacles they face in access to justice,' focusing on the opinion of the general public, stakeholders in equal rights and the monitoring of court judgments and activities of administrative authorities.

All grounds

The Ombudsman recommended 15 key measures including the following:

- Create targeted information campaigns aimed at increasing the awareness of disadvantaged groups.
- Continually educate judges, attorneys, inspectors, clerks, teachers, social workers, police officers, healthcare personnel and other groups.
- Award damages to discrimination victims in trials.
- Provide free legal aid to discrimination victims and introduce a database of attorneys specialising in anti-discrimination law.
- Introduce *actio popularis* into legal codes in discrimination cases.
- Ensure that the issue of fair treatment is a regular part of inspections from the authorities.
- Levy effective, adequate and deterring fines for violating discrimination rules.

Internet source:

<http://spolecne.ochrance.cz/dokumenty-ke-stazeni/konference/konference-diskriminace-v-cr-obet-diskriminace-a-jeji-prekazky-v-pristupu-ke-spravedlnosti/>

Last accessed 12 May 2016.

Concluding observations by the CRPD on the initial report of the Czech Republic

The Committee on the Rights of Persons with Disabilities considered the initial report of the Czech Republic concerning the implementation of the Convention on the Rights of Persons with Disabilities and adopted the concluding observations.

Disability

The Committee especially welcomed a number of measures:

- The prohibition of direct and indirect discrimination of persons with disabilities in the Anti-Discrimination Law;
- The introduction of the provision in the Building Act that the creation of a barrier-free environment is in the public interest.
- The independent mandate given to the Ombudsman to carry out systematic preventive visits to places and facilities where persons with restricted liberty are or may be located;
- The decision of the Supreme Administrative Court in December 2014 recognizing the right of children with disabilities to live in the community;²⁸
- The official recognition of Czech sign language.

However, the Committee expressed specific concern that:

- Mechanical and chemical restraints, which may amount to torture or cruel, inhuman or degrading treatment, are commonly used in psychiatric institutions;
- Under the Civil Code and the Health Care Act, guardians of persons with disabilities are authorized to give consent for the sterilization of the person concerned, without his or her free and informed consent.

28 Supreme Administrative Court, judgement No. 4 Ads 134/2014 of 30 October 2014. Available at http://www.nssoud.cz/files/SOUDNI_VYKON/2014/0134_4Ads_1400029_20141119104139_prevedeno.pdf.

In addition, the Committee called upon the Czech Republic, *inter alia*:

- To amend the definitions of disability and persons with disabilities in its legislation and to make explicit reference in those definitions to the barriers faced by persons with disabilities;
- To amend its legislation and extend the prohibition of the denial of reasonable accommodation to other areas than employment and labour relations;
- To take all measures necessary, including training the judiciary, strengthening independent human rights bodies and building the capacity of persons with disabilities and their organisations, to foster the use of legal remedies available to persons with disabilities who face discrimination and inequality;
- To step up the process of deinstitutionalisation and to allocate sufficient resources for the development of support services in local communities that would enable all persons with disabilities, regardless of their impairments, gender or age, to choose freely with whom, where and under which living arrangements they will live;
- To implement the amended School Law, incorporate inclusive education as the guiding principle of the education system and ensure the admission of children with disabilities to mainstream schools, to intensify its efforts and to allocate sufficient financial and human resources for reasonable accommodation that will enable boys and girls with disabilities, including intellectual disabilities and autism, and deaf-blind children, to receive inclusive quality education;
- To amend the relevant laws so that all persons with disabilities can enjoy the right to vote and stand for election, regardless of guardianship or other regimes;
- To provide the Ombudsman with the mandate of the independent national monitoring mechanism required under Article 33(2) of the Convention and in accordance with the principles relating to the status of national institutions for the promotion and protection of human rights (Paris Principles).

Since the adoption of the concluding observations, the Czech Republic has already changed the definitions of ‘disability’ in school legislation. Since 1 September 2015, a ‘pupil with special education needs’ is a pupil who needs to be provided with support measures to fulfil his or her educational opportunities or for the enjoyment or exercise of his or her rights on an equal basis with others (School Law as amended, Section 16(1)).

Internet source:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fCZE%2fCO%2f1&Lang=en

Last accessed 12 May 2016.

Paternity benefit proposed

In December 2015, the Ministry of Labour and Social Affairs presented a proposal for the amendment of Act No. 187/2006 Coll. on sickness insurance, introducing a paternity benefit. The amendment stipulates that the father of a child shall be entitled to this benefit if he cares for a new born child (until the child reaches six weeks of age). The entitlement shall last for one week. The benefit will be subject to the same conditions as maternity benefit (70 % of the daily salary). After the child has reached six weeks of age, there is a possibility for the father to claim the maternity benefit instead of the mother, upon the written agreement of both parents.

After several discussions and attempts to support fathers and encourage them to care for their new born child, the Ministry has finally come up with a concrete proposal for a paternity benefit, which can be expected to be quite popular among Czech fathers.²⁹

Internet source:

<http://www.mpsv.cz/cs/23270>

Last accessed 24 June 2016.

29 After the cut-off date of this publication, in May 2016, the proposal was adopted by the Government, and is expected to be discussed by Parliament in the near future.

Denmark

DK

LEGISLATIVE DEVELOPMENT

Amendments to the Act on the Board of Equal Treatment

On 15 December 2015, a series of amendments to the Act on the Board of Equal Treatment were adopted, establishing *inter alia* that individuals making complaints to the Board must have an individual and current interest in the case in question.³⁰ The amendments also establish that the Institute for Human Rights – the National Human Rights Institute of Denmark – may bring complaints to the Board in cases that are a matter of principle or of general public interest. This is a positive development compared to the previous legal framework which did not allow the Institute to bring cases to the Board of Equal Treatment. In addition, the amendments establish that complaints which can be adjudicated in accordance with well-established case law could be decided by one member of the Board's presidency only. The amendments entered into force on 1 January 2016.

All grounds

Internet source:

<https://www.retsinformation.dk/Forms/R0710.aspx?id=176316>

Last accessed 12 May 2016.

CASE LAW

Supreme Court case on a dismissal because of disability-related sickness absence

The claimant was employed in a supermarket as a department manager and was diagnosed with arthritis in 2008. According to her doctor's orders she was exempted from a checkout operator's work in September 2008. In March 2009, due to increasing sickness absence, the supermarket, the local authorities and the claimant entered into an agreement granting the employer a refund of paid sickness benefits. In December 2009 the claimant was dismissed with reference to Section 5(2) of the Salaried Employees Act, which entitles an employee to be dismissed with a shortened notice period if he or she has been absent because of illness for an extended period of time.

Disability

The Supreme Court referred to CJEU C-335/2011 (*Ring*) and C-377/2011 (*Skouboe Werge*) and reiterated the definition of the concept of disability as contained in that ruling. The Court stated that the burden of proof rested with the claimant; she had to prove that she suffered from an illness causing a disability encompassed by the Act on the Prohibition of Discrimination in the Labour Market etc. On that basis the Court concluded that the limitations because of her illness appeared to be long-term and that the illness of arthritis was encompassed by the concept of disability in the Act.

The Court observed that it is a precondition for the employer's obligation to reasonably accommodate the employee when the employer actually knows or ought to know about the disability. In this regard, the Court found that the employer knew about the disability and was obliged to reasonably accommodate the employee. The claimant had made several proposals for ways of accommodating her disability, including giving her a part-time position. The employer had not considered this proposal and the Court thus concluded that the employer had failed to provide reasonable accommodation for the employee.

On this basis, Section 5(2) of the Danish Salaried Employees Act is inadmissible. Referring to *Ring and Skouboe Werge*, the Court stated that it would be in conflict with Directive 2000/78 to apply this provision

30 Act No. 1570 of 15 December 2015 amending the Act on the Board of Equal Treatment.

if the sickness absence was a result of the fact that the employer had disregarded his or her obligation to provide reasonable accommodation for the employee. The employer had argued that EU Directive 2000/78 was not directly applicable to private employers. The Court rejected this point of view and argued that the state of the law is a result of the Act on the Prohibition of Discrimination in the Labour Market etc., which is both more recent and more specialised than Section 5(2) of the Danish Salaried Employees Act.


The Supreme Court ordered the employer to pay compensation for the loss of wages. Furthermore, the employer was ordered to pay nine months' salary as compensation for the failure to reasonably accommodate the employee.

Internet source:

<http://domstol.fe1.tangora.com/page31478.aspx?recordid31478=1070>

Last accessed 12 May 2016.

Board of Equal Treatment: Change to conditions of employment by employer



The claimant was employed by a government agency when he was involved in a traffic accident resulting in him suffering severe neck and back injuries. After six months of sick leave he still had chronic pain, difficulties with concentration and fatigue. He was not able to work full time and for more than a year he was on partial sick leave being able to work only around 10 hours a week. During that period of time his employer had adjusted his working tasks, allowed him to work from home and exempted him from office meetings. Nearly two years after the accident, the employer recommended the dismissal of the claimant because of his illness. Negotiations between the parties resulted in a settlement by which the full-time position was changed to a part-time position (10 hours a week). After the settlement, the claimant brought a complaint to the Board of Equality claiming that he had been discriminated against on account of his disability.


The Board stated that a change to his conditions of employment from a full-time to a part-time position should be put on the same footing as a dismissal. The Board referred to CJEU C-335/2011 (Ring) and C-377/2011 (Skouboe Werge) and concluded that the claimant had a disability encompassed by the Act on the Prohibition of Discrimination in the Labour Market etc. The Board argued that he was in reality dismissed because of sickness absence, which was caused by his neck and back injury. The Board thus concluded that the claimant had established facts to demonstrate that he had been indirectly discriminated against because of his disability. Subsequently the Board assessed that the employer had tried to reasonably accommodate the claimant so that he could function in his position, including shorter working hours. On this basis the Board did not decide in favour of the claimant.

Internet source:

<http://ligebehandlingsnævnet.dk/naevnsdatabase/afgoerelse.aspx?aid=1604&type=Afgoerelse>

Last accessed 12 May 2016.

Board of Equal Treatment: Definition of disability: long-term limitation



The claimant was a full-time machine operator in a factory. He was diagnosed with podagra (gout) and had two short periods of sickness absence. Four months after receiving his diagnosis he was dismissed. The employer referred to his sickness absence as the reason for the dismissal. The claimant complained to the Board of Equal Treatment claiming that he had been discriminated against on account of his disability. In a memorandum his doctor explained that in the future he should expect attacks of podagra that would cause impairments. The doctor wrote that it was impossible to say how often such attacks would occur or whether the illness would be short-term or permanent.

The Board referred to the definition of disability in CJEU C-335/2011 (Ring) and C-377/2011 (Skouboe Werge) and stated that the claimant's condition had caused a significant impairment, which in interaction with various types of working tasks had hindered his full and effective participation in working life on an equal basis with other employees. The Board, however, also stated that it had not been possible for the claimant's doctor to estimate the duration of the impairment, including the frequency of attacks and the duration of the illness, and whether the illness was short-term or permanent.

On that basis the Board concluded that the claimant's illness did not constitute a disability encompassed by the Act on the Prohibition of Discrimination in the Labour Market etc. and thus did not decide in his favour.

Internet source:

<http://ligebehandlingsnaevnet.dk/naevnsdatabase/afgoerelse.aspx?aid=1609&type=Afgoerelse>

Last accessed 18 May 2016.

Eastern High Court judgment on disability discrimination and dismissal

The claimant was an engineer in a municipality and shortly after she was appointed, she had an accident and injured her right arm. She was later diagnosed with Complex Regional Pain Syndrome due to which she was partly absent owing to illness for more than a year. Her request for a part-time position was rejected by the municipality because of the general practice not to employ engineers in her kind of job in part-time positions. She was dismissed due to her sickness absence and argued that she had been discriminated against because of her disability.

Disability

The parties to the case agreed that the claimant at the time of the dismissal had an impairment, which in interaction with various types of working tasks hindered her full and effective participation in working life on an equal basis with other employees. The employer, however, challenged that the impairment was long-term. The Court referred to the information provided by the doctor concerning the diagnosis of Complex Regional Pain Syndrome. The doctor also stated that this illness often lasted a couple of years but that it was unpredictable and that it could last for both a shorter and a longer period of time. The Court concluded that the impairment at the time of the dismissal could be characterized as long-term and that it constituted a disability encompassed by the Act on the Prohibition of Discrimination in the Labour Market etc.

The court emphasized that the claimant was dismissed because of sickness absence and that the question to be resolved concerned indirect discrimination on account of disability. To answer that question the Court assessed whether the employer had fulfilled the obligation to reasonably accommodate the employee. Based on the information in the case, the Court argued that a part-time position of 20 hours a week would meet the claimant's needs to be reasonably accommodated. The Court further argued that the municipality did not look into and concretely evaluate whether a part-time position or other solutions would be possible. The municipality simply referred to the general policy and based on that background, the Court stated that the municipality had not proved that it would constitute a disproportionate burden to appoint the claimant in a part-time position. Thus the Court concluded that the dismissal constituted indirect discrimination because of disability.

The claimant was awarded compensation amounting to six months' salary for indirect discrimination because of disability. In this regard the Court stated that the fact that her disability derived from a work accident could not lead to higher compensation.

Internet source:

<http://domstol.fe1.tangora.com/Domsoversigt.16692/F-9-12.1555.aspx>

Last accessed 18 May 2016.

Supreme Court ruling following the preliminary ruling of the CJEU on dismissal because of disability-related sickness absence

Disability

The case was referred for a preliminary ruling and the Court of Justice of the European Union delivered its judgment on 11 April 2013 in the joined cases C-335/11 and C-337/11 (*Skouboe Werge and Ring*). The Danish Maritime and Commercial Court dealt with the two cases and delivered its judgments on 31 January 2014 in F-13-06 and F-19-06,³¹ which were appealed to the Supreme Court.

The Supreme Court judgment of 23 June 2015 is the final decision in the *Skouboe Werge* case. The claimant had been involved in a traffic accident in which she suffered a whiplash injury. More than a year later she still suffered from persistent pains and had several periods of absence due to sickness. She was dismissed from her job with reference to a special rule – section 5(2) of the Salaried Employees Act entitling the employer to dismiss an employee with a shortened notice period when the employee has been sick for 120 days within a period of 12 consecutive months.

The Supreme Court referred to the definition of ‘disability’ as stipulated in the CJEU preliminary ruling. The Court stated that the burden of proof rested on the employee as she had to prove that she suffered from an illness causing a disability encompassed by the Act on the Prohibition of Discrimination in the Labour Market etc. The Court referred to a doctor’s note containing a prognosis of her illness, which stated that the limitation would be long-term. On that basis the Court concluded that the employee had a disability at the time of dismissal and that it was immaterial for this assessment whether the employer knew or ought to know that her illness had caused a disability.

Regarding the obligation to reasonably accommodate the employee, the Court observed that it is a precondition for the employer’s duty that he/she actually knows or ought to know about the disability. The parties to the case had been e-mailing each other during the employee’s sickness absence, but the note from the specialist doctor with the long-term prognosis was not sent to the employer. Based on that background the Court did not find that the employer at the time of the dismissal knew or ought to have known about the fact that the illness had caused a disability. In conclusion there was no basis for ascertaining that the employer had failed to reasonably accommodate the employee.

Regarding the dismissal with a shortened notice period, as prescribed by Section 5(2) of the Danish Salaried Employees Act, in referring to paragraphs 69-92 of C-335/11 and C-337/11 the Court stated that this provision would be in conflict with Directive 2000/78 unless as well as pursuing a legitimate aim, it did not go beyond what would be necessary to achieve that aim. In its judgment the CJEU had stated that it was up to the Danish courts to make this assessment.

The Supreme Court argued that one of the aims of Section 5(2) is to prevent an employer in the event of an employee’s illness from immediately dismissing that employee and that in reality it is therefore also easier for a person who is at risk of being absent because of sickness to get a job. The Court did not find that the provision went beyond what is necessary and thus concluded that section 5(2) of the Salaried Employees Act is not in conflict with Directive 2000/78. Accordingly, the sickness absence related to the disability of the employee could be included in the making up of 120 sick days according to Section 5(2) of the Salaried Employees Act. Thus, the Court concluded that it was legal for the employer to dismiss the employee with the shortened notice period.

Concluding, the Supreme Court overruled the judgment by the Danish Maritime and Commercial Court and found for the employer.

31 See *European Anti-Discrimination Law Review*, issue 19, pp. 57-58.

Internet source:

<http://domstol.fe1.tangora.com/page31478.aspx?recordid31478=1044>

Last accessed 18 May 2016.

Softer obligation for a small firm to provide for reasonable accommodation

The claimant was a full-time electrician in a small firm with eight employees. All the electricians had their own company vehicle. In March 2012 during working hours, the claimant had a traffic accident that caused a whiplash injury to his neck. He worked full-time after the accident. During an appraisal in May 2012, the claimant explained that his injuries were under control and that he did not wish to work part-time. Some 18 months later, during another appraisal, the claimant explained that his working day was somewhat stressful but he declined an offer from the employer to work part-time.

Disability

As of December 2013, the claimant was absent because of sickness. In January 2014, his doctor and the municipal job centre concluded that he could not return to his previous full-time position because of his chronic and lasting injury. He had difficulty in concentrating, had constant headaches and a low stress threshold. The employer offered another position in the stockroom, which, however, would be without any customer contact and it would also be a part-time position. The claimant refused the offer as he wanted to stay in a job where he would keep his contact with customers. He was dismissed on 23 April 2014 and complained to the Board of Equal Treatment that he had been discriminated against on account of his disability.

The Board referred to the definition of disability in CJEU C-335/2011 (*Ring*) and C-377/2011 (*Skouboe Werge*) and stated that the claimant's whiplash in combination with a previous neck injury had caused a significant and lasting impairment, which hindered his full and effective participation in working life on an equal basis with other employees.

The Board then confirmed that the employer was obliged to reasonably accommodate him, unless such measures would impose a disproportionate burden on the employer. The Board referred to Section 21 of the Preamble to Directive 2000/78 and stated that in order to determine whether the measures in question would give rise to a disproportionate burden, particular attention should be paid to the resulting financial and other costs, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance.

On that basis the Board concluded that the employer had tried to reasonably accommodate the claimant so that he would be able to continue his work as an electrician. The Board emphasized that the employer had offered him reduced working hours as well as work in the stockroom without customer relations. It was part of the Board's assessment that the employer was a small one-man business that often received jobs from customers to be undertaken from day to day. Thus the redeployment of an electrician with many years of experience and specialisation to fixed and scheduled working days with low stress levels and minimum interference would not be unreasonable. In conclusion, the Board did not decide in favour of the claimant.

Internet source:

<http://www.ligebehandlingsnaevnet.dk/naevnsdatabase/afgoerelse.aspx?aid=1700&type=Afgoerelse>

Last accessed 18 May 2016.

Supreme Court case on occupational pension schemes and age discrimination

Age

The claimant was a 29-year-old woman recruited by a company providing analytical and information services to businesses and consumers. Pursuant to her employment contract, she was included in a compulsory pension scheme where pension contributions from her employer would increase with her age. The claimant's wage was composed of the agreed basic salary plus the employer's pension contribution consisting of 6 % of her basic salary. She would herself contribute to the pension with 3 % of her basic salary. If she had been between 35 and 44 years of age, the employer's contribution would have been 8 % and her own contribution would have been 4 %. Finally, if she had been over 45 years of age, the employer's contribution would have been 10 % and she would have contributed 5 % herself.

The claimant resigned less than a year afterwards and claimed that the pension scheme constituted unlawful discrimination on the ground of age. The employer claimed that pension schemes were not covered by the prohibition of age discrimination in the Act on the Prohibition of Discrimination in the Labour Market etc. The Western High Court requested a preliminary ruling from the Court of Justice of the European Union. A judgment was issued in case CJEU C-476/11 on 26 September 2013.³²

The Supreme Court delivered its ruling on 12 November 2015, referring to the preliminary ruling of the CJEU and stating that an occupational pension scheme is exempted from the prohibition of discrimination on grounds of age if it can be justified under EU law and especially under Article 6(1) of Directive 2000/78. The question for the Court was whether the pension scheme in question fell within the exception in section 6a of the Act on the Prohibition of Discrimination in the Labour Market etc. The Supreme Court concluded that the aim of the pension scheme constitutes a 'legitimate aim' as it takes into account the interests of all employees in the company.

Hereafter, the Court assessed whether the age-related increases in contributions complied with the principle of proportionality. The Court argued that the employer was not under any obligation in law or based on any collective agreement to contribute to a pension scheme. According to the Court, the employer could also have precluded younger employees by setting a minimum age for participating in the pension scheme. Instead the employer had managed to include more employees in the pension scheme because the pension contributions were based on age. Against that background the Court concluded that the detriments resulting from the differential treatment on account of age were offset by the woman's benefits from the occupational pension scheme and that the principle of proportionality had not been violated.

Thus, the judgment by the Western High Court was upheld and the employer was exonerated.

Internet source:

<http://domstol.fe1.tangora.com/Domsoversigt-%28Højesteretten%29.31478.aspx?recordid31478=1129>
Last accessed 18 May 2016.

Supreme Court judgment on age discrimination and dismissal

Age

In 2011, the two claimants (along with three other colleagues) were dismissed from their positions in a government agency because of a workforce reduction. The dismissed employees were all above 50 years of age. The claimants argued that they had been discriminated against because of their age.

The Board of Equal Treatment had previously issued a decision in the case stating that the percentage of elderly employees who had been dismissed constituted a disproportionately high percentage of the overall number of employees. The Board concluded that the claimants had established facts which

³² See *European Anti-Discrimination Law Review*, issue 18, p. 40.

amounted to possible discrimination and that the employer could not prove that no discrimination had taken place. Thus the claimants were awarded compensation.³³

The government agency declined to follow the decision. Thus, the Board brought the case against the government agency to the civil courts. In January 2015 the Eastern High Court concluded that A and B had not established facts which amounted to possible discrimination and exonerated the government agency. The case was appealed to the Supreme Court.

In December 2015, the Supreme Court stated that statistical information being authentic and sufficiently significant by itself could establish an assumption for discrimination because of age. The Court referred to the ruling of the CJEU in the case of C-127/92 (*Enderby*). The Court, however, also emphasised that a number of employees in the government agency who were older than the claimants had not been dismissed during the workforce reduction. Thus the Court concluded in this case that the statistical data on the age of the dismissed as well as information about the age composition in the government agency did not establish facts which amounted to possible discrimination. Like the Eastern High Court, the Supreme Court exonerated the government agency.³⁴

Internet source:

<http://domstol.fe1.tangora.com/Domsoversigt-%28Højesteretten%29.31478.aspx?recordid31478=1149>
Last accessed 12 May 2016.

Estonia

EE

LEGISLATIVE DEVELOPMENT

Study committee on gender equality in Parliament

The Constitutional Committee initiated a draft resolution on the formation of a parliamentary study committee for analysing gender equality on 13 October 2015. The draft resolution was discussed and passed the first reading in Parliament on 10 November 2015. Amendments were requested by 24 November 2015. On 8 December 2015, the Pro Patria and Res Publica Union faction (IRL)³⁵ opposed the formation of two special study committees (one for analysing gender equality problems and another on HIV).³⁶ Parliament has standing committees, select committees, committees of investigation and study committees.³⁷ Study committees are established by a Parliamentary resolution in order to analyse problems of considerable importance. Upon the termination of its work, a study committee presents a report on that work to Parliament.³⁸

Gender

Arguments for establishing the committee concerned facts about persistent gender inequality and the high gender pay gap in Estonia. Arguments against the committee were connected with costs and the need to limit the number of Parliamentary committees. Work on the draft resolution and attempts to reach common acceptance will continue in 2016.

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

34 Supreme Court judgment of December 14, 2015. Case 28/2015.

35 Christian democrats, coalition faction, 14 members in Parliament, <http://www.riigikogu.ee/en/parliament-of-estonia/factions/pro-patria-res-publica-union-faction/>, accessed 26 December 2015.

36 Available in Estonian: <http://uudised.err.ee/v/eesti/d26a9190-0882-4ee0-82f0-b23b2c39806f/irl-ei-toeta-probleemkomisjonide-loomist-riigikogus>, accessed 26 December 2015.

37 Article 17 of the Riigikogu Rules of Procedure and Internal Rules Act.

38 Article 21 of the Riigikogu Rules of Procedure and Internal Rules Act.

Internet sources:

<http://www.riigikogu.ee/en/sitting-reviews/lowering-of-voting-age-for-local-elections-was-not-passed-in-riigikogu-2/>

<https://www.riigiteataja.ee/en/eli/512032015002/consolide>

[http://www.riigikogu.ee/tegevus/eelnoud/eelnou/4d8ebbcc-be51-4740-8f56-51711e3c034a/Riigikogu%20otsuse%20%25E2%2580%259ERiigikogu%20probleemkomisjoni%20moodustamine%20soolise%20v%25C3%25B5rd%25C3%25B5iguslikkuse%20probleemide%20l%25C3%25A4bit%25C3%25B6%25C3%25B6tamiseks%25E2%2580%259C%20eeln%25C3%25B5u%20\(107%200E%20I\)/](http://www.riigikogu.ee/tegevus/eelnoud/eelnou/4d8ebbcc-be51-4740-8f56-51711e3c034a/Riigikogu%20otsuse%20%25E2%2580%259ERiigikogu%20probleemkomisjoni%20moodustamine%20soolise%20v%25C3%25B5rd%25C3%25B5iguslikkuse%20probleemide%20l%25C3%25A4bit%25C3%25B6%25C3%25B6tamiseks%25E2%2580%259C%20eeln%25C3%25B5u%20(107%200E%20I)/)

Last accessed 24 June 2016.

CASE LAW

Linguistic requirements in recruitment procedures

Professional linguistic requirements are stipulated on the basis of the Language Act of 2011. The proficiency requirements are subdivided into three broad levels: Basic User: A1 and A2; Independent User: B1 and B2; Proficient User: C1 and C2. The requirements for proficiency in and the use of the Estonian language are established by a Government Regulation. Teachers at non-Estonian kindergartens must be able to speak the Estonian language at level B2; teachers' assistants at level A2.

In the case at hand the employment contracts of two teachers at a Russian-language kindergarten were cancelled due to 'a long-term inability to perform their duties,' namely due to insufficient proficiency in Estonian. Both teachers were native speakers of Russian and were of Russian ethnic origin. According to the Employment Contract Act (Article 88 (3)), before the cancellation of an employment contract on this basis the employer shall offer other work to the employee, where possible. In this case this requirement was not fulfilled. There were two positions as teachers' assistants which were available at the kindergarten. The relevant job advertisement stated, however, that candidates must speak Estonian as their mother tongue.

The Commissioner for Gender Equality and Equal Treatment came to the conclusion that both teachers had been discriminated against due to their ethnicity insofar as they had not been offered another position at the kindergarten. Their proficiency in Estonian at level A2 was not properly controlled. Furthermore, a requirement to speak Estonian as one's mother tongue (as stated in the job advertisement) discriminated against jobseekers from other ethnic origins.³⁹

Internet source:

http://www.vordoigusvolinik.ee/wp-content/uploads/2015/08/Voliniku-arvamus_anonymiseeritud_22-07-2015.pdf

Last accessed 12 May 2016.

39 Case A. & B. v. C. Opinion of the Commissioner for Gender Equality and Equal Treatment of 22 July 2015.

Former Yugoslav Republic of Macedonia

MK

POLICY DEVELOPMENT

Equality Body and Civil Society Organisations join forces to advocate that sexual orientation and gender identity should constitute explicitly protected grounds

Sexual orientation and gender

Since the adoption of the Law on Prevention and Protection against Discrimination ('Anti-discrimination Law'), one of the main concerns, regardless of its open-ended list of protected grounds, was the exclusion of sexual orientation from the explicitly protected grounds (Article 3). Nevertheless, the national equality body, the Commission for Protection against Discrimination (CPAD), has referred, since the beginning of its mandate, to international law to acknowledge that sexual orientation is a protected ground. During the mandate of the current Commissioners this has been a well-established practice.

Sexual
orientation

Gender

With joint efforts, the CPAD and H.E.R.A., a civil society organisation which works on protecting and promoting the rights of marginalised groups, with a focus on health rights, prepared a Protocol for the CPAD on how to act in cases when a person claims discrimination on grounds of sexual orientation or gender identity, thereby formalising the practice developed during the mandate of the Commissioners. In addition, the Protocol contains an annex with an amended form for filing a complaint with the CPAD. The amended form contains, in addition to the list of grounds explicitly listed in Article 3 of the Anti-discrimination Law, the option of filing a complaint on the grounds of 'sexual orientation and gender identity.'

Finally, the Protocol also contains a list of CSOs to which victims of discrimination can turn for assistance and to which the new Commissioners of the CPAD could eventually turn for expertise or advice.

France

FR

CASE LAW

Air transport carriers' obligation to provide access to air transport to disabled persons with reduced mobility and the scope of opposable safety requirements

Article 3 of Regulation (EC) No. 1107/2006⁴⁰ forbids an air transport carrier from refusing to allow a disabled person on board on the ground of disability or reduced mobility. However, Article 4 provides that an air carrier may refuse boarding 'in order to meet applicable safety requirements established by international, Community or national law or in order to meet safety requirements established by the authority that issued the air operator's certificate to the air carrier concerned.'

Disability

In the absence of precise regulations defining 'applicable safety requirements' some air transport carriers have implemented restrictive policies that result in systematically refusing boarding to unaccompanied disabled persons with reduced mobility.

⁴⁰ Regulation (EC) No. 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air.

Easyjet adopted such a policy, formally instructing its subcontractor responsible for boarding in Paris Charles De Gaulle Airport to systematically refuse boarding to disabled unaccompanied travellers because the flight personnel are ‘not trained to manage and assist disabled persons.’

Three disabled persons who were denied the right to embark on the ground that they were not accompanied filed penal complaints against Easyjet. The company was convicted by the first and second instance courts, and finally lodged a recourse before the Supreme Court.

On 15 December 2015, the Criminal Chamber of the Supreme Court upheld the ruling of the Court of appeal, finding that the decision not to train its personnel and the systematic refusal of the company to allow unaccompanied disabled persons to board a plane without verifying their concrete capacity to travel alone constituted an overall policy based on disability.⁴¹ Considering that industry practice shows that other companies provide the necessary assistance to disabled persons, the aircraft company (and its subcontractor executing its instructions) cannot use the personnel restrictions argument to justify these security requirements and to systematically refuse a service to disabled persons without committing discrimination.

The Court of cassation specifically stated that the European regulation does not provide for a safety requirement denying access to persons on the ground of disability, and Easyjet did not establish the existence of such a safety standard recognised by the national or international authorities.

Internet source:

<http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000031658282&fastReqId=2131939514&fastPos=2>

Last accessed 19 January 2016.

Court decision quashing the instruction of an academic director excluding the participation of veiled mothers in field trips

The academic director of the Amiens educational district issued an instruction on 4 December 2013 ordering school principals of a certain town to refuse participation in school activities for all mothers wearing an Islamic veil.

The claimant requested that this instruction be annulled on the ground of its illegality and claimed damages for the refusal of her requests to accompany field trips in December 2013 and February 2014.

Before the Court, the Ministry of Education admitted that the prohibition on students exhibiting religious signs within the school environment and premises is not applicable to parents. In specific circumstances the school authorities can limit the expression of religious freedom in order to ensure respect for public order. However, in the absence of an explicit legal text, parents cannot be subjected to the strict obligation of neutrality imposed on personnel and students and religious signs cannot be forbidden on a continuous basis.

The claimant however failed to establish that she had in fact submitted requests to accompany field trips and that those requests were refused; her claim was therefore dismissed.⁴²

The Administrative Tribunal followed the opinion rendered by the Council of State shortly after the instruction at hand was issued, stating that parents participating in school activities were occasional

41 Supreme Court, Criminal Chamber, No. 13-81586, *Easyjet vs. Gianmartini et al.*, 15 December 2015.

42 Amiens Administrative Tribunal, decision No. 1401803, of 15 December 2015.

participants and could not therefore be subjected to an obligation of neutrality allowing the school authorities to exclude parents wearing religious signs.⁴³

Statutory discrimination on the ground of nationality, i.e. indirect discrimination on the ground of origin, throughout the claimants' career

In the 1970s, the SNCF (the French public railway service) hired 2 000 Moroccan employees by means of a twelve-month recruiting process. However, they were not hired according to the same conditions as the French employees, as the regulatory 'permanent employee' status of the SNCF imposes a requirement of French nationality. The Moroccan employees were thus hired as contractual agents under a specific status ('PS25'), which was used for temporary employees and for persons holding a list of jobs that were not covered by the statutory regime. The employment conditions of this specific status were less favourable than those applicable to French permanent employees: no access to career evolution beyond a certain level of lower execution jobs (while only 2 % of French employees holding the permanent status ended their career at these levels); more physically strenuous jobs (having an impact on the workers' physical condition upon retirement); a slower salary evolution; less favourable overtime conditions; and less favourable retirement conditions in terms of periods of service and age requirements for access to a full pension, the financial conditions of retirement and of widow's pension rights. Approximately half of the 2 000 Moroccans had acquired French nationality at some point, yet only 113 had obtained the 'permanent employee status.'

Racial or
ethnic origin

The claimants were all of Moroccan origin and had all been hired under the PS25 status, spending their entire careers with SNCF. They filed a complaint after retirement, claiming damages for their career and retirement conditions.

SNCF argued that the various legal instruments prohibiting discrimination on the ground of origin were not in force in France at the time of the formation of the contract and during the period covering part of its execution and that the claims were time barred 30 years after signing the contracts. Furthermore, it argued that the claimants could not be held to be in a comparable situation as employees hired under the permanent employee status because they did not exercise the same jobs, and that the requirement of French nationality was authorised by rules applicable to requirements related to the exercise of national sovereignty, and that this could not therefore give rise to the liability of SNCF.

On 21 September 2015, the Labour Court of Paris ruled on the cases at first instance. The Court held that the claims were only time barred 30 years after the claimants were aware of the damage suffered, i.e. at the time of the interruption of the employment contract. As regards international conventions, the arguments of the Court are quite elliptic although the Court did find that Article 14 ECHR was applicable as well as the principle of anti-discrimination provided by EU law. In addition, the employment contract provided for a provision of equal remuneration (covering accessory advantages) with French employees having similar employment.

The Court held that jobs covered by the specific 'PS25' status were comparable to those held by French employees but were only designated otherwise in order to meet the formal requirements to be able to employ foreign employees under different working and retirement conditions. SNCF failed to prove that the activities of the French employees holding comparable jobs related to the exercise of sovereignty justifying a distinct status reserved to French nationals.

Thus, the court concluded that the claimants' employment status constituted indirect discrimination on the ground of origin. The claims were admitted, except in a few specific cases, and the claimants were

43 Council of State, 'Application du principe de neutralité religieuse dans les services publics – Etude du Conseil d'Etat', 23 December 2013: <http://www.defenseurdesdroits.fr/fr/publications/etudes/application-du-principe-de-neutralite-religieuse-dans-les-services-publics-etude>. See also *European Anti-Discrimination Law Review*, issue 18, pp. 60-61.

awarded damages ranging from EUR 150 000 to EUR 250 000.⁴⁴ SNCF has appealed before the Paris Court of Appeal.

DE

Germany

LEGISLATIVE DEVELOPMENT

Rights of persons living in a same-sex registered partnership

On 2 September 2015, the German Parliament passed a law abolishing a number of legal provisions in various areas which provided unequal treatment to persons living in same-sex registered partnerships.⁴⁵ The law encompasses – among other things – an administrative procedure, registrars, promotion, education and examination law, the law of displaced persons, health law, asylum law, statistics, civil procedure law, civil law, criminal law, social law, family law and adoption law.

Internet source:

<http://dip21.bundestag.de/dip21/btd/18/059/1805901.pdf>

Last accessed 12 May 2016.

CASE LAW

Discrimination against civil servants on the ground of age

The claimant was a police officer who argued that retirement regulations requiring police officers to retire earlier than other civil servants constitute discrimination on the ground of age. The court had to determine, firstly, whether the retirement age limit for police officers can be lower than for other civil servants and, secondly, whether an increase in age limits for retirement can justifiably be based on demographic developments and their effect on pension systems. The respective law provided for an increase in the retirement age of police officers, remaining, however, lower than that of other civil servants. It was justified by the increase in the proportion of older persons in society and the need to secure sufficient means for pensions systems by a later retirement age.

The court held that the particular professional duties of a police officer, including physical fitness, justify a lower age limit in comparison to other civil servants.⁴⁶ An increase in the retirement age can be based, in the view of the court, on the development of the population and the needs it creates for the organisation of the civil service and its pension system, including the necessity of later retirement.

In addition, it argued that the time limits of the Equal Treatment Act do not preclude claims for damages seeking to establish state liability on the basis of EU law, because the latter addresses legislative action, not individual discriminatory action regulated by the Equal Treatment Act.

Internet source:

<http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=a6a4ec83fab99a1588d4b31e2278e86&nr=71988&pos=12&anz=19>

Last accessed 12 May 2016.

⁴⁴ Paris Labour court, decision RG No. F 05/12309 et seq., of 21 September 2015.

⁴⁵ Law revising the Law of Registered Partnerships (Gesetz zur Bereinigung des Rechts der Lebenspartner), 20 November 2015 (BGBl. I 2015, 2010).

⁴⁶ Federal Court (Bundesgerichtshof), Az.: III ZR 4/15, 23 July 2015.

Greece

EL

LEGISLATIVE DEVELOPMENT

Introduction of civil partnership for same-sex couples and amendments to the general anti-discrimination legislation⁴⁷

On 23 December 2015, the Greek Parliament adopted a human rights bill recognising same-sex civil partnerships.⁴⁸ Since 2008, civil partnerships have been possible for opposite-sex couples but not for same-sex couples. This difference in treatment deprived same-sex couples of a number of basic rights related to family and professional life and constituted a violation of the European Convention on Human Rights.⁴⁹

Sexual orientation

The new legal provisions recognise that persons who enter into civil partnerships acquire a similar legal status to that of married couples, including rights and obligations related to taxation, health insurance and pensions, residence permits and citizenship rights, the refusal to testify, the next of kin status for medical purposes, etc.

In addition, the new Law also introduces some provisions that improve equal treatment in general. For instance, Article 15 of the Law establishes a 'National Council against Racism and Intolerance' (the Council) as an advisory body for improving the consultation process and cooperation amongst stakeholders as well as for improving services in issues related to preventing and combating racism and intolerance. Article 17 states that the Council is responsible for the harmonisation of national law with international and European regulations and practice; and the development of initiatives throughout the whole public sector in order to achieve the most effective protection of persons and groups which are targeted because of their race, colour, national or ethnic origin, descent, social origin, religious or other beliefs, sexual orientation, gender identity or disability. Furthermore, a National Action Plan will be carried out with clear qualitative and quantitative indicators, which will progress through the following stages: a) the prioritisation of goals and costs, b) observation and update and c) evaluation, in order to ensure the coordinated combating of racism and intolerance by the State.

Finally, the new Law introduces an important amendment concerning the general anti-discrimination legislation. The existing anti-discrimination act Law 3305/2005 already prohibits discriminatory treatment during the provision of goods and services in exchange for payment. Through Article 29 of the new Law, cases of discrimination in the field of access to goods and services described in the new Law as 'contemptuous treatment' leading to the person's exclusion from the provision of goods and services based on grounds of race, colour, national or ethnic origin, descent, religious or other beliefs, sexual orientation, gender identity, or disability is included. Through criminal law, victims are now protected against discrimination when receiving volunteer or humanitarian assistance. This provision refers to exclusion from the provision of goods and services, which objectively leads to the demonstrated contempt of the victim.

Internet source:

<https://nomoi.info/%CE%A6%CE%95%CE%9A-%CE%91-181-2015-%CF%83%CE%B5%CE%BB-1.html>
Last accessed 12 May 2016.

⁴⁷ See also, in relation to the adoption of this law, the policy development reported below, on p. 94.

⁴⁸ Law 4356/2015 of 23 December 2015.

⁴⁹ EctHR, *Vallianatos and others v Greece*, judgment of 7 July 2013.

CASE LAW

Court of appeal confirms a conviction for the discriminatory denial of access to a service

On 16 October 2015 the three-member Misdemeanour Court of Thessaloniki sentenced a driver of the Organisation of Public Transport in Thessaloniki to eight months' imprisonment, suspended for three years, and a fine of EUR 1 000, for having denied two black passengers access to the bus, on the grounds of them allegedly being illegal immigrants. The Prosecutor initiated proceedings following a number of complaints by a group of lawyers and by witnesses, with the assistance of an antiracist NGO specialising in litigation. At first instance, the driver was convicted to 10 months' imprisonment and a fine of EUR 1000 for breaching the anti-discriminatory Law 3304/ 2005 transposing Directive 2000/43/EC.⁵⁰

Internet source:

<http://charta.gr/oasth-racism/>

Last accessed 12 May 2016.

Greek Council of State rules that a pregnant woman must be allowed to take the athletic tests for admission to the Fire Corps after pregnancy

By a decision of the Head of the Fire Corps, the request of a pregnant candidate to take the necessary athletic tests for admission to the Fire Corps after her pregnancy was rejected. The candidate lodged an action for the annulment of this decision, which was upheld by judgment 13/2015 of the Council of State (the Supreme Administrative Court; CS) on the basis of Articles 4(2) (gender equality) and 21(1) of the Constitution (family and maternity protection) and of Directives 76/207/EEC⁵¹ and 2002/76/EU.⁵²

The Head of the Fire Corps invoked the provisions of Presidential Decree (PD) 19/2006,⁵³ 'Regulation for Recruitment in the Fire Corps,' according to which athletic tests constitute the first stage of admission. The tests are a necessary precondition for participating in the following stages of the competition, which include written tests and an interview. The PD provided that if there is an impediment to the participation of a candidate, the admissions committee may at its discretion postpone the candidate's athletic tests, albeit to a date which is within the period prescribed for the tests. According to the PD, a candidate who states that she is pregnant may take the athletic tests only if she submits an attestation by her doctor that her participation is allowed and will not harm her health and/or the foetus. The claimant stated that she was pregnant and submitted an attestation by her obstetrician that she was in the second trimester of pregnancy and thus not allowed to take the athletic tests. She requested that she be allowed to take the athletic tests after her pregnancy. However, the Head of the Fire Corps did not allow her participation and rejected her request to take the athletic tests at a later date.

The claimant lodged an action for the annulment of the decision of the Head of the Fire Corps with the competent Athens Administrative Court of Appeal (ACA), which rejected this action. The ACA held, inter alia, that the impugned decision did not conflict with Article 21(1) of the Constitution that required the protection of the family, childhood and motherhood. It found that reasons of the highest public interest require that the assessment of candidates for the Fire Corps must be completed within a reasonable period of time so that the effective discharge of the Fire Corps' duties may be ensured. The ACA also

50 Decision 4232/2014, issued on 24 February 2014. See *European Anti-Discrimination Law Review*, issue 19, pp. 70-71.

51 Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 39, 14.2.1976, pp. 40-42.

52 Directive 2002/73/EC of the European Parliament and the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L OJ L 269, 5.10.2002, pp. 15-20.

53 OJ A 16/2006.

held that the impugned decision did not conflict with Directive 76/207, as the PD provision regarding the postponement of the athletic tests applies to male and female candidates without distinction.

The Council of State held that the provisions of the PD ought to be interpreted in the light of Articles 4(2) and 21(1) of the Constitution and Directive 76/207, which was replaced by Directive 2002/73. It consequently quashed the ACA judgment and annulled the impugned decision of the Head of the Fire Corps. It is noteworthy that the CS relied directly on the Directives, not on the statutes transposing them, which it did not mention.

Internet sources:

<http://www.hellenicparliament.gr/en/Vouli-ton-Ellinon/To-Politevma/Syntagma>

<http://www.et.gr>

Last accessed 24 June 2016.

Greek Council of State judgment 252/2015 finds that the modification of a town plan is compatible with the Greek Constitution

A Presidential Decree (PD) modified the town plan of a commune so as to allow the building of a communal nursery and kindergarten in a space which was previously for common use. An inhabitant of a nearby house lodged an action for the annulment of this PD with the Council of State (the Supreme Administrative Court; CS), alleging that it conflicted with the Constitution as it led to the downgrading of the environment. The CS dismissed the action holding that the environment was not downgraded, while the building of a nursery and kindergarten serves an important social need: family and maternity protection.

Gender

In support of his action for the annulment of the PD, the claimant invoked Article 24 of the Greek Constitution, which requires the protection of the natural and cultural environment by the State and imposes several particular obligations on the State for the preservation of the environment. The claimant also alleged that getting rid of the common use of the space would downgrade the natural and housing environment of his home. However, the CS considered that it was proven that 'the modification of the town plan and the building of a communal nursery and kindergarten aims to serve an important social need related to family and maternity protection, in view of the fact that there is no other nursery in the area, while the two existing kindergartens are housed in inappropriate buildings rented by the commune.' It was also proven that the space at stake was chosen on the basis of town planning criteria, as it 'is easily accessible from all areas of the commune, it is far from areas with heavy traffic and near the borders of the commune with the Mount Hymettus forest, and there is no other appropriate plot.' The CS consequently held that the impugned PD was compatible with the Constitution and dismissed the action.

Article 21(1) of the Constitution provides that the family, marriage, motherhood and childhood shall be under the protection of the State. The CS did not invoke Article 21(1). However, by holding that the impugned PD served the protection of the family and motherhood, it implicitly indicated that it served the aims of and materialized the obligations imposed on the State by this constitutional provision. It is obvious that the impugned PD also serves the purposes of the EU principle of reconciling family and professional obligations, Article 33 of the EU Charter of Fundamental Rights and the parental leave Directive 2010/18/EU.

Internet sources:

<http://www.hellenicparliament.gr/en/Vouli-ton-Ellinon/To-Politevma/Syntagma>

<http://www.et.gr>

Last accessed 24 June 2016.

POLICY DEVELOPMENT

Act 4356/2015 ‘on the life partnership agreement’ fails to adequately transpose Directive 2010/41/EU

Directive 2010/41/EU,⁵⁴ regarding self-employment, was transposed in 2012 by Act 4097/2012⁵⁵ (the transposing Act), albeit inadequately. In particular, the Act did not transpose Article 7 of the Directive, which requires social protection for the spouses and life partners of the self-employed. Therefore, this Act did not improve the situation of the life partners and spouses of the self-employed in matters of employment and social security. The situation of these persons had been inadequately regulated by Act 3719/2008,⁵⁶ which had introduced a different sex life partnership. The latter Act had created no rights in matters of employment and social security for the life partners that it covered. It must be noted that life partners are not dealt with at all by Greek social security legislation, while the social security coverage of spouses of the self-employed is limited under social security legislation.

Furthermore, Article 8 of Directive 2010/41/EU (maternity benefits) was only partly transposed. The transposing Act provided that self-employed women only (not the female spouses or life partners of self-employed men) may be granted a maternity allowance allowing a temporary interruption of their activity due to pregnancy or maternity. Moreover, Paragraph 4 of Article 8 (temporary replacements) has not been transposed at all regarding either female spouses or female life partners of the self-employed. For the above reasons, Greece was in breach of Directive 2010/41.

The adoption of Act 4356/2015⁵⁷ in December 2015 which, inter alia, introduced same-sex life partnerships (detailed under the legislative developments above), was an opportunity to fill the gaps of the transposing Act, and therefore to remedy the breaches of Directive 2010/41. However, this Act has only vaguely provided that existing provisions of labour and social security law ‘may’ be adapted as regards life partners by Presidential Decree, within six months of the date on which this Act comes into effect.’ As this Act came into effect upon its publication in the OJ (24 December 2015), the deadline for issuing the Decree is 24 June 2016. Such a decree has not yet been issued.

Directive 2010/41 has only been partly implemented in Greek law regarding the employment and social security rights of spouses and life partners of the self-employed. The rights of the former are limited, while no rights are provided for the latter. The implementation of the Directive was not improved by subsequent legislation.

Internet source:

<http://www.et.gr>

Last accessed 24 June 2016.

54 Directive 2010/41/EU of the European Parliament and of the Council on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC, OJ L 180, 15.7.2010, pp. 1-6.

55 OJ A 235/03.12.2012.

56 OJ A 241/26.11.2008

57 OJ A 181/24.12.2015.

Hungary

HU

CASE LAW

Equal Treatment Authority condemns the town of Miskolc for a failure to adequately plan and prepare the elimination of segregated Roma neighbourhoods⁵⁸

Miskolc is Hungary's third largest town with a significant Roma population, mainly living in low-comfort social housing in segregated neighbourhoods; one of them is known as the 'Numbered Streets'. In 2008, the municipality of Miskolc adopted its Integrated Town Development Strategy for 2008-2013 (hereafter: IVS). The IVS contained a desegregation plan that envisaged the elimination of the segregated neighbourhoods, including the Numbered Streets. It set forth that the elimination of such neighbourhoods shall be accompanied by the preparation of mobilisation plans for the residents, and preceded by their placement in a way that would prevent the development of new segregated areas, decrease the geographical concentration of low-status tenancies, and provide the tenants with at least semi-comfort placement. The IVS also stipulated that the existence of funds available for the above purposes is a precondition for the elimination of segregated areas. In September 2014, a new strategy replacing the IVS was adopted: the Integrated Settlement Development Strategy (hereafter: ITS). While its chapter on desegregation sets forth that in itself the physical elimination (demolition) of segregated areas does not solve the problem of people moving from one segregated area to another, it does not envisage any concrete conditions and steps, and with regard to the Numbered Streets it contains one single sentence: 'due to the real estate development connected to the stadium, this segregated area shall be eliminated.'

Racial or
ethnic origin

In July 2014, the NGO Legal Defence Bureau for National and Ethnic Minorities (NEKI) filed an *actio popularis* complaint with the Equal Treatment Authority claiming that the municipality of Miskolc was systematically terminating the social housing tenancies of persons living in the Numbered Streets without taking any measures to provide them with housing and thus exposing them to the threat of homelessness. In their petition, they identified a number of ways in which the tenancies are terminated, including the following: (i) replacing indeterminate tenancies with fixed-term tenancies whenever possible (e.g. when a tenant is moved to a new apartment); (ii) refusing to prolong fixed-term tenancies after their expiry (even in the case of tenants who always pay their rent and utility fees); (iii) terminating tenancies even when the tenants who are overdue with payments are willing and able to pay the arrears. At the same time, despite its obligations under the laws of Hungary and its own IVS, the municipality failed to (i) notify the tenants of the Numbered Streets beforehand in due course; (ii) involve the tenants in the decision-making process in any way; (iii) prepare any impact assessment of the situation; (iv) take any steps to place those tenants who were forced to leave the tenancies because of the expiry of their contract. According to NEKI's estimation, as a result of these practices and failures, 40-45 % of the approximately 900, mostly Roma, residents of the Numbered Streets have been exposed to the threat of homelessness, which amounts to discrimination on the basis of their financial situation, social status and ethnic origin.

The municipality put forth the following arguments to refute that discrimination had taken place: (i) Government Decree 1895/2013 (XII. 4.) on Measures related to the Reconstruction of the Diósgyőr Stadium [the stadium of the local football team] to be Implemented in the Framework of the National Stadium Development Programme prescribes that a building site shall be created in a certain area of the Numbered Streets, and the municipality is under an obligation to implement the tasks prescribed by the Government Decree; (ii) the elimination of the segregated neighbourhoods (including the remaining areas of the Numbered Streets) is justified by the desire to eliminate living conditions that violate the dignity of those who live there and their right to a healthy environment; (iii) after a tenancy has been terminated

⁵⁸ In relation to this case, see also below, p. 98.

– either because it expires or because the municipality must terminate it due to the tenant's failure to pay the rent and utilities – there is no longer any legal relationship between the municipality and the tenant, so there is no obligation that can be imposed on the municipality with regard to these persons; (iv) the treatment is not based on ethnicity, financial or social status, it is based solely on the location of the concerned persons' tenancies, so no discrimination could have taken place; (v) the provisions of the IVS cannot be applied in the present case, as it was replaced by the ITS, and therefore lost its effect.

The Equality Authority established that the IVS can and shall be applied to the present case, as it was in force when the procedure was launched, and also because it contains general principles that also stem from the municipality's obligation under Article 13 of Act CLXXXIX of 2011 on Hungary's Municipalities, which expressly states that providing for the rehabilitation of persons who become homeless on its territory and the prevention of homelessness are a municipality's statutory tasks. For the same reason, the argument that after the termination of the tenancy agreements the municipality does not have any obligations in relation to the former tenants was unfounded. The municipality cannot be exempted from its social duties by referring to its ownership and property rights.

The Authority went on to state that the municipality failed to take all those measures that according to the IVS should have preceded the elimination of a segregated neighbourhood (the preparation of a mobilisation plan, making an impact assessment, informing the tenants, etc.), and recalled that discrimination may be committed by means of an omission. Furthermore, the Authority qualified the municipality's omission as indirect discrimination, claiming that despite its apparent neutrality (being based on the location of the tenancies), it had a disproportionately negative effect on a group of persons on the basis of their ethnicity.

After arriving at this conclusion, the Authority looked into whether the arguments provided by the municipality reasonably justified the municipality's action (or the lack thereof). The Authority concluded that while it may justify the termination of the tenancies concerned, the reconstruction of the stadium may not reasonably justify that this is done in a manner that exposes people to homelessness or forces them to move to another segregated area. Similarly, the desire to eliminate conditions that violate human dignity and the right to health may not justify the elimination of the neighbourhood without any preparation, impact assessment, or the involvement of those tenants concerned, because this would potentially lead to the conditions that it claims it is to trying to rectify.

On this basis, in its decision of 15 July 2015 the Authority established that the municipality of Miskolc subjected the residents of the Numbered Streets to the threat of homelessness or having to move to other segregated areas, and by doing so, it discriminated against them on the basis of their social status, financial situation and Roma origin.

The Authority obliged the municipality to put an end to the discriminatory situation by developing an action plan (by 31 December 2015) on where within Miskolc, how and from what sources it can provide the tenants of the Numbered Streets with adequate housing. The Authority also called on the municipality to stop its ongoing discriminatory practice until the action plan is prepared. Furthermore, the Authority obliged the municipality to prepare (by 30 September 2015) another action plan on how it will provide those who have already become homeless or are concerned by the revealed practices with adequate housing. Finally, the Authority imposed a fine of HUF 500 000 (EUR 1 670) on the municipality.⁵⁹

Internet source:

<http://dev.neki.hu/ujabb-elmarasztalas-a-miskolci-szamoszott-utcak-ugyeben/>

Last accessed 17 May 2016.

59 After the cut-off date of this report, the decision of the Equality Authority was confirmed upon an appeal by the municipality; Metropolitan Administrative and Labour Court, decision No. 6.K.33.048/2015/17 of 25 January 2016.

Court decision finding the Municipal Council and Ministry responsible for school segregation, but the court did not order the implementation of the desegregation plan

In November 2010, the Supreme Court established that the Pécsi street school in Kaposvár was ethnically segregated, and that its maintainer, the Municipal Council of Kaposvár, had violated the requirement of equal treatment by failing to act against the spontaneously developed segregation by means of (for instance) redetermining the catchment areas of the local schools. Despite the court decision, the Municipal Council did not take any measures to put an end to the segregation. Consequently, the Chance for Children Foundation (CFCF) decided to start another lawsuit in late 2013. In the meantime, the function of maintaining the school was transferred to a centralised state organisation – the Klebelsberg Centre for Maintaining Educational Institutions (KLIK) – which operates under the Ministry of Human Resources. Therefore, the CFCF extended the lawsuit to these bodies as well, requesting the court not only to establish a violation, but also to order desegregation by closing the school.

Racial or ethnic origin

In its first instance decision delivered on 11 November 2015, the Kaposvár Regional Court established the violation, and also declared that the Ministry of Human Resources was responsible for a breach of equal treatment, because it failed to instruct the KLIK to put an end to the segregation.⁶⁰ At the same time, the court took the stance that it was not in a position to order the implementation of the complex desegregation plan devised by CFCF and based on the closing of the school. Nevertheless, in the same decision, when responding to CFCF's request to refer a preliminary question to the CJEU regarding the compatibility of sanctions available in Hungary with the requirements of Article 15 of the Racial Equality Directive, the court took the position that nothing in the Hungarian legal framework excludes the possibility that courts adjudicating segregation cases provide detailed orders as to how segregation shall be terminated. However, in the present case the court concluded that due to many factors (including political will) the desegregation process is too complex to be ordered with the clarity and unambiguity that is required from a judicial decision in order for it to be executable.

Internet source:

http://cfcf.hu/sites/default/files/MX-M264N_20151116_142154.pdf

Last accessed 17 May 2016.

Equal Treatment Authority establishes age discrimination by the national tax authority

The National Tax and Customs Administration published a job advertisement to recruit office administrators, indicating that the applicant had to be younger than 40 years of age. The Authority launched an *ex officio* investigation into the case.

Age

In its defence, the respondent claimed that the age requirement had been included in the advertisement due to an administrative error, and no applicant was refused on the basis of age. Out of the 87 persons applying, 18 were older than 40, and all the applicants meeting the requirements were interviewed. Of the four applicants who were finally employed, one is in fact 44 years of age.

On the basis that the advertisement was capable of discouraging and likely to have discouraged potential applicants older than 40 from applying, the Authority concluded in its decision of 16 October 2015 that there had been a violation of the requirement of equal treatment irrespective of the fact that one of the recruited applicants was actually older than 40.⁶¹ Article 21 of the ETA lists public job advertisements among the areas in which particular attention must be paid to the requirement of non-discrimination, which – in the Authority's view – implies that a discriminatory job advertisement in itself constitutes a violation, and that no further disadvantage is required (e.g. in the actual recruitment procedure) for

⁶⁰ Kaposvár Regional Court, decision No. 11.P.21.553/2013/70 of 11 November 2015.

⁶¹ Equality Authority, decision No. EBH/449/2015 of 16 October 2015.

discrimination to be established. The Authority ordered that its decision be published for 30 days and banned the respondent from future violations.

The decision is important in making it clear that the defence of an administrative error is not acceptable in the case of discriminatory job advertisements. It is also important that the Authority stated that the potential discouraging effect of such advertisements is in itself a disadvantage that can substantiate the establishing of a violation.

Internet source:

http://www.egyenlobanasmod.hu/app/webroot/files/img/articles/9ccc7998480e6d0382a5102a2af48f14/449_2015_z.pdf

Last accessed 17 May 2016.

POLICY DEVELOPMENT

Ombudsman's report on housing discrimination in Miskolc and neighbouring towns⁶²

In May 2014, the Municipal Council of Miskolc amended its Decree on Social Housing, introducing a limitation on receiving financial compensation for the termination of social housing for those who live in 'low-comfort' social housing (in practice, they are almost exclusively Roma).⁶³ Following the amendment, the authorities could only provide financial compensation if the tenants agreed to be relocated outside of the municipality. In response to the Miskolc decree, nine municipal councils in the city's proximity adopted decrees excluding those persons who purchase real estate in their respective territory with the support of any other municipal council from social benefits, social housing and public employment.

In March 2014, two NGOs filed a complaint with the Commissioner for Fundamental Rights (Hungary's Ombudsman) complaining about the recurring and concentrated inspections that the Miskolc municipal authorities (public health, child protection, social administration authorities, etc.) kept carrying out in the segregated, mainly Roma neighbourhoods, which, according to the complainants, amounted to racially-based harassment. After the May 2014 amendment of the social housing decree, the NGOs extended their complaint to the decree as well. In January 2015, the complainants – along with two further NGOs – submitted yet another complaint concerning the decrees of the towns neighbouring Miskolc. The Ombudsman therefore extended his investigation – carried out in cooperation with the Deputy Ombudsman responsible for national minorities living in Hungary – to these decrees as well.

In the meantime, on the basis of proceedings initiated by the County Government Office responsible for the supervision of the legality of municipal decrees, in May 2015 the Curia quashed the amended provision of the Miskolc decree.⁶⁴

The Ombudsman also dealt with the general housing situation in Miskolc for marginalised groups. In this respect, the investigation established the following. In 2008, 90 % of municipally-owned apartments were rented out as social housing; by 2014 this ratio had decreased to just 15 %. This situation was the result of a number of factors. In 2010, the relevant local decree was modified. The new legislation prohibited municipal housing from being rented for an indeterminate period of time, and limited the rental of municipal housing to a maximum of five years. As a result, many indeterminate rental contracts were modified so as to form determinate contracts, and after the rental periods expired, the contracts were not renewed. There were cases when the authorities refused to register the tenants' requests for a prolongation of the expiring rental agreements, and also instances when the municipality did not

⁶² In relation to this issue, see also above p. 95.

⁶³ Decree No. 25/2006 (VII.12). See also *European equality law review*, issue 2015/1, pp. 115-116.

⁶⁴ Curia decision No. Köf.5003/2015/4, published in the *Official Journal* on 13 May 2015; see also *European equality law review*, issue 2015/2, p. 100.

warn or notify the tenants falling behind with payments about the termination of their rental contracts, so they were only faced with the problem when the eviction process had already been started. It was also discovered that in a number of cases the local authorities refused tenants' requests to have their domicile registered as the official address of their relatives (including their children), in some instances on the basis of the pertaining decree's provision that makes such a decision possible if the registration 'would disproportionately increase the number of persons living in the apartment concerned.' As a result, in the absence of an official address in the territory of Miskolc, several children could not be enrolled in local schools, which rejected the admission of the children on the basis that their official domicile was not within their catchment area.

In relation to the decree of the Miskolc municipality, the Ombudsman fully agreed with the Curia's decision and stated that it amounted to direct discrimination on the basis of one's financial situation, and indirect discrimination on the ground of race.

In relation to the decrees of the neighbouring municipalities, the Ombudsman pointed out that the restrictions concerning social allowances, social housing and public employment contradict the relevant acts of Parliament (which, for instance, do not allow for the consideration of circumstances beyond one's financial situation when deciding on social allowances) and that there is no objectively justifiable reason for discriminating between those who wish to settle in the given municipality on the basis of whether they wish to buy property with the support of another municipal council or any other source. The Ombudsman concluded that such restrictions amount to direct discrimination based on one's financial situation and raised the possibility of indirect discrimination based on race. Furthermore, the restrictions violate the human dignity of the persons concerned, as they are capable of stigmatising and isolating the newcomers, who are already in a very disadvantaged position.

With regard to the social housing situation, the Ombudsman concluded that the Miskolc authorities' related practice violated the tenants' right to fair administrative proceedings. Due to the severe decrease in the numbers and proportions of social housing and the evictions, it can be established that the municipality failed to comply with its obligations concerning the promotion of social protection and housing, and created a situation that poses the threat of mass homelessness. The authorities' practice of refusing to register official domiciles was in contradiction with the applicable laws, and was therefore a violation of the requirement of legal certainty, and entailed the direct and severe risk of breaching the fundamental interests of children.

The Ombudsman formulated a number of recommendations, including: the withdrawal of the discriminatory municipal decrees; the termination of concentrated inspections; cooperation with NGOs and professional bodies in a number of areas (the prevention of evictions, the placement of families threatened by becoming homeless, etc.); bringing the provisions on the registration of domicile into line with the relevant higher-ranking legal norms.

The report establishes that:

- decrees disadvantageously differentiating tenants of low-comfort social housing amount to direct discrimination based on financial status, and indirect discrimination on the ground of race (as most of these tenants in the region are of Roma origin);
- unlawful practices leading to a significant decrease in the number and proportion of available social housing violate fundamental rights.

While this latter issue is not approached from the perspective of discrimination, but from the point of view of other fundamental rights and constitutional values (the right to a fair administrative procedure; legal certainty, etc.), it is still an important document that can serve as a point of reference for non-discrimination work in the marginalised and vulnerable Roma community in the region.

Internet source:

http://www.ajbh.hu/documents/10180/2395518/miskolci_jelentes_20150527.pdf/49568f34-d431-4112-a64f-9e3a5e2babfd

Last accessed 17 May 2016.

Government Office examines a potentially discriminatory municipal decree in Ózd

On 7 May 2015, the Municipal Council of Ózd adopted Municipal Decree 8/2015 on the renting out of housing and other real estate owned by the municipality.⁶⁵ At the council's session the town's Mayor affiliated with the far-right Jobbik party stated that the new decree would make the conditions for access to social housing and living in such housing stricter. He said that tenants in social housing owed the municipality close to HUF 64 million (EUR 206 450) in arrears, while 136 persons were on the waiting list. He presented the draft of the decree as a step to guarantee that everyone living in such housing shall pay the rent, to impose strict rules on how such housing may be used and to set clear consequences for non-payment. The representative of the local Roma self-government raised the complaint that although many Roma families live in such housing, the municipality had not involved the self-government in the drafting process. The Mayor replied that the issue was not seen as being related to ethnicity, but purely as a 'professional' matter. The decree was passed by nine votes in favour, with five abstentions.⁶⁶

Racial or
ethnic origin

On 21 May 2015, the NGO 'Legal Defence Bureau for National and Ethnic Minorities' (NEKI) filed a complaint with the County Government Office responsible for the supervision of the legality of municipal legislation, requiring the provisions of the decree that are deemed to be discriminatory to be withdrawn. The main points of the NGO's complaint were the following:⁶⁷

- Those whose tenancy had earlier been subject to immediate termination are excluded from access to social housing. Since most often the reason for immediate termination is the failure to pay the rent, this provision is very detrimental to the most underprivileged, unemployed families, given that they are excluded from access even if they subsequently pay the arrears and would otherwise meet the criteria for social housing.
- Social housing may not be provided if the ground surface per person does not exceed eight square meters. This provision (which is similar to the one that was found unconstitutional by the Ombudsman in relation to the Miskolc decree on housing) excludes large families from social housing. Since the Roma are overrepresented among large and indigent families these two provisions are highly likely to amount to indirect discrimination based on race or ethnicity.
- Another point criticised by NEKI was that persons who 'can be proven to have damaged municipal housing' are also excluded from social housing. NEKI pointed out that such a provision only meets constitutional requirements if it concerns persons about whom a final and binding court decision establishes that they have caused damage. NEKI added that even such persons should be exempted from the ban if they have served their sentence and/or paid for the damage they have caused.

It can also be added that while the management of social housing is carried out by the competent company of the municipality, the Mayor has an unrestricted right to appoint the tenant for such housing if the person concerned meets the general requirements and provides a certificate of a clean criminal record. Members of the municipal council also have this right with the limitation that they may exercise it no more than five times a year and only with regard to non-comfort housing. This opens the way to the arbitrary distribution of social housing.

⁶⁵ http://www.ozd.hu/content/cont_4d7752e1c7b088.85910224/lakasrendelet_2015_05_07_egys_szerk.pdf Last accessed 12 August 2015.

⁶⁶ <http://www.ozd.hu/news.php?id=3244> Last accessed 12 August 2015.

⁶⁷ <http://dev.neki.hu/torvenyesegi-felulvizsgalatot-kert-a-neki-az-ozdi-lakasrendelet-miatt/> Last accessed 12 August 2015.

According to information shared with the media by the Mayor and published on 14 July by a news portal,⁶⁸ the Government Office called on the Municipal Council to amend one and withdraw five provisions of the Decree. The Mayor did not specify which were the provisions concerned and the Government Office failed to respond to the national news agency's request for a specification of the problematic provisions. The Mayor informed the media that the Municipal Council would decide what to do about the Government Office's warning after discussing the matter from a 'professional' point of view. (With regard to the meaning of the term 'professional', see what is said above.)

According to another news portal, evictions have already started in the town (no specific information is provided in this respect by the article).⁶⁹

The Ózd decree fits within a line of municipal decrees attempting to push Roma out of towns through restricting access to social housing.⁷⁰ It still needs to be seen what the basis of the Government Office's warning is, and whether issues of discrimination are considered in the proceedings. If the municipality does not comply with the warning, this case will also end up before the Curia.

Iceland

IS

CASE LAW

Ground-breaking case concerning the right to free interpretation for deaf people

Article 76, para. 1 of the Icelandic Constitution sets out that the law shall guarantee for everyone the necessary assistance in case of sickness, invalidity, infirmity by reason of old age, unemployment and similar circumstances. Deaf/blind people rely on the services of specialised tactile sign interpreters to communicate and are entitled to certain minimum assistance regardless of their means. The Communication Centre for the Deaf and Hard of Hearing – a public body under the auspices of the Ministry of Education – is charged with providing sign language interpreting services for deaf people. Interpreting services relating to all public services are to be provided where needed free of charge. However, in past years the annual allocation of funds from the State budget to the Centre has not been sufficient to cover this need. As national law does not clearly define what constitutes 'minimum assistance', each year the Centre accepts all applications for interpretation services, free of charge, until the funds run out, leaving those in need later in the year to pay for the services.

Disability

In the case at hand, the claimant was deaf and blind, and claimed that the Communication Centre for the Deaf and the Hard of Hearing had unlawfully denied free language interpretation from 7 October 2014 onwards.

The District Court of Reykjavik found that the users' constitutionally protected minimum services could not be met by the limited funds allocated to the Centre in 2014. The approach of the Centre entails that the distinction between constitutionally protected minimum social assistance, and other services which applicants pay for is blurred in the case of free sign-language interpretation services. Furthermore, this procedure discriminates between applicants on the basis of what time of year they need the services, in violation of the equality provisions of the Constitution and constitutional and administrative law. The court found, taking into account the failure of the State to regulate the minimum rights of people with disabilities to adequate services of sign-language interpreters that it should bear the cost of the services

68 <http://vs.hu/kozelet/osszes/az-ozdi-lakasrendelet-tobb-pontjat-kifogasolta-a-kormanyhivatal-0714#!s0> Last accessed 12 August 2015.

69 http://index.hu/belfold/2015/05/21/neki_torvenytelen_az_ozdi_lakasrendelet/ Last accessed 12 August 2015.

70 See, for instance, *European equality law review*, issue 2015/2, p. 100.

provided to the claimant after October 2014. By refusing the claimant free interpretation services, her right to minimum assistance in accordance with Article 76, para. 1 of the Constitution was violated. The Court awarded the claimant ISK 550 000 (approx. EUR 3 750) in non-pecuniary damages as the State had failed to fulfil its obligation to establish a system to guarantee her minimum assistance, resulting in a diminished quality of life and social exclusion.⁷¹

This is an important case establishing that the funding and organisation of sign-language interpreting services for deaf people is inadequate and discriminatory, in breach of the right to minimum assistance enshrined in the Constitution and the equality provisions of administrative law. The State will have to increase its funding for these services and make legislative changes to define what constitutes minimum rights and adequate services when it comes to the right to sign-language interpretation.

Internet source:

<https://www.domstolar.is/domar/domur/?id=f20c3c58-0227-4e8b-8b8b-c1e5f50a2a86>

Last accessed 17 May 2016.

IE

Ireland

LEGISLATIVE DEVELOPMENT

Workplace Relations Act 2015

The Workplace Relations Act 2015 was signed into law by the President of Ireland on 20 May 2015. The Act commenced on 1 October 2015 in respect of new claims. The Act makes provision for the dissolution of the Labour Relations Commission, the umbrella body of the Equality Tribunal. All claims and disputes shall be referred to the Director General of the Workplace Relations Commission, who then refers the claim or dispute to an adjudication officer who shall hear claims at first instance. Adjudication officers do not have to be lawyers. A claim under the Employment Equality Act 1998, the Equal Status Act 2000 or the Pensions Act 1990 shall be heard by an adjudication officer in a like manner as such a claim was heard by an equality officer of the Equality Tribunal. Such decisions may be appealed to the Labour Court and on a point of law to the High Court. There is also a provision for mediation. The new Act also removes the right of direct access to the Circuit Court for a gender discrimination claim.

Gender

If an employee is dismissed on a discriminatory ground (e.g. pregnancy or matters connected therewith or not permitted to return to work following maternity, adoptive, parental or carer's leave), he or she may elect to bring a claim under the Employment Equality Act 1998 or under the Unfair Dismissals Act 1977. Heretofore, if an employee brought a claim under the Unfair Dismissals Act 1977, the employee could elect to bring a claim to a rights commissioner (a private hearing) (unless the employer objected) or directly to the Employment Appeals Tribunal (a full public hearing with evidence heard on oath). The decision of a rights commissioner may be appealed to the Employment Appeals Tribunal and the decision of the Employment Appeals Tribunal may be appealed to the Circuit Court and on further appeal to the High Court.

For the purposes of equality claims generally, there will probably be no change. The real change will be where a claim is brought under the Unfair Dismissals Act 1977 that neither a lawyer may hear their claim nor will a judge appointed under the Constitution of Ireland hear their claim. In addition, at first instance the claim will be heard in private. It is arguable that this new statutory procedure is not in

71 Judgment of the District Court of Reykjavik, Case No. E-327/2015, *Snædis Rán Hjartardóttir v. the Communication Centre for the Deaf and Hard of Hearing and the Icelandic State and, in reserve, the City of Reykjavik*, 30 June 2015.

accordance with the Constitution of Ireland, as under Article 34.1 justice must be administered in public. The time limit for all claims is six months from the date of the contravention of the statute with an extension of time of a further six months if a reasonable case can be shown and all appeals from an adjudication officer to the Labour Court shall be made within 42 days of the date of the communication of the decision; this time limit can be extended if there are 'exceptional circumstances'.

Hearings under the new statutory framework have only recently commenced, so it is too early to give a full analysis of the Act in practice.

Internet source:

<https://www.workplacerelations.ie/en/>

Last accessed 24 June 2016.

CASE LAW

High Court judgment on employers' obligation to provide reasonable accommodation

The claimant was employed as a special needs assistant in a school for children with special needs. Following an accident, she was paralysed from the waist down and became a wheelchair user. The school did not discuss any reasonable accommodation options with the claimant, including employing her on a part-time basis, or allowing her to continue with her part-time secretarial role, but dismissed her.

The claimant argued that the school had failed in its duty under s. 16 of the Employment Equality Acts to make reasonable accommodation for her disability. Although the school's failure in this regard had resulted in her dismissal, the claimant had not made a claim of discriminatory dismissal. The Equality Tribunal decided against the claimant, who appealed to the Labour Court.

Disability

On 11 December 2015, the Labour Court decided that reasonable accommodation must remain within the boundaries of what is reasonable and proportionate, including having regard to the financial implications involved. If redesigning the position of a person with a disability so as to include those duties that he/she can perform constitutes a reasonable and proportionate means by which that person can be facilitated in exercising their right to work, there is no reason to exclude in principle the extension of the duty of reasonable accommodation to cover such measures. Section 16(1)(b) of the Act provides that an employer is not obliged to employ or maintain a person in employment in a position the duties of which they cannot perform. However, if a job is modified so as to reflect the abilities of the person with a disability, they are then able to fully discharge the duties to that position as modified. If there is a difference between the provisions of s. 16 of the Act and the provisions of Directive 2000/78/EC (the Framework Directive), the provisions of the Directive must take precedence. The duty to provide reasonable accommodation includes an obligation to make an informed and considered decision on what is or is not possible, reasonable and proportionate. A failure to adequately consider all available options on how a person with a disability can be accommodated can amount to a failure to discharge the duty to provide reasonable accommodation. If all available options are not adequately considered then the employer cannot form a bona fide belief that any such options are impossible, unreasonable or disproportionate. The school's refusal to allow the claimant to return to work was based on the mistaken belief that its duty was confined to providing her with such accommodation as might enable her to undertake the full range of tasks expected from an SNA. The school construed its duty too narrowly and took a mistaken view of what the law required. Reasonable accommodation duties must be construed broadly. The ultimate test is that of reasonableness and proportionality, including practicability, cost, possible disruption to the service that the employer provides, and consequences for the person with a disability of not providing the accommodation required. Where an employer reaches an honest and informed decision having considered all of the available options, the court must show a high degree of deference to that decision and should not seek to substitute its opinion on what is possible or reasonable

in the particular circumstances of that employment. If, however, the employer fails to properly understand the scope of its duty or fails to adequately consider all of the options that may be available, it will have failed in its statutory duty toward the person with a disability. The school appealed against the decision, arguing that under s. 16 of the Act the obligation to provide reasonable accommodation only applied where it would leave the disabled employee in a position to perform the totality of their original job.

The High Court referred to the decision of the CJEU in *HK Danmark, acting on behalf of Ring*, which was that reasonable accommodation extended to altering the working hours of a disabled worker provided that it did not impose a disproportionate burden on the employer.⁷² This included relieving the worker from the obligation to perform certain tasks and considering whether a redistribution of tasks would impose a disproportionate burden.

The court found that it was reasonable that the claimant should have been consulted or afforded some opportunity to make submissions on how she could be accommodated before a decision was taken to dismiss her. Finally, the court found that the issue of a disproportionate burden did not arise as the school had not engaged in any meaningful way with the concept of reasonable accommodation because of the wrong interpretation that it placed on Section 16 of the Act. It dismissed the appeal.⁷³

Internet source:

<http://www.courts.ie/Judgments.nsf/0/86867F31D053511280257F30005C002F>

Last accessed 24 May 2016.

Signing of the Istanbul Convention

Ireland signed the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence ('the Istanbul Convention') on 5 November 2015. The Minister for Justice and Equality has said that this is a step towards full ratification of the Istanbul Convention. The Government has set out the outstanding actions to be taken. These actions form part of the actions in the Second National Strategy on Domestic, Sexual and Gender-based Violence 2015-2020 which was launched in January 2016. The actions to be taken include:

- Education and training for the police force, court services, probation service staff and health and children agency staff, and law students;
- The general scheme of the Domestic Violence Bill published in July 2015;
- A review of the Criminal Injuries Compensation Scheme for victims of domestic violence;
- The enactment of the Criminal Law (Sexual Offences) Bill 2015;
- The development of a Risk Assessment Matrix for all victims of domestic violence and sexual crimes;
- A National Helpline Service to respond to issues of domestic and sexual violence;
- Amendment of the Criminal Law (Mutual Assistance) Act 2008 to include a reference to the Istanbul Convention;
- The Irish Human Rights and Equality Commission providing information to victims of violence on access to complaint mechanisms such as the European Court of Human Rights;
- Extension of access to barring orders;
- Legislation for extra-territoriality where an offence is committed by an Irish national or a person who is habitually resident in Ireland over offences in the Non-Fatal Offences Against the Person Act 1997, sexual offences and the new offence of forced marriage;
- Annual report on the monitoring of the application of the Convention;
- Examination of the potential for the removal of the common law defence of reasonable chastisement which may be availed of in proceedings under the Non-Fatal Offences Against the Person Act 1997 and under section 246 of the Children's Act 2001.

⁷² CJEU, joined cases C-335/11 and C-337/11, *HK Danmark, acting on behalf of Ring v Dansk Almennyttigt Boligselskab; HK Danmark, acting on behalf of Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S*.

⁷³ High Court, *Nano Nagle School v Marie Daly* [2015] IEHC 785 (11 December 2015).

Internet sources:

<http://www.justice.ie/en/JELR/Pages/PR15000568>

<http://www.justice.ie/en/JELR/Pages/PR16000026>

Last accessed 24 June 2016.

Italy

IT

LEGISLATIVE DEVELOPMENT

The protection of motherhood and fatherhood

The Budget Act for 2016 (Act No. 208 of 28 December 2015) allocated the funds needed to sustain some experimental measures enforceable from 2012 to 2015 for a further year.

In 2016, under Article 1 paragraph 205 of the Budget Act, fathers will still be entitled to take up to two days of leave, as an alternative to the mother, within the first five months after the child's birth. This is in addition to compulsory leave, which has been extended from one to two days. The latter can also be used at the same time as the mother's compulsory leave and is added to the paternity leave the father is entitled to in case of the mother's death or serious illness. These forms of leave are also granted in the case of national and international adoption or fostering.

Gender

Under Article 1 paragraph 285, the introduction of paid vouchers for babysitting services has also been extended to 2016: these will be made available to mothers from the end of compulsory maternity leave for the following eleven months as an alternative to parental leave. The Budget Act provided for the extension of this temporary measure to professionals and autonomous workers. A Decree is to be issued to fix the criteria to accede and to use this benefit for the latter categories.

The Budget Act further clarified that the compulsory maternity leave is to be considered with the aim of productivity bonus, that is the suspension of the working relationship in this period cannot jeopardise the mother's income as regards wage incentives (Article 1 paragraph 183). The temporary measures mentioned above were scarcely used in the first two years of implementation. Their extension to 2016, and to autonomous workers as regards babysitting expenses, is likely to enable the government to evaluate their efficiency.

Internet source:

<http://www.gazzettaufficiale.it/eli/id/2015/12/30/15G00222/sg>

Last accessed 24 June 2016.

CASE LAW

Discrimination against Roma in a legal publication

A bar exam preparatory handbook, published by a very popular legal publisher, consisted of several opinions of criminal law as examples for the bar exam, where lawyers have to write two opinions, one of civil law and one of criminal law. One of these opinions was about the crime of buying goods of doubtful origin. As an example of facts that the buyer should take into account in order to suspect the 'doubtful origin' was the circumstance that an object of high value is sold by 'a beggar, a gypsy or a well-known convicted felon.' A person belonging to the Roma community felt injured and, together with two NGOs, initiated a civil action against discrimination.

Racial or ethnic origin

Firstly, the Tribunal found that all the three claimants had legal standing. The individual claimant because she belonged to the Roma community and therefore felt personally injured reading the challenged text; the two NGOs because they have the right to legal standing according to Article 5 of Legislative decree 215/2003, in case of collective discrimination. Secondly, the Tribunal found the text to be discriminatory on the ground of ethnic origin. In the example Gypsies were put next to beggars and convicted felons, two groups identified by their activities while the group of Gypsies is identified by its ethnic origin. According to the Court the text constitutes direct anti-gypsy discrimination. The Tribunal highlighted that the intent of the author was not relevant according to Article 2 of Legislative decree 215/2003 providing the definition of direct discrimination. Finally, the Tribunal ordered the publisher to withdraw from the market all the copies of the book; to change it in case of future publications by deleting the word 'gypsy' and to pay EUR 1 000 as non-pecuniary damages to the individual victim as a member of the discriminated ethnic group. The Tribunal condemned the publisher to the redress of the damages without any specific reasoning, and the amount of EUR 1 000 was established without any particular justification or evidence, simply accepting the request of the claimant. The redress in this case seems to be a sort of reparation for the injury suffered but taken for granted, without the need to show the particular effects that the injury has provoked.

Internet source:

<http://www.asgi.it/wp-content/uploads/2015/04/Tribunale-di-Roma-I-sez.-Civile-1622015-est.-Pratesi-XXX-ASGI-Associazione-21-luglio-avv.-Fachile-C.-Gruppo-Editoriale-Simone-%E2%80%A6.pdf>

Last accessed 17 May 2016.

POLICY DEVELOPMENT

Independence and resources of the national equality body UNAR

On 30 September 2015, the (then) Director of the Italian equality body UNAR (Marco De Giorgi) sent an open letter to a Member of Parliament, Giorgia Meloni, following her public statements calling for the borders to be closed to immigrants from Muslim countries. According to her comments, people from those countries are more violent and linked to terrorist acts than others.

The letter contained an invitation to the MP to consider in future speeches the opportunity to provide different messages to the people, not based on stereotypes. The Member reacted very strongly to the letter, invoking freedom of speech and the immunity of all Members of Parliament. The Director of UNAR subsequently received a request for clarifications from the Secretary General of the Prime Minister, which initiated an internal disciplinary procedure.

Meanwhile, a vacancy was published for the post of Director of UNAR, making it impossible for the (then) Director to apply due to the ongoing disciplinary procedure.⁷⁴ Moreover, UNAR had contracts with 15 external experts providing specific anti-discrimination expertise to inform the equality body's work. These contracts were however not renewed, and the majority of the remaining staff are devoted to administrative tasks.

Internet source:

<http://www.fratelli-italia.it/2015/09/02/lettera-di-giorgia-meloni-a-renzi-dopo-nota-formale-ricevuta-dall-unar/>

Last accessed 24 June 2016.

⁷⁴ After the cut-off date of this publication, a new Director was appointed, taking office on 11 January 2016.

Latvia

LV

LEGISLATIVE DEVELOPMENT

Amendments to the concept of discrimination in the field of social security

The Law on Statutory Social Insurance is the umbrella law for the entire social security system in Latvia, covering education, vocational training, statutory social insurance, state and municipal social allowances and services and the statutory healthcare system.

On 29 September 2015, Parliament adopted amendments to the Law on Social Security. Among several amendments, Article 2¹ providing for the obligation of non-discrimination was amended by a provision (paragraph 5¹) expressly stipulating that discrimination on the grounds of sex occurs in cases of less favourable treatment of a woman during pregnancy or one year after pregnancy or during the entire breastfeeding period.

Gender

The amendments ensure a more precise implementation of the obligations (concepts) of Directive 79/7/EEC and Directive 2004/113/EC (as long as they might be applicable to the services provided by the state). However, the amendments are imprecise and do not ensure a full and complete implementation of the EU gender equality law.

Firstly, the new provision is in itself defective since, according to a grammatical reading, it prohibits less favourable treatment during the pregnancy and maternity period while the concept under EU law is wider. Namely, EU law prohibits not only less favourable treatment during pregnancy and maternity but also less favourable treatment by reason of the pregnancy and maternity. Secondly, the amendment does not correct all deficiencies with regard to the correct implementation of EU gender equality law. The wording of Article 5(1) of the Law on Social Security prohibits discrimination when receiving social services; however, the concept of social services is not defined. Consequently, it is unclear whether the prohibition of discrimination applies to the entire social security system or only to one type of social protection measure, namely, social services.

Internet sources:

<http://likumi.lv/doc.php?id=36850>

[http://likumi.lv/ta/id/277778-grozijumi-likuma-par-socialo-drosibu-](http://likumi.lv/ta/id/277778-grozijumi-likuma-par-socialo-drosibu)

Last accessed 24 June 2016.

Liechtenstein

LI

POLICY DEVELOPMENT

Setting up of a national centre for human rights⁷⁵

Since 1996, the Office for Equal Opportunities has been the main body dealing with issues related to discrimination. This Office deals with disability, gender, migration and integration (including race and ethnicity), sexual orientation and social disadvantage. In addition, the Commission for Equal Opportunities

All grounds

⁷⁵ After the cut-off date of this publication, on 3 May 2016, the Government approved the recommendation report and handed it as a recommendation to Parliament for final approval. It is expected that the proposal will be accepted by Parliament in the autumn of 2016.

was set up and appointed by the government as a consultative body in order to address issues of equality in all spheres of life. The Commission was established to coordinate activities with respect to equal opportunities and to implement an interdepartmental anti-discrimination policy. In 2013, however, due to a governmental reorganisation, the members of the Equal Opportunity Commission stepped down from their function as commissioners.

After numerous clarifications and discussions, the Liechtenstein government has decided to establish an independent national association for human rights and to reorganise the duties of governmental Offices by law. Therefore, the government proposes to set up a non-profit organisation which will serve as an institution acting independently and on its own initiative. Its main missions would be to promote human rights and to advise and provide recommendations to the relevant authorities.

The governmental report for consultation provides for the transfer of the governmental tasks of the Office for Equal Opportunities to the Office for Social Services whereas the independent tasks of the Office for Equal Opportunities will be transferred to the National Association for Human Rights. The Office for Equal Opportunities, the Commission for Equal Opportunities and the Gender Equality Commission would thus all be dissolved.

Therefore, the government created a recommendation report for approval by Parliament, which is open for statements by the involved governmental Offices, non-governmental organisations and communities of Liechtenstein until 31 of January 2016. After January 2016 the government will discuss the outcome and submit a resolution for a recommendation to Parliament.

Internet source:

<http://www.llv.li/#/12395/stabsstelle-chancengleichheit>

Last accessed 17 May 2016.

MT

Malta

LEGISLATIVE DEVELOPMENT

Introduction of sanctions in case of non-compliance with disability quota in employment

On 15 July 2015, an amendment was adopted to Article 16 of the Persons with Disability (Employment) Act ('the Principal Act'), which provides details on the regulation of the quota rule contained in Article 15.⁷⁶ Article 16 regulates the calculation of the number of persons with disabilities to be employed by each employer with at least 20 employees. The amendment adds two new provisions: sub-Articles 5A and 5B to Article 16 of the Principal Act.

The new sub-Article 5A provides sanctions against anyone who does not respect the quota referred to in the law. Any such employer shall be required by the Maltese Employment and Training Corporation to make an annual contribution of EUR 2 400 for every person with a disability that should be in his/her employment, up to a maximum of EUR 10 000.

Sub-Article 5B specifies how the payment shall be completed, by providing for a gradual implementation of the sanctions until 2017. It states that a person found to be in breach must pay one third of the contribution for the year 2015, two thirds of the contribution to be paid in 2016 and by 2017, the payment shall be that of the full contribution.

⁷⁶ Act No. XXII of 2015: Persons with Disability (Employment) (Amendment) Act, adopted on 15 July 2015.

Internet source:

<http://www.justiceservices.gov.me/DownloadDocument.aspx?app=lp&itemid=26998&l=1>

Last accessed 17 May 2016.

Montenegro

ME

LEGISLATIVE DEVELOPMENT

Adoption of new law on the Prohibition Against Discrimination of Persons with Disabilities

On 26 June 2015, the Parliament of Montenegro adopted a new Law on the Prohibition against Discrimination of Persons with Disabilities (LPADPD), which entered into force on 14 July 2015.⁷⁷ One of the main aims of the law which repeals and replaces the previous LPADPD is to harmonise national legislation with the international law on human rights, especially with the UN Convention on the Rights of Persons with Disabilities and the Optional Protocol to the Convention.⁷⁸ The draft law was developed by the Ministry for Human and Minority Rights after consultations with non-governmental organisations.

Disability

The key provisions of the Law are related to definitions and the terminology on the discrimination of persons with disabilities, as well as providing for the stronger accountability of the perpetrators of discriminatory acts against persons with disabilities before judicial authorities. In Article 4 of the LPADPD, the definitions of direct and indirect discrimination on the basis of disability are harmonised with the definition prescribed by the Law on the Prohibition of Discrimination (Official Gazette of Montenegro, No. 18/14). The new Law also provides new forms of discrimination on the ground of disability, such as: calling, supporting, abetting somebody to discriminate (incitement), giving instructions, and announcing the possibility that a disabled person or group of persons with disabilities shall be discriminated. Finally, the Law provides that the consent of a person with disabilities to be discriminated against does not relieve the person who discriminates of liability.

The previous LPADPD did not provide any sanctions for acts of discrimination, which has been remedied through Article 28 of the new Law which stipulates the applicable sanctions in cases of discrimination. These legal solutions prescribe new forms of discrimination such as discrimination against a group of persons with disabilities who are in the same situation, discrimination against persons with disabilities who are in different situations as well as belittling and insulting persons with disabilities.

Internet source:

http://www.skupstina.me/~skupcg/skupstina/cms/site_data/DOC25/ZAKONI%20I%20IZVJESTAJI/844/844_0.PDF

Last accessed 17 May 2016.

⁷⁷ Law on the Prohibition against Discrimination of Persons with Disabilities, Official Gazette of Montenegro, No. 35/15.

⁷⁸ Montenegro signed the UN CRPD and the Optional Protocol to the Convention in December 2006 and ratified them in November 2009.

CASE LAW

Municipal policy on trailer (caravan) parks found to be discriminatory

The national equality body, the Netherlands Institute for Human Rights (NIHR), has confirmed its previous case law that a policy implemented by a local government that would eventually put an end to ‘trailer parks’ amounts to discrimination on the ground of race (ethnic identity).⁷⁹ In the Netherlands, many Roma and Traveller people live in caravans or trailers, situated on officially designated trailer parks.

Racial or
ethnic origin

In the city of Vlaardingen, nine places for caravans or trailers are available at a designated trailer park. The municipal government, with reference to (i) integrating the inhabitants of these parks into the wider society and (ii) the financial costs associated with these parks, dismantles every stand that becomes unoccupied. A resident of the trailer park brought a case before the NIHR against the municipal government, complaining about this policy. The woman, who lived with her parents in one of the trailers, wanted to leave the parental home and move into a trailer of her own with her partner. She complained that the policy renders it effectively impossible for (the children of) current residents to move to another trailer and therefore threatens their way of living (invoking the ground race / ethnic identity).

The NIHR, referring to its previous case law, found that the policy affects the core of the caravan culture. The equality body considers that the (*prima facie* neutral) policy only affects one particular group, i.e. Roma people and travellers, and therefore concludes that the policy is directly discriminatory on the ground of race. The two possible exceptions to the prohibition of direct racial or ethnic discrimination under national law, concerning cases where a person’s racial appearance is a determining factor, or cases where a person’s racial appearance is, by reason of the nature of the particular occupational activity concerned, a genuine and determining occupational requirement, do not apply. The municipal policy thus constitutes a forbidden distinction on the ground of race.

Internet source:

<http://mensenrechten.nl/publicaties/oordelen/2015-61>

Last accessed 17 May 2016.

Supreme Court requires a strict application of the proportionality test in the case of a reduction of a survivor’s pension because of an age difference

Gender

On 18 December 2015, the Dutch Supreme Court rendered a decision on the question as to what extent pension funds are allowed to reduce the survivor’s pension of a woman who has been married to a man who was more than ten years older than herself. Many pension funds apply a reduction of two or three percent per year in that situation on the ground that, because of the age difference between the widow(er) and her or his deceased partner, the survivor’s pension is higher than the average pension, which means that the participants in the pension fund will have to pay a higher premium. The application of such a reduction leads to indirect discrimination against women, as significantly more women than men are more than ten years younger than their spouse/registered partner. The question that was brought before the Supreme Court was whether there is an objective justification for the indirect discrimination and, more specifically, how the proportionality test – which is part of the objective justification test – must be carried out.

⁷⁹ Decision No. 2015-61, rendered on 28 May 2015.

The Supreme Court ruled in the first place that the fact that the pension reduction is the result of negotiations between the social partners does not mean that the courts have to take a reticent stance in this respect. The judge has to give an autonomous opinion on the matter and is not restricted by the freedom of (collective) bargaining of employers ('organisations') and trade unions.

Secondly, the Supreme Court stated that the proportionality test must be strict and must focus on the details of the case at hand. The pension fund had stated that the abolition of the regulation on a reduction would lead to a once-only increase in costs of approximately EUR 10 million and to a yearly increase of approximately EUR 1 million. The Supreme Court ruled that these general considerations were not precise enough. The pension fund should have presented specific calculations of the consequences of not applying the reduction, both for the fund itself and for the premiums to be paid by the participants in the fund. Furthermore, these calculations should give an insight into the relation between the damage as a result of not applying the reduction and the entire size of the fund.

The judgment makes it clear that the proportionality test must be applied strictly and that the freedom of negotiations of the social partners cannot impede the right to equal treatment of men and women. The lower courts had taken a reticent stance in both respects, giving the pension funds room to present general justifications and to refer to the collective bargaining process as a justification. The Supreme Court has now made it clear that this line of reasoning is not valid.

Internet source:

<http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2015:3628>

Last accessed 24 June 2016.

POLICY DEVELOPMENTS

CERD recommends to eliminate those features of Black Peter which reflect negative stereotypes

In 2014, a fierce debate took place in the Netherlands on the allegedly racist character of 'Zwarte Piet' (Black Peter), one of the central figures in the Dutch Saint Nicholas festivities. Black Peter's black face, red lips and curly hair led opponents to argue that he forms an offensive caricature of black people and a throwback to slavery. On 12 November 2014, the Council of State (the highest administrative court of the Netherlands) ruled that mayors, when deciding on whether or not to grant a permit for public Saint Nicholas festivities, are not empowered to take into account whether Black Peter would stereotype black people; instead, mayors are limited to evaluating the effects of the festivities on public order and security.⁸⁰ That same month, the Netherlands Institute for Human Rights found in a non-binding opinion that the festivities do indeed contain discriminatory features, and that (inter alia) schools have a duty of care to ensure that discriminatory stereotypes are removed from the Black Peter figure.⁸¹

Racial or
ethnic origin

Since then, the debate has continued, and was again fuelled when the UN Committee for the Elimination of Racial Discrimination (CERD) published its Concluding Observations on the Netherlands on 28 August 2015, calling upon the State party to eliminate 'those features of Black Pete which reflect negative stereotypes,' recommending to 'find a reasonable balance, such as a different portrayal of Black Pete.' The Committee asserted that it understood that the tradition of Saint Nicholas is enjoyed by many in Dutch society, but simultaneously stressed that 'even a deeply-rooted cultural tradition does not justify discriminatory practices and stereotypes.' In a reaction to the CERD report, the Prime Minister stated that it is not up to the Dutch government to decide on the content of any celebration or cultural manifestation.

80 Council of State, decision No. 201406757/1/A3, of 12 November 2014. See also *European equality law review*, issue 2015/1, p. 133.

81 NIHR Opinion No. 2014-131, of 4 November 2014.

Internet source:

http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/NLD/CERD_C_NLD_CO_19-21_21519_E.pdf
Last accessed 17 May 2016.

Rise in registered racist and anti-Semite incidents in the Netherlands

In December 2015, the Verwey-Jonker Institute, a social science research institute, published its fourth Report on anti-Semitism, Racism and Extreme Right Violence in the Netherlands. The report found that the number of racist incidents has increased sharply, from 2 189 in 2013 to 2 764 in 2014 (an increase of 26 %). Racism against Muslims amounted to 142 of these incidents, as compared to 35 incidents in 2013. The real prevalence of this kind of discrimination is however difficult to estimate, especially because the police only started to register such incidents separately in 2013. Anti-Semitism was also reported more often; 76 times in 2014, as compared to 61 incidents in 2013. The increase in racist and anti-Semite incidents is commonly linked to Israel's military actions against Hamas in the summer of 2014 and the discussions in the Netherlands about Black Peter and Islam. The report found that the registration of racist incidents by police officers has been improved.

Internet source:

http://www.annefrank.org/ImageVaultFiles/id_17776/cf_21/Racisme_2014_VJI.PDF
Last accessed 24 May 2016.

NO

Norway

LEGISLATIVE DEVELOPMENT

New legislative proposal to regroup the five existing anti-discrimination acts into one

A proposal for a comprehensive anti-discriminatory legal framework contained in one single act was presented and sent for public hearing in October 2015. The new proposal follows the main lines of a similar proposal made in July 2009 by a Commission set up by the government,⁸² and also draws on the subsequent input from consultative bodies including civil society to the previous proposal. As there was a revision and re-enactment of all discrimination bills in 2013 (in force as of 1 January 2014), the current legislative proposal contains few new elements, as it is in reality an alignment of five existing bills into one legal instrument.

One of the few proposed changes is that multiple discrimination/intersectionality will be expressly included in the new legislation. In addition, the proposal specifies that a lack of accommodation for pregnant workers constitutes discrimination and that discrimination because of caregiving is prohibited. It is foreseen that it will also extend the possibility to introduce positive action in favour of men. The proposal aims, furthermore, to strengthen the duty of activity imposed on employers, but also to abolish their current reporting duty.

Internet source:

<https://www.regjeringen.no/no/dokumenter/horing---forslag-til-felles-liestillings--og-diskrimineringslov/id2458435/>
Last accessed 17 May 2016.

82 NOU 2009:14, see <https://www.regjeringen.no/no/dokumenter/nou-2009-14/id566624/>, last accessed 30 October 2015.

Poland

PL

CASE LAW

First case of discrimination by association on the ground of sexual orientation in Poland

The claimant was a shop security guard who, during his spare time, participated in the equality parade (an LGBT community event), fragments of which were reported in the media. After the reports, the claimant received a text message from the security manager of the store where he worked, informing him that he had been dismissed. The dismissal was confirmed via a telephone conversation with another representative of the company, according to the claimant based on the argument that a person who participates in such events and is associated with groups organising them cannot be a security guard because it endangers the company's image. The claimant brought a case to court, demanding PLN 5 000 (EUR 1 250) in damages (50 % as compensation for material loss, 50 % as compensation for non-material damage).

Sexual orientation

The court of first instance found that there had been discrimination by association on the ground of sexual orientation and awarded the claimant PLN 2 500 (EUR 625) only for material loss and refused to grant compensation for non-material damages.⁸³ The claimant appealed against the ruling, arguing that limiting the compensation only to material damage contradicts the duties of the EU Member States to interpret national law in line with the objective and substance of European law. The claimant argued that the national court did not impose a sanction that could be understood as effective, dissuasive and proportionate. The respondent also appealed against the decision.

The second instance court dismissed the appeals of both parties. The court stressed that the Equal Treatment Act does not differentiate within Article 13 between material and immaterial damages, and the first instance court should therefore not have applied such a differentiation. However, the second instance court decided that the amount of the damages awarded was adequate.⁸⁴

Pregnancy-related discrimination of religious instruction teachers

The ruling in this case⁸⁵ concerned a female employee who worked as a religious instruction teacher in a public school. The school terminated the employment of the religious instruction teacher, despite the fact that she was pregnant, after the bishop withdrew her permit to teach the subject after learning that she was cohabiting with her partner outside of marriage. In the view of the school's management, once the bishop withdrew the teacher's permit, the school was obliged to dissolve her employment contract, in accordance with the provisions of the Teacher's Charter. The woman sued the school, requesting to be reinstated at work; she also claimed damages with respect to, among others, the violation of the equal treatment rule (Article 18^{3a} LC) and the prohibition of discrimination in employment (Article 11³ LC).

Gender

Religion or belief

According to Section 12 (3) of the Concordat, religious instruction teachers must have a valid clearance (*missio canonica*) issued by the diocesan bishop. The withdrawal of such clearance means a loss of the right to teach religion. In matters of religious upbringing and education, religious instruction teachers are subject to Church regulations and ordinances. In all other matters, public law provisions apply (Article 12 (4) of the Concordat). According to Article 23 (1) item 6 of the Teacher's Charter, the employment relation with a nominated teacher is to be dissolved in the case of a withdrawal of the clearance for teaching

83 District Court Warszawa Śródmieście, decision No. sygn. VI C 402/13, of 9 July 2014.

84 Regional Court in Warsaw, V Civil-Appellate Division, decision No. sygn. V Ca 3611/14, of 18 November 2015.

85 District Court Kraków Nowa Huta, decision No. sygn. VII Pa 326/15 of 20 October 2015.

religion in a school, as regulated in separate provisions. Article 23 (2) item 6 of the Teacher's Charter stipulates that it should occur by the end of the month in which the clearance has been withdrawn.

The District court had to decide if the withdrawal of the bishop's permit to teach religion and the resulting loss of the right to conduct lessons meant that the school had no other choice than to terminate the employment contract of the teacher, irrespective of the provisions of the Labour Code regarding the protection of the employment relationship of pregnant women. Article 177 (1) of the LC states that the employer may not dissolve an employment contract with a woman during her pregnancy. According to Article 177 (3) LC, such a dissolution is only possible in the case of the insolvency or liquidation of the employer's enterprise (after consultations with the employees' organization representing the employee).

The District court rejected the claim, finding that the school was entitled to dissolve the employment contract with the woman after the bishop withdrew her teaching clearance. This withdrawal meant that she was no longer entitled to teach the subject and, in the light of the Teacher's Charter, constituted a lawful basis for the dissolution of the employment contract. This decision has been appealed to the Regional Court in Kraków and the case is still pending.

Internet source:

<http://www.oswiata.abc.com.pl/czytaj/-/artykul/sad-ciaza-nie-chroni-katechetki-przed-zwolnieniem-jezeli-zada-tego-biskup>

http://wyborcza.pl/1,76842,16914842,Katechetka_w_ciazy_zwolniona_ze_szkoly_za_zycie_w.html?disableRedirects=true

Last accessed 24 June 2016.

POLICY DEVELOPMENT

Newly appointed Ombud appoints his deputy responsible for equality issues

The five-year term of the office of the Commissioner for Civil Rights Protection that also serves as an Equality Body in Poland expired in July 2015. The vice-president of the Helsinki Foundation for Human Rights, Dr Adam Bodnar, announced his unofficial candidature and was supported by a coalition of 67 NGOs, which organised an entire campaign.⁸⁶ For the first time the (unofficial) candidate was widely debated and there were a number of media reports, interviews and debates organised. He was also attacked on a number of occasions for his personal views on LGBT issues (mainly marriage and the adoption rights of same-sex couples). Following wide social support, Members of Parliament with the right to put forward official candidates proposed Dr Bodnar who was elected as the new Ombud by the Sejm on 24 July and on 7 August by the Senate.

In September the new Ombud took his oath, and presented two new deputy Ombuds. One of them will be responsible, for the first time, for equal treatment issues, which indicates that the equality body mandate of the Ombud may be underlined during this new mandate.

Internet source:

<https://www.rpo.gov.pl/pl/content/dr-adam-bodnar-rpo-vii-kadencji>

Last accessed on 17 May 2016.

86 See the page 'Our Ombud' – <http://naszrzecznik.pl> with the list of organisations, the programme of the new Ombud and other relevant news Last accessed 17 May 2016.

Ombud announces anti-discrimination research topics for 2016-2017

Racial or ethnic origin, religion or belief, disability and sexual orientation

In February 2015, the Office of the Ombudsman launched the second edition of public consultations on anti-discrimination research topics, the aim of which was to select six research topics to be implemented in 2016 and 2017. Some 54 proposals were submitted, out of which a group of experts selected six research topics in September 2015. The final scope of each study and its methodology will be defined at a later stage, before public tenders for the implementation of particular research projects are announced.

The selected topics are as follows:

In 2016:

1. Personal assistance of people with disabilities;
2. Unequal treatment in the workplace on grounds of religion;
3. Prevention of violence motivated by sexual orientation and gender identity.

In 2017:

1. Discrimination against people with disabilities in healthcare;
2. The phenomenon of harassment and sexual harassment;
3. Discrimination on grounds of nationality and ethnic origin in employment.

Internet source:

<https://www.rpo.gov.pl/pl/content/tematy-badan-antydiskryminacyjnych-na-lata-2016-i-2017>

Last accessed 17 May 2016.

Racial or
ethnic origin

Religion
or belief

Disability

Sexual
orientation

Portugal

PT

LEGISLATIVE DEVELOPMENT

Maternity and reconciliation of family and working life

The Labour Code (LC) was recently changed by Law No. 120/2015 of 1 September 2015, with regard to the sharing of maternity leave and the reconciliation of family and working life. The amendment provides for the possibility to take telework, part-time work, or other flexible working time arrangements. It is now possible for parents who choose to take maternity leave for a period of 150 days to enjoy the last 30 days of the leave simultaneously (Article 40 No. 2 of the LC). In all other situations, the leave can be shared between the parents but cannot be taken at the same time. This is quite a novelty because until now the sharing of maternity leave was dependent on alternative periods of the leave enjoyed by each parent subject to his or her own choice.

Law No. 120/2015 of 1 September 2015 also amended the LC in order to introduce the legal right to telework for reconciliation purposes. In this sense, a worker with a child under the age of three has the right to change to telework if the professional activity performed is compatible with this form of work and the employer can provide the necessary means to make this possible (Article 166 No. 3 of the LC).

Aside from these schemes, the LC also now imposes some limitations to flexible working time arrangements on the ground of entrepreneurial reasons (such as adaptable working time and the banking of hours), which may have a negative impact on the reconciliation of family and working life. From now on, flexible working time arrangements determined by collective agreements or by the internal regulation of the

Gender

company cannot be imposed on workers with children under three years of age without the specific and written consent of the working parent (Articles 206 No. 4 (b) and 208-B No. 3 (b) of the LC).

In addition, Law No. 133/2015 of 7 September 2015 reinforces the sanctions for the breach of maternity rights. This Law determines the amount of losses of public allowances or other public support imposed upon companies that have dismissed women on the grounds of pregnancy or maternity. Under Law No. 133/2015, companies that have been found guilty by the Courts of having illegally dismissed pregnant workers, recent mothers or workers who are breastfeeding, cannot benefit from public allowances or other public support measures of any kind for a period of two years after the Court's judgment.

Internet source:

www.dre.pt

Last accessed 24 June 2016.

RO

Romania

CASE LAW

Court of Appeal issues unprecedented decision on the duty to ensure the accessibility of taxis for persons using wheelchairs

Disability

The claimant was the mother of a young boy using a wheelchair. They called a taxi service to go to school, but the taxi driver refused to take them stating that the wheelchair would not fit in the trunk as his car had a special compressed-gas bottle occupying the trunk. He called two companies he was working for and asked them to send an adapted car.

The claimant filed a complaint against the driver and one of the taxi companies before the National Council for Combating Discrimination (NCCD) claiming discrimination in access to services. In its decision 126 of 25 February 2015, the NCCD ruled that the behaviour of the taxi driver did not amount to discrimination as the plaintiffs did not specify the need for an adapted car when making the initial call and the driver's refusal was justified by the physical impossibility of fitting the wheelchair in the taxi. The claimant challenged the NCCD decision before the Court of Appeal of Bucharest seeking the annulment of the NCCD decision.

On 12 October 2015, the Court of Appeal repealed, in part, the NCCD decision.⁸⁷ The court upheld the part of the decision regarding the conduct of the taxi driver. By extending the scope of the petition, the Court of Appeal found, however, that the refusal of the two taxi companies amounted to discrimination and imposed a fine on each of them of RON 10 000 (approx. EUR 2 250). The court also ordered the two companies to redress the situation of discrimination by owning at least one car which is specifically adapted to be used exclusively for persons with disabilities who are using electric wheelchairs that cannot be folded. In addition, the court accepted as additional respondents the local public administration and thereby ordered Bucharest municipality, the General Directorate for Social Assistance and the Agency for Payments and Social Inspection from Bucharest to redress the situation of discrimination by taking all administrative measures provided by the legislation in order to oblige all companies authorised to provide taxi services to have at least one vehicle adapted for persons with disabilities using such wheelchairs. The decision can be challenged before the High Court of Cassation and Justice.

⁸⁷ Court of Appeal of Bucharest, section VIII Administrative and Fiscal litigation, decision No. 2547 of 12 October 2015.

This case clearly introduces the argument that a failure to pre-emptively take all measures in order to ensure reasonable accommodation in public transportation amounts to discrimination in access to public services. The Court of Appeal used the Anti-discrimination Law in order to sanction the failure to observe the requirements of the legislation on the rights of persons with disabilities, Law 448/2006. In its Article 62, this Law provided the duty for local authorities to ensure the adaptation of public transportation by 31 December 2010, including taxis. In Article 64 (2) it also established a six-month period for all taxi operators to ensure at least one car adapted for persons using a wheelchair. Finally, Article 64(3) of Law 448/2006 defines as discrimination the refusal by a taxi driver to ensure transportation for a person with disabilities using a wheelchair. The enforcement of Law 448/2006 falls under the mandate of distinct entities, the national authority for the rights of persons with disabilities and the Social Inspectorate. Given the failure of these institutions to sanction non-compliance, in the past the NCCD has already imposed sanctions against them.⁸⁸

Internet source:

http://portal.just.ro/2/SitePages/Dosar.aspx?id_dosar=200000000319018&id_inst=2

Last accessed 17 May 2016.

High Court confirms the rejection of the action by ACCEPT in a case based on CJEU C-81/12

The High Court of Cassation and Justice finally communicated to the parties its reasoning in decision No. 2224 in file 12562/2/2010 in which the court rejected ACCEPT's request to quash the decision of the national equality body as being 'unfounded'. The High Court confirmed the legality of the decision of the Court of Appeal of Bucharest of 23 December 2013, which did not follow the interpretations given by the CJEU in its preliminary ruling on the case.⁸⁹ The decision was delivered in a case regarding discriminatory statements in relation to hiring policies at a football club.

Racial or
ethnic origin

In its decision No. 2224, the High Court of Cassation and Justice rejected the appeal filed by ACCEPT against the decision of the Bucharest Court of Appeal, thus maintaining the decision of the national equality body. In its reasoning, the High Court only mentioned the CJEU case C-81/12 to underline that even the CJEU in its preliminary ruling recognised that the competence for assessing the facts in the case belongs exclusively to the national court. There was no analysis or incorporation of the substantive guidance provided by the CJEU in the case. The decision mentioned the submissions of the complainants indicating that the CJEU ruling had been misquoted by the NCCD and misinterpreted by the Court of Appeal but did not address this issue.

In quickly dismissing the case, the High Court decided that there are no elements suggesting that the football club is liable for discrimination in employment on grounds of sexual orientation. With regard to the sanctions issued, which was challenged by the claimant as not being dissuasive, proportionate and sufficiently adequate for a case of discrimination, the High Court stated: 'contrary to the statements of the complainant, a warning (as a sanction) is not incompatible with Art. 17 of Directive 2000/78/EC and cannot be considered *de plano* as a purely symbolic sanction. In applying this sanction, the NCCD has a margin of appreciation under which it is assessing multiple elements, among which the context in which the deed was perpetrated, the effects or the outcome and the person of the perpetrator played an important role. Last but not least, the publicity generated by the decision to sanction the author of the deed of discrimination who excessively exercised his freedom of expression played a dissuasive part in society.'

⁸⁸ See, for instance, *European equality law review*, issue 2015/1, pp. 144-145.

⁸⁹ See *European Anti-Discrimination Law Review*, issue 18, p. 79.

POLICY DEVELOPMENT

Report on attitudes and perceptions regarding discrimination in Romania released by the national equality body

On 15 September 2015 the Romanian National Council for Combating Discrimination (NCCD) published a survey on perceptions and attitudes regarding discrimination in Romania.⁹⁰ Some 85 % of the persons interviewed declared that they had heard about discrimination phenomena and two out of three considered that discrimination is an actual problem that often occurs in Romania.

Similar to previous years, the respondents considered that the most discriminated groups in Romania are persons living with HIV/AIDS (65 %), drug users (57 %) or persons with physical or intellectual disabilities (55–56 %). Other categories of potential victims of discrimination are Roma (49 %), ‘sexual minorities’ (49 %), institutionalized children (48 %), and Romanians in the counties where they are a minority (48 %). Elderly people, people with no income, women, and people with chronic diseases are considered to be discriminated against to a lower extent.

When looking at the distance and acceptance levels towards vulnerable groups (the Bogardus social distance scale), the respondents demonstrated the lowest tolerance levels towards drug users and LGBTI people, with 39 % of those interviewed stating that they would not even accept drug users or LGBTI people to live in Romania. A higher level of openness is mentioned in relation to unemployed people, people having no income and people with a different religion.

Politicians and public officials are groups that are strongly associated with being potential perpetrators of discrimination.

Employment seems to be the field with the highest rate of perceived discrimination as almost two thirds of the interviewees believe that the number of discrimination cases in this field is high or very high. Persons living with HIV and the Roma are the categories that are perceived to have the lowest possibilities of accessing the labour market. Discrimination in relation to access to health services is perceived as high or very high by 55 % of the survey participants. When interviewed about discrimination in education, half of the interviewees thought that the number of discrimination cases is high or very high while 45 % believed that it is low or very low.

In preparation for the future national strategy for equality, currently being developed by the NCCD, the survey also included questions regarding the priorities for intervention in tackling discrimination and the best actions in each specific field. Ethnicity is the protected ground which is perceived as being the most important (27 %), followed by age and disability.

Internet source:

<http://cncd.org.ro/files/Sondaj%20TNS%20CNCD%202015.pdf>

Last accessed 17 May 2016.

90 <http://cncd.org.ro/files/Sondaj%20TNS%20CNCD%202015.pdf> last accessed 17 May 2016. The survey included 1 406 interviews with respondents aged over 18, with a margin of error of 2.6 % for a level of trust of 95 %. Interviews were carried out face to face in August 2015.

Serbia

RS

CASE LAW

Strategic litigation on direct discrimination against Roma in employment⁹¹

A lawsuit was filed against an employer for discrimination against Roma. Namely, a Roma woman replied to an advertisement for the position of a raspberry harvester, on behalf of herself and of her husband, stating that they already had some experience in harvesting raspberries. She also requested information on working conditions, including the salary. She received a reply on the same day, and together with the requested information and a contract template, she received a document entitled 'Remarks' containing practical information as well as the following remarks: 'People of Roma nationality cannot be employed because of quarrels with the employees of other nationalities and possible consequences that can occur during the joint stay with the employer.'

Racial or
ethnic origin

The employer claimed that he and his parents already employed several Roma, that he does not have prejudices towards them, that he has Roma friends and that he is not denying them employment rights. However, he also claimed that his remarks related to accommodation and that the majority of employees have prejudices towards Roma which caused some problems and conflicts among employees in previous years. These conflicts related to the majority of them not wanting to sleep in the same room as Roma, while the employer could not ensure spare rooms for them. He also stated that in 2014 among 25 employees, one person of Roma origin was hired as a raspberry harvester. That Roma employee testified that the employer employed him without any problems and that some other Roma employees were engaged as well, but since those other Roma had lighter skin, the employer probably did not know that they were of Roma origin.

The Commissioner for the Protection of Equality demanded, aside from the lawsuit, that the court would order a temporary measure so as to remove the document 'Remarks' from the public eye. The court ordered an interim measure (P. no. 519/14, 1 September 2014) requesting that the employer withdraws the discriminatory document.

The court relied on several provisions of the Law on the Prohibition of Discrimination, as well as Article 14 of the European Convention on Human Rights and two Constitutional provisions. The Court particularly underlined that discrimination offends dignity, honour, reputation and personal integrity.

The court found direct discrimination based on national affiliation and ordered the following:

- the employer to remove the discriminatory provisions from the 'Remarks' document;
- a prohibition on this discriminatory situation occurring again;
- the employer to send a written apology to the Roma woman who had applied for the job within 15 days from the date of receiving the judgement; and
- the publication of the judgment in a national daily newspaper at the employer's expense.

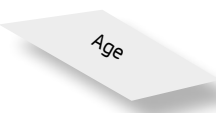
This case is very important as the case law that has found discrimination against Roma is quite scarce, although such discrimination is widespread in practice. It is also positive that the judge found that the offensive remark in the 'Remarks' document was indeed discriminatory despite the fact that the employer had in practice employed some Roma and that he did not ask future employees about their ethnic origin.

This case is also important from the position of defining the locus standi. Thus, the respondent argued that the lawsuit should be dismissed as the requirement of locus standi was not fulfilled. He claimed that

91 *The Commissioner for the Protection of Equality v I. Cvetić*, Higher Court in Belgrade, I P no. 519/14, 22 October 2015.

employment discrimination can be raised only against the employer, his father, who is the owner of the registered agricultural holding. However, the Court found that the locus standi requirement is fulfilled as Article 2, par. 1 (2) of the Law on the Prohibition of Discrimination prescribes that the terms ‘person’ and ‘everyone’ shall be used to designate any person who resides on the territory of the Republic of Serbia or a territory under its jurisdiction, as well as any legal entity registered or operating on the territory of the Republic of Serbia.

Discrimination against a female employee based on a different retirement age for the sexes



In Serbia, according to Article 19 of the Law on Pension and Disability Insurance, the state-imposed mandatory retirement age is 65 years with a minimum of 15 years of pension insurance, or 45 years of insurance. However, Article 19 a) prescribes that women can voluntarily retire at the age of 60 years and 6 months with a minimum of 15 years of pension insurance. Each year, the retirement age for women will be raised until 2032, when it will be equalized for both sexes at 65. In practice, many women are forced to retire when they reach retirement age.

In this case, the claimant had been employed since 1980 by the respondent company as a leading economist for planning and analysis. From 2001 until 2013 she served as the Chief of financial services. At the beginning of 2013, she was advised to retire as she had fulfilled the conditions for retirement. She rejected this proposal and was then moved to a lower-paid job in the planning service, without any justification. She lodged a complaint with her employer claiming that she was discriminated on the basis of age, but she did not receive any response.

She then submitted a complaint to the Commissioner for the Protection of Equality. In his reply to the complaint, the employer explained that she was moved to another job due to the increased volume and complexity of the work in the planning service, although she claimed that she did not have any work assignments in her new post.

In the resulting opinion, the Commissioner relied on Article 21 of the Constitution which prohibits discrimination, as well as several provisions of the Law on the Prohibition of Discrimination and of the Labour law.

In order to issue an opinion whether this was a case of discrimination, and whether there was a causal link between a personal characteristic – age – and the act (a change of position and salary), the Commissioner needed to rely on statistical data. Thus, the Commissioner requested additional information from the employer on the number of employees that were offered retirement or replacement. In 2013, out of 154 employees who were placed in another position, 106 received a higher salary, 24 received the same salary, while 24 employees received a lower salary. In the age group 20-30, 16 employees were replaced; in the group 30-40, 49 employees; in the group 40-50, 35 employees; and in the group 60-65, 5 employees.

The Commissioner found that there was no case of discrimination as the company was entitled to effect changes by means of an act of systematization and to carry out personnel changes in order to improve its business. In addition, the Commissioner considered that the employer provided enough reasons for its decision and that only 5 employees in the group 60-65 were replaced among 154 employees who were moved to another post. However, a closer link between the explanation of the employer and the replacement was missing in this case, and the Commissioner did not take into account the fact that the employer was ignoring D.K.’s attempts to obtain information on her shift.

Although it is important that the Commissioner relied on statistical data in order to prove discrimination, it seems that some important data were not requested. In order to reach an informed decision, it would

have been necessary to have information on the total number of employees in the age group 60-65 in order to assess the percentage of those whose positions had been changed. It would also have been necessary to take into consideration the sex of the 24 employees who had been moved to lower-paid jobs. Finally, it would have been important to assess the number of those who had retired and their sex.

Internet source:

<http://www.ravnopravnost.gov.rs/rs/старосно-доба/притужба-д-к-против-рб-к-л-због-дискриминације-на-основу-старосног-доба-у-области-рада>

Last accessed 17 May 2016.

Slovakia

SK

LEGISLATIVE DEVELOPMENT

Adoption of an amendment to the Schools Act with provisions likely to perpetuate the segregation of Roma children

On 30 June 2015, the Slovak Parliament adopted an amendment to the Schools Act containing measures that were presented by the government as aiming to eliminate the segregation of Roma children in education.⁹² However, the adopted provisions raise serious doubts as to whether they are capable of fulfilling this aim and rather generate serious concerns about having a strong potential to perpetuate the status quo.

The newly enacted provision of Section 29(11) of the Schools Act stipulates that primary schools may establish a 'specialised class' for the education of those pupils who are 'not likely to successfully manage the content of education in the corresponding year, in order to compensate them for the lacking content of education.' Pursuant to this provision, the decision to place a pupil in the specialised class is taken by the school director upon a proposal from the class teacher and after consulting an educational counsellor, with the informed consent of a legal representative of the pupil. The placement in a specialised class can only last for the time which is inevitably necessary, but it cannot exceed one school year. The provision does not stipulate against what criteria the assessment of the 'unlikeliness' to 'successfully manage the content of education' is to be made (for example, whether this assessment will be based on purely 'subjective' circumstances of a particular pupil, or on 'objective' features of the external conditions at schools, such as the unavailability of schooling in the Roma language). It also fails to stipulate any details about the educational counsellor to be consulted or whether the placement of a pupil in the specialised class can be repeated.

The provision of Section 29(11) of the Schools Act is partly a repetition of and partly in contradiction with the existing provision of Section 13 of the Ministry of Education Ordinance No. 320/2008 Coll. on Primary Schools. This provision defines specialised classes as classes for pupils with 'special educational needs', who are understood to be pupils with a 'health disadvantage,' as well as pupils from 'socially disadvantaged environments,' defined as pupils who '(1) are not likely, after completing the 0th year of school, to successfully manage the educational content in the first year of school, (2) are not managing the educational content of the first year of school or, depending on the child, and based on a psychological examination, are assessed as unlikely to successfully manage the educational content in the first year of school, (3) have been educated in primary schools for pupils with health disadvantages but disability has not been proved in their case.' The Ordinance, compared to the newly enacted Schools Act amendment,

Racial or ethnic origin

Disability

92 See for example <http://romovia.sme.sk/c/7862664/rezort-skolstva-navrhuje-legislativnu-zmenu-skolskeho-zakona.html?ref=avizocl>, last accessed 15 July 2015.

requires an educational counselling and prevention facility to be consulted (as compared to individual counsellors required by the Schools Act amendment), and although the Ordinance enables placement in a specialised class only for the period which is ‘inevitably necessary,’ it does not set any other maximum limitation period. This Ordinance provision has for a long time been one of the tools to enable the placement of Roma children in segregated classes, through biased diagnostics (labelling Roma children as ‘mentally disabled’) which is still in place. It has also been one of the legislative tools for having a parallel system of ‘normal’ and ‘special’ education.

The Schools Act amendment also introduces a new provision in the Schools Act concerning the education of children and pupils from socially disadvantaged environments (Section 107). The new provision stipulates that ‘a child or a pupil whose educational needs stem exclusively from their development in a socially disadvantaged environment cannot be placed in special schools or special classes,’ and the education of such children shall be pursued through ‘individual conditions,’ meaning the adjustments of the organisation of education on the one hand, the environment in which education is taking place on the other, as well as the use of special methods and forms of education. Children from socially disadvantaged backgrounds are to be placed in classes ‘together with other children or pupils.’ This rule, however, does not apply to cases of placing pupils in a 0th degree (with the informed consent of the legal representative), and to placing pupils in ‘specialised classes’ pursuant to the newly enacted Section 29(11).

Adoption of a new Civil Dispute Act

On 21 May 2015, the Slovak Parliament adopted a new Civil Dispute Act, coming into effect on 1 July 2016. The Act regulates proceedings in private law matters (and some other matters) in general and also focuses on some particular types of proceedings, including those concerning alleged violations of the principle of equal treatment. The Act repeals the Civil Procedure Act, in force since 1964. The Act introduces many new rules for all civil dispute proceedings, with some exceptions for some special types of proceedings including anti-discrimination proceedings.

All
grounds

A change of a general character but with a great significance for proceedings concerning equal treatment is clarity in the rules concerning submitting audio and video recordings as evidence. The Act stipulates that the only admissible evidence is that which has been obtained legally.⁹³ However, the Act provides an exception to this rule, in particular in the situation when an interpretation of the Act in accordance with the Constitution, with public order, with international obligations, and with the case law of the ECtHR and CJEU would require the acceptance of evidence acquired contrary to the law. The explanatory report that was submitted together with this bill makes it clear that proceedings concerning discrimination should be an example of cases when this exception will be applied.⁹⁴

The Act introduces the concept of ‘Disputes with the Protection of a Weaker Party’ where it deviates from some of the general rules contained in the Act, with the aim being to mitigate the power imbalance between the parties to these proceedings. The three categories of such proceedings are consumer law disputes, anti-discrimination disputes, and individual labour disputes. In the regulation on anti-discrimination disputes (Sections 307–315), the Act refers to anti-discrimination legislation (mainly the Anti-Discrimination Act) and stipulates that the procedural provisions contained in anti-discrimination legislation (e.g. on the burden of proof) take precedence over the Civil Dispute Act. Among the exceptions to the general procedural rules contained in the Act that apply to anti-discrimination disputes are, for example, a wider duty of the court to instruct the complainants on their rights, the possibility for the court to seek evidence on its own initiative (the consent of the claimant for seeking such evidence and taking it into account by the court is, however, not required), the possibility for the claimant to submit evidence

93 Section 187 and Article 16(2) of the Basic Principles of the Act.

94 Explanatory Report to the Civil Dispute Act, Special Part, p. 4, available at <http://www.nrsr.sk/web/Default.aspx?sid=zakony/cpt&ZakZborID=13&CisObdobia=6&ID=1333> accessed 21 July 2015.

until the decision on the merits is delivered, and the duty of the courts to conduct hearings in all anti-discrimination proceedings (except when the claimant agrees to omit the hearing).

The Act also introduces the possibility for NGOs and the Slovak National Centre for Human Rights to represent claimants when referring an extraordinary appeal to the Supreme Court (in disputes concerning violations of the principle of equal treatment).⁹⁵ Under the legislation currently in force, legal representation by these entities is only possible before the courts of first and second instance.⁹⁶

The provisions concerning/impacting on anti-discrimination proceedings can as such be assessed positively, and their final shape has been significantly influenced by NGOs successfully intervening in the legislative process (and the Ministry of Justice drafting the bill was responsive to their comments).

Internet source:

<https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2015/160/20160701>

Last accessed 17 May 2016.

CASE LAW

Supreme Court ruling in favour of inclusive education for a child with a disability

The claimant was a child with an intellectual disability and a hearing impairment who was refused enrolment at a mainstream primary school. The local government upheld the decision on the claimant's appeal against the decision of the director of the primary school. The claimant then initiated a judicial review of both of the administrative decisions before the Regional Court in Bratislava, but her lawsuit was dismissed.⁹⁷ Therefore the claimant appealed against the first instance decision to the Supreme Court.

Disability

The respondent (the local government which had upheld the decision of the director of the school) argued that the mainstream school did not have adequate staff and technical conditions for a child with special educational needs stemming from her disability, and defended that if the conditions of a 'special school' (i.e. a school for children with a health disadvantage, distinct from mainstream schools) better suit the needs of this child, then the child should be enrolled at this special school. The respondent also argued that special schools respect the right of children with disabilities to education as guaranteed by Article 24 of the Convention on the Rights of Persons with Disabilities and that these facilities guarantee reasonable accommodation as stipulated by the Convention.

The Supreme Court quashed the decision of the director of the mainstream school and that of the local government and ordered the latter to continue conducting proceedings in the case. It also expressed its legal opinion on the case which will be binding in the proceedings to follow.⁹⁸

The Supreme Court applied the CRPD as the 'relevant legal basis,' noting that the Convention takes precedence over the national legislation, and hence it was the duty of the school director and the local government to interpret the provisions of the School Act in accordance with the Convention. The Court noted that the respondent's argument regarding the inability of a mainstream school to provide special conditions for a child with special educational needs cannot be accepted in this case, mainly because the case file did not contain any evidence that the school director was actively trying to create special conditions for the claimant. The Court also noted that neither the school director nor the local government

⁹⁵ See Section 429(2)(b) of the Act.

⁹⁶ Such representation, however, remains impossible before the Constitutional Court. Changing this situation would require an amendment to the constitutional law on proceedings before the Constitutional Court.

⁹⁷ Decision of the Regional Court in Bratislava (*Krajský súd v Bratislave*) No. 15/208/2013-76 of 3 July 2014.

⁹⁸ Decision of the Supreme Court of Slovakia in case No. 75Žo/83/2014, of 24 September 2015.

or the regional court had specified in what way the realisation of reasonable accommodation would create a disproportionate or excessive burden.

The Court noted that a refusal to provide reasonable accommodation is a form of prohibited discrimination on the ground of disability. The Court also emphasised that the best interests of a child must represent the primary perspective when deciding about enrolment at a mainstream school, and that in this case inclusive education for the claimant, accompanied by the reasonable accommodation that she needed, was in her best interest. The Court referred to an expert opinion recommending that education for the claimant in a mainstream school, with the simultaneous provision of an individual educational plan and a teacher's assistant, should be considered.

This landmark decision states authoritatively that providing reasonable accommodation for disability is a legal duty not only in the field of employment but also in the field of education. The decision is solely based on the provisions of the CRPD and the national anti-discrimination law is not mentioned at all.

The claimant first initiated the case in the spring of 2013, and the Supreme Court decision was delivered in September 2015. At the time of reporting, no decision has yet been made by either the local government or the school director to enrol the claimant in the mainstream school. From this perspective, the remedy provided cannot be considered effective.

Internet source:

http://www.supcourt.gov.sk/data/att/47341_subor.pdf

Last accessed 18 May 2016.

POLICY DEVELOPMENT

The Commissioner for Persons with Disabilities and the Commissioner for Children Elected by the Slovak Parliament for the First Time

On 2 December 2015, the Slovakian Parliament elected the first Commissioner for Persons with Disabilities and the first Commissioner for Children, following the establishment of these two positions in June 2015.⁹⁹

The legal framework of each Commissioner is based on the relevant UN Conventions, i.e. the Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol, on the one hand, and the Convention on the Rights of the Child (CRC) and its optional protocols, on the other. Thus, the position of the Commissioner for Children will be important also for many children discriminated against on various grounds including ethnicity and sexual orientation.

Any person can approach the Commissioners on issues falling under their mandates. The Act on the Commissioners explicitly states that this right is also guaranteed for persons without full or any legal capacity to act, and there is no need for legal representation.

The Commissioners are independent bodies that carry out their tasks independently from other bodies. Their tasks include assessing whether the rights of persons with disabilities and of children are being observed, monitoring the observance of these rights mainly through independent investigations, research and surveys, promoting the interests of persons with disabilities and of children in society, direct cooperation and consultations with them directly and with organisations active in these fields, raising awareness on rights, and cooperation with foreign and international bodies.

⁹⁹ Act No. 176/2015 Coll. on the Commissioner for Children and on the Commissioner for Persons with Disabilities and on Changing and Supplementing Other Laws, adopted on 25 June 2015.

The Commissioners can exercise their tasks and powers in relation to public bodies, legal persons, and natural persons who are entrepreneurs. However, this does not apply to several state bodies including the President, the courts, prosecutors, the police (acting in the framework of criminal proceedings), or the ombudsperson, unless these bodies are acting in the capacity of public administrative bodies.

The powers of the Commissioners include the right to request information, data, copies of files or any records, to request that public bodies exercise their powers, to request opinions on their findings from the respective bodies under consideration, and, when finding that such a body has violated the rights concerned, to request measures to be adopted. The Commissioners' powers also include the right to file complaints to the respective UN treaty bodies, to provide opinions on issues falling under their mandates, or to become third parties to civil judicial proceedings. The Commissioners do not have any sanctioning powers. Each of the Commissioners is obliged to annually submit a report to Parliament on the activities undertaken in the previous year.

Internet source:

<http://www.zakonypreludi.sk/zz/2015-176>

Last accessed 18 May 2016.

Slovenia

SI

LEGISLATIVE DEVELOPMENT

Referendum on the Act Amending the Marriage and Family Relations Act

On 22 October 2015 the Constitutional Court annulled the decision of the National Assembly rejecting a request for a referendum on the Act Amending the Marriage and Family Relations Act¹⁰⁰ which was passed by the National Assembly on 3 March 2015 but did not enter into force.¹⁰¹

Sexual
orientation

The main change that the Act would have brought was the legalisation of marriage for same-sex partners, also extending employment-related rights to (both married and cohabiting) same-sex couples: the right to paid sick leave from work to care for a sick partner, the right to additional days of leave from work for a wedding, and the right of a cohabiting same-sex partner to obtain a survivor's pension that is based on contributions paid during the employment of the deceased partner.

The referendum took place on 20 December 2015, with 63.51 % of the votes rejecting the Act.

Internet source:

<http://www.volitve.gov.si/referendum/>

Last accessed 18 May 2016.

100 Zakon o spremembah in dopolnitvah Zakona o zakonski zvezi in družinskih razmerjih, EPA 257/VII (draft law), available at <http://www.ds-rs.si/sites/default/files/dokumenti/zzzdr-d.pdf>.

101 For further information, see *European equality law review*, issue 2015/2, pp. 136-137.

LEGISLATIVE DEVELOPMENT

Spain recognises the right to a pension supplement for mothers

The General State Budget Act for 2016 of 29 October 2015 approved an important reform of the General Law of Social Security that consists of the recognition of a pension supplement to mothers of two or more children. The Act also modified the legislation concerning civil servants (Royal Legislative Decree 670/1987 of 30 of April of 1987), which consists of the same recognition of a pension supplement to civil servants. This new benefit has been incorporated into Article 60 of the new General Law of Social Security (approved by Royal Legislative Decree 8/2015 of 31 October 2015) and into Additional Provision 18 of the Royal Legislative Decree 670/1987 of 30 April 1987.

Gender

The main features of the new pension supplement are the following: (a) the objective of the pension supplement is to recognize women's 'demographic contribution' (*aportación demográfica*) to Social Security; (b) the supplement will be granted to every woman who has had at least two children, by birth or by adoption, starting in 2016; (c) the supplement will be applied to the following pensions: retirement, permanent disability and widowhood; (d) it will apply only to so-called 'contributory pensions' (*pensiones contributivas*), which means that it will not apply to 'non-contributory pensions' (social assistance pensions); (e) the pension supplement will apply as follows: if the woman has had two children, her pension will be increased by 5 %; if the woman has had three children, her pension will be increased by 10 %; if the woman has had more than three children, her pension will be increased by 15 %; and (f) if the application of the pension supplement implies that the resulting pension is greater than the maximum pension established in the social security system, the supplement will be reduced to half the amount.

Internet source:

<https://www.boe.es/boe/dias/2015/10/30/pdfs/BOE-A-2015-11644.pdf>

<https://www.boe.es/boe/dias/2015/10/31/pdfs/BOE-A-2015-11724.pdf>

<https://www.boe.es/buscar/doc.php?id=BOE-A-1987-12636>

Last accessed 24 June 2016.

CASE LAW

Discrimination based on sexual orientation in publicly assisted human reproduction

The claimants were two women united in marriage. In April 2014 one of them began a treatment of assisted human reproduction (AHR) at a private clinic receiving public funds. On 31 October 2014, a ministerial order was published reducing the list of medical services receiving public assistance.¹⁰² Following this order, the clinic suspended the provision of the treatment as the couple did not satisfy the requirement of having had 'sexual relations with vaginal intercourse' for a minimum of 12 months. The couple continued the treatment in a private clinic, personally paying all expenses.

Sexual orientation

102 Due to budgetary constraints, the Ministry of Health, Social Services and Equality approved Order SSI / 2065/2014, of October 31, which reduced the list of services of the National Health System. This Ministerial Order states that 'assisted human reproduction treatments that require therapies are facilitated to persons who have been subjected to a study of infertility and are in one of the following conditions: 1) The existence of a documented disorder of reproductive capacity, observed after the appropriate diagnosis and not susceptible to medical treatment protocol or after the apparent ineffectiveness of treatment. 2) The absence of achieving pregnancy after at least 12 months of sexual relations with vaginal intercourse without using contraception.'

Although the clinic allowed the claimant to access the AHR programme again in April 2015, the couple filed a complaint for the protection of fundamental rights against the clinic, the Ministry of Health of the Community of Madrid and the Ministry of Health, Social Services and Equality. The Social Court of Madrid ruled on 15 September 2015.¹⁰³

The ruling found that the clinic had discriminated against the claimants on the ground of sexual orientation and noted that the claimant was entitled to AHR treatment by direct application of Law 14/2006.¹⁰⁴ The Court came to this finding although it recognised that the clinic had no intention of discriminating against the claimants, but was merely applying the provisions of the ministerial order (ignoring Law 14/2006).

In addition, the court also found that the Ministry of Health of the Community of Madrid had failed in its obligation to provide healthcare, regardless of sexual orientation. The court ordered the clinic and the Ministry to compensate the claimant financially for material and non-material damages. The judgment absolved the Ministry of Health, Social Services and Equality as it has no competence in the management of health in the Community of Madrid.

Sweden

SE

LEGISLATIVE DEVELOPMENT

Amendments to the Parental Benefit Scheme

The Swedish Parliament accepted Government bill 2014/15:124 concerning an amendment to the public parental benefit scheme regulated in Chapter 12 of the (2010:110) Social Security Code. The number of days not transferable between parents has been increased from 60 to 90. The purpose is to further a more equal use of the benefits, i.e. to make fathers take out more of the days available by introducing 'a third daddy month.' The reform is not about the total number of parental benefit days (480 days in total) but about the transferability of those benefit days between the parents. It applies to the income-replacement benefit days in the scheme. The reform entered into force on 1 January 2016 and only applies to children born after this date.

Gender

The reform is a step towards a more gender-neutral parental benefit scheme. The amendment is gender-neutral in its terms – 90 days are thus reserved for the mother and father, respectively. In practice, since mothers currently use approximately 80 % of the days available, it is about augmenting the number of days taken by fathers.

CASE LAW

Age discrimination of workers at the age of 70

On 16 September 2015, the Labour Court decided on a case brought by the Equality Ombudsman regarding age discrimination in employment, case 2015 No. 51, *The Equality Ombudsman v. Keolis AB*.

Age

¹⁰³ Decision of the Social Court of Madrid No. 18 of 15 September 2015, No. Auto. 672/2015.

¹⁰⁴ Law 14/2006 of 26 May 2006 on assisted human reproduction (AHR) states that 'Every woman over the age of 18 with full capacity to act may be a recipient or user of the techniques regulated in this Law (...). The woman may be a user or recipient of the techniques covered in this law regardless of her marital status and sexual orientation' (Article 6).

Swedish employers may freely decide to dismiss workers at the age of 67 according to Sections 32 a) and 33 of the Employment Protection Act,¹⁰⁵ which has been deemed to be compatible with regard to both national and EU anti-discrimination law.¹⁰⁶ Employers are furthermore free to use limited-time contracts above that age without any restriction according to Section 5 of the Employment Protection Act.

The bus company Keolis had a relatively generous policy of offering limited-time employment contracts of one year to workers dismissed at the age of 67 (renewable). These contracts allowed the worker to work on an hourly basis in cases when the company had specific needs, due to, for instance, ordinary workers calling in sick – but the elderly worker was not guaranteed any work or income. The company policy applied yearly health checks for workers above 65 although the renewal process for the yearly contracts automatically stopped at the age of 70 for safety reasons.

The Equality Ombudsman filed a complaint on behalf of three workers whose yearly contracts had not been renewed when they reached the age of 70. On 16 September 2015, the Labour Court found that a private company's safety concerns could in principle constitute a legitimate aim that could justify a decision not to renew the contracts, but further held that such a decision could not be based directly on the age of the workers. The yearly health checks applied to all workers aged above 65 were sufficient to address the company's safety concerns. Consequently, the Court awarded each worker SEK 40 000 (approx. EUR 4 000) for discrimination.

Internet source:

<http://www.do.se/globalassets/diskrimineringsarenden/arbetsdomstol/dom-arbetsdomstol-keolis-anm-2014-592-600-6012.pdf>

Last accessed 18 May 2016.

TR

Turkey

CASE LAW

Lower court orders the Turkish Football Federation to pay damages to a referee banned from his profession on the ground of his sexual orientation

In 2010, a football referee with 14 years of experience was dismissed from his profession by the Turkish Football Federation after the disclosure of a health report issued by a military hospital certifying his 'unfitness for military service' on the basis of his sexual orientation. The referee filed a civil case against the Turkish Football Federation on the grounds that he had been subjected to discrimination on the basis of his sexual orientation. He claimed that, having lost his job, being stripped of his professional qualifications and rejected from the profession and unable to find new employment due to the Federation's leaking of his health report to the media, he suffered a great deal of financial and emotional damages.

The referee also filed a petition with the Provincial Human Rights Board of Istanbul, which decided on 24 December 2012 that the applicant's rights to life, equality and non-discrimination, to the protection of privacy and family life and to employment, had been violated due to the loss of employment, rejection from the profession which prevented him from working as a referee ever again, as well as the receipt of death threats and being subjected to negative media reports.

¹⁰⁵ Lag (1982:80) om anställningsskydd.

¹⁰⁶ Court of Justice of the EU, Case 141/11, *Torsten Hörnfeldt v Posten AB*, (judgement of 5 July 2012).

On 29 December 2015, the 20th Civil Court of First Instance in Istanbul issued its ruling, ordering the Federation to pay the applicant NTL 3 000 (approx. EUR 950) in pecuniary damages and NTL 20 000 (approx. EUR 6 300) in non-pecuniary damages. The Court found the Federation's dismissal of the applicant in accordance with its by-laws, which disqualify individuals who are exempted from military service on health grounds from being a referee, to constitute a subjective decision which did not rest on objective criteria and therefore to be legally invalid. The Court noted that the health report which exempted the applicant from military service diagnosed the applicant with a 'psychosocial disorder' and did not refer to a health problem which would prohibit the applicant from working as a referee. Thus, the Court held that the Federation's conclusion that the applicant was unfit to be a referee was exclusively based on his sexual orientation, which does not constitute a barrier to an individual's performance of sporting activities. Furthermore, the Court stated that this attitude contrasts with the reality of the industry where one frequently encounters homosexual referees and athletes. The Court concluded that the Federation's decision violated the constitutional anti-discrimination clause as well as its own by-laws.¹⁰⁷

Turkish court issues unprecedented harsh sentences in a case concerning hate crimes against Roma minority

On 5 January 2010, a crowd of more than 1 000 local people in the district of Selendi in the Manisa province attacked the town's Roma population, throwing stones and setting houses on fire, while chanting slogans such as 'Get the Gypsies out.' The local police could not control the situation and sought reinforcements to assist them. The pretext for the attack was a fight between a Roma man and the owner of a coffee house several months earlier, although it became clear after the incidents that the attack was planned. Instead of providing the Roma families with protection, the Governor of Manisa forcibly relocated the victims to another district on the ground that the local authorities would not be able to ensure their safety. The displaced Roma continue to live in the district where they were relocated. A criminal case was instigated against the perpetrators of the attacks, and on 23 December 2015, five years after the first hearing was held, the 2nd Criminal Court of First Instance in Usak delivered its judgment.

Racial or ethnic origin

The court convicted 38 of the 80 respondents of incitement to enmity or hatred and denigration under Article 216 of the Penal Code¹⁰⁸ and of property damage under Articles 151 and 152 of the Penal Code. The sanctions ranged from 8 months to 45 years' imprisonment, which corresponds to the upper limit of the available sanctions. The remainder of the respondents were acquitted. In its reasoning, the Court held that the defendants were part of a concerted action by around 150 individuals who had raided the Roma neighbourhood with stones, bats and rifles, some of whom openly incited the public to hatred and enmity by chanting slogans such as 'they will leave here or else we will do what is necessary' and 'Selendi is ours and will remain so.'¹⁰⁹

The defendants appealed to the Court of Cassation, which is expected to issue a judgment sometime in 2017. The lower courts are obliged to publish their judgments within one month after issuing them. Accordingly, the judgment in this case is expected by early February 2016. Pending the outcome of the appeal process, the judgment is not final.

Key points of analysis: The judgment constitutes a very important precedent for the Turkish courts' handling of lynching attempts against ethnic and racial minorities. This is the first time that a Turkish

¹⁰⁷ Turkey, 20th Civil Court of First Instance in Istanbul, decision of 29 December 2015 (the opinion was drafted on 3 February 2016), E. 2010/399, K. 2015/554.

¹⁰⁸ Article 216 of the Turkish Penal Code criminalises, inter alia, (1) incitement to enmity or hatred on grounds, inter alia, of race, religion or denomination in a manner which may present a clear and imminent danger to public safety, and (2) open denigration of a section of the population on grounds, inter alia, of race, religion or denomination.

¹⁰⁹ Second Criminal Court of First Instance in Usak, decision of 23 December 2015. The Court published its reasoning in May 2016, which is not publicly available. The information is based on news coverage in the Turkish media. 'Manisa'nın Selendi İlcesindeki Olaylarla İlgili Dava', *Haberler.com*, 10 May 2016, <http://www.haberler.com/manisa-nin-selendi-ilcesindeki-olaylarla-iligili-8426621-haberi/>.

Court has convicted perpetrators of hate crimes under Article 216 of the Turkish Penal Code, which had so far been used to protect individuals engaged in hate speech or acts against minorities rather than victims who had been subject to such crimes.

UK

United Kingdom

CASE LAW

The Court of Appeal rules on Tribunal Fees challenge

This is the latest in a series of decisions arising from challenges brought by Unison (a trade union) to the tribunal fees that were imposed in 2013. In 2013, Unison sought to challenge a Fees Order made pursuant to the Tribunals, Courts and Enforcement Act 2007, Sections 42(1) and 43(3), which required fees to be paid in respect of claims and appeals brought by employment tribunals and the Employment Appeal Tribunal. The Fees Order allowed the remission of fees dependent on the disposable capital and income of the claimant/appellant and contained a discretionary provision for dispensing with fees in exceptional circumstances. This claim had failed but Unison had been granted permission to appeal. Prior to the appeal being heard the appeal was stayed while Unison launched a second application for judicial review of the same Order (after evidence became available as to its impact on the number of cases brought). The second application for judicial review failed and relates to the union's appeal on both decisions below.

The Court of Appeal rejected the appeals brought by the trade union Unison against the rejection of its challenges to the imposition of tribunal fees in 2013.¹¹⁰ The Court of Appeal agreed with the lower courts that the imposition of fees, although they had reduced the number of discrimination cases by around 80 %, did not breach the principle of effectiveness and did not amount to unlawful discrimination.

Permission has been granted for Unison to appeal to the Supreme Court.

Internet source:

<http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/2015/935.html&query=unison&method=boolean>

Last accessed 24 June 2016.

Narrowing indirect discrimination

The case was brought by civil servants who had failed a generic 'Core Skills Assessment' ('CSA') test which all civil servants were required to pass in order to be eligible for promotion. The CSA bore no correlation to the post for which a candidate intended to apply, in respect of which a candidate who had passed the CSA would have to pass a second, job-specific test. The evidence was that the success rate of Black and Minority Ethnic (BME) candidates was lower than that of white candidates (40.3 %) and that the success rate of candidates aged 35 or over was lower than that of younger candidates (37.4 %).

The Court of Appeal ruled that it was insufficient for the claimants to establish a statistical disparity in success rates in order to bring a *prima facie* claim of age and race discrimination. Rather, they would have to point to the reason why the CSA had disadvantaged them as BME and older candidates.

110 *R (Unison) v The Lord Chancellor* [2015] EWCA Civ 935, decision of 28 August 2015.

The Court reached this conclusion because it found that it was impossible to prove that a provision, criteria or practice put a group at a particular disadvantage, and also put a claimant at that disadvantage (this being the language of s. 19 Equality Act 2010) without establishing the reason why the provision, criteria or practice was said to put the group (and the individual) at the disadvantage. However logical this might be, it is likely to impose significant hurdles for indirect discrimination claimants.

Internet source:

<http://www.bailii.org/ew/cases/EWCA/Civ/2015/609.html>

Last accessed 18 May 2016.

Caste discrimination in employment and linkages with racial or ethnic origin

The claimant was a domestic servant who complained, *inter alia*, that she had been discriminated against because of her race, religion and caste (she was of the 'Adavasi' or servant caste) by her employers who had subjected her to harassment, failed to pay her the national minimum wage and unfairly dismissed her.¹¹¹ It was unclear whether the Equality Act 2010, which prohibits discrimination *inter alia* because of national or ethnic origins, colour or nationality, prohibited such discrimination. The Act was amended in 2013 to require the prohibition of caste discrimination by regulation but those regulations are still awaited. The employer had initially sought to have the case dismissed on the basis that caste discrimination did not fall within the Equality Act.

Racial or
ethnic origin

In December 2015 the Employment Appeal Tribunal (EAT) confirmed that, although caste discrimination was not yet regulated as such by the Act, many aspects of 'caste' might fall within it, particularly because 'ethnic origins' has a wide and flexible ambit and included characteristics determined by 'descent'. It was agreed by the parties at the EAT that the matters upon which the claimant relied might fall within 'ethnic origin,' and the case was returned to an employment tribunal for determination.

The tribunal found that the claimant had been subject to discrimination because of religion and race, as well as being denied payment by the respondents, and she was awarded over GBP 180 000 (approx. EUR 250 000) by the Tribunal in unpaid wages. The tribunal adjourned its decision on damages in respect of race and religious discrimination to be determined at a later date.

The Tribunal accepted that the Claimant had been subjected to indirect religious discrimination (she was not permitted to bring her bible from India where the respondents had recruited her, because it was 'too heavy,' and was not allowed to attend Church). It also ruled that she had been paid radically less than the statutory minimum and had been denied the holidays and other rest periods to which she was lawfully entitled. She had worked at least 18 hours a day, 7 days a week and had often been denied a bed to sleep in. Her passport had been removed from her and she did not have access to the bank account into which her employers purported to pay her wages. She was not permitted to leave the house in which she worked except with the children for whom she was responsible.

The Tribunal accepted that the Claimant had been treated in the manner in which she was treated by the respondents in part because of her caste position: they had recruited her 'not because of her skills but because she was by birth, by virtue of her inherited position in society, and by virtue of her upbringing – i.e. because of her ethnic origins – a person whose expectations in life were no higher than to be a domestic servant ... The treatment afforded to the Claimant ... was because she was a low caste, Indian national, who could not speak English and by upbringing and by her inherited position in Indian society expected and was expected by others to do no more than serve others...'

111 The employers, a married couple, were a Buddhist born in India to Afghan Hindu parents and a German national born to Afghan Hindu parents.

Thus, the EAT did not rule that caste was a form of race for the purposes of the Equality Act 2010, rather that aspects of caste overlapped with aspects of race and so the facts of a particular caste-related case may be caught within the Act. The Tribunal accepted that the ill-treatment to which she had been subjected amounted to harassment on grounds of race without specifically addressing the relationship between caste and race. The Tribunal also found that the religious discrimination to which the Claimant was subjected was indirect; the Respondents had not permitted her to practice her religion because they wanted to keep her isolated from the outside world so that she would not recognise the unacceptability of her working conditions.

Internet sources:

http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKEAT/2014/0190_14_1912.html&query=tirkey&method=boolean

<https://drive.google.com/file/d/0Bw20oNMQGJI2bEl3YmRYcHFUbWc/view?pli=1>

Both last accessed 18 May 2016.

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