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Non-discrimination

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Country report

Non-discrimination

Estonia

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EXECUTIVE SUMMARY

1. Introduction

Estonia is a heterogeneous society. According to the 2011 national census, there were representatives of more than 150 ethnic groups residing in Estonia, including the two biggest groups: Estonians (70 %) and Russians (25 %). According to data from the Population Registry, in early 2015, 15 % of the population were non-citizens: 6 % were de facto stateless former Soviet citizens ('persons with undefined citizenship') and 9 % were foreign nationals.

2. Main legislation

According to the Estonian Constitution¹, the norms stipulated by international treaties that have been ratified have priority over domestic legislation. Estonia has signed and ratified the vast majority of international instruments aimed at combatting discrimination.

Article 12 of the Estonian Constitution establishes the explicit prohibition of discrimination on any ground. A flexible and comprehensive mechanism for protection against discrimination may be based on this provision, which is directly applicable against both natural persons and public and private legal persons.

In addition to generally worded anti-discrimination provisions in the Constitution and some other laws, the structure of Estonian anti-discrimination law is now shaped by three basic acts:

- Gender Equality Act² (adopted 7 April 2004);
- Chancellor of Justice Act³ (relevant amendments adopted 11 February 2003);
- Equal Treatment Act⁴ (adopted 11 December 2008; entered into force 1 January 2009).

The two latter acts were specifically amended/adopted to transpose the requirements of the EU anti-discrimination Directives 2000/43 and 2000/78.

The Gender Equality Act covers all spheres of public life and prohibits discrimination on the basis of sex. This act might be useful in the context of multiple discrimination.

The Equal Treatment Act is designed to ensure the protection of persons against discrimination on the grounds of ethnic origin, race, colour, religion or other beliefs, age, disability or sexual orientation (a scope of its application is identical with that in Directives 2000/43 and 2000/78 for the respective grounds). The act introduced a new equality body: the Commissioner for Gender Equality and Equal Treatment.

The Chancellor of Justice is an institution similar to an ombudsman, which can deal with cases of discrimination on any grounds by public bodies and institutions. In January 2004 the Chancellor of Justice's Office became a quasi-judicial institution for disputes regarding discrimination by natural persons and legal persons in private law on the grounds of sex, race, ethnic origin, colour, language, origin, religious, political or other belief, property or social status, age, disability, sexual orientation or other grounds of discrimination provided for in the law (known as conciliation procedure).

¹ Estonia, Constitution of the Republic of Estonia (*Eesti Vabariigi põhiseadus*), Riigi Teataja 1992, 26, 349. Riigi Teataja (hereinafter RT) – Official State Gazette.

² Estonia, Gender Equality Act (*Soolise võrdõiguslikkuse seadus*), RT I 2004, 27, 181.

³ Estonia, Chancellor of Justice Act (*Õiguskantsleri seadus*), RT I 1999, 29, 406.

⁴ Estonia, Equal Treatment Act (*Võrdse kohtlemise seadus*), RT I 2008, 56, 315.

Under the criminal provisions of the Penal Code,⁵ the most severe violation of the principle of equal treatment constitutes a crime, e.g. Article 152 (violation of equality), Article 153 (discrimination based on genetic characteristics of the person) and Article 151 (public incitement to hatred, violence or discrimination on the basis of ethnic origin, race, colour, sex, language, origin, religion, sexual orientation, political opinion, financial or social status).

3. Main principles and definitions

The general principles of equality and non-discrimination in Estonian law can be found in the Constitution (primarily Article 12). The Equal Treatment Act includes detailed definitions of direct and indirect discrimination, and harassment.

In the Equal Treatment Act, provisions regarding victimisation, instruction to discriminate, genuine occupational requirements, reasonable accommodation of the disabled, burden of proof, positive action measures, and exceptions for associations and other public or private organisations the ethos of which is based on religion or belief are almost identical with those in the directives.

The Equal Treatment Act does not prejudice preferences to be granted on the following grounds: representation of the interests of employees or membership of an association representing the interests of employees (if appropriate); pregnancy; confinement; giving care to minors or adult children who are incapacitated for work; and giving care to parents who are incapacitated for work.

According to the Employment Contracts Act, an employer can terminate an employment contract, inter alia, for reasons of an employee's long-term incapacity for work. Similar provisions are applicable to public officials. However, in 2014 the Tartu Administrative Court confirmed⁶ that release from service of an ordinary public official on the ground of redundancy cannot be based on age criteria as that would be a breach of the principle of equal treatment (discriminatory redundancy).

There are no rules and plans for adoption of such rules or case law dealing with situations of multiple discrimination or discrimination by association or by assumption in Estonia.

4. Material scope

Article 12 of the Constitution bans discrimination in all spheres of activities that are regulated and protected by the state.

The material scope of the Equal Treatment Act is identical with that of the directives for the following grounds: employment related areas for ethnic origin, race, colour, religion or other beliefs, age, disability or sexual orientation; social welfare, social security, healthcare, education, and access to and supply of goods and services including housing for ethnic origin, race and colour.

In the private sector, the Chancellor of Justice in the context of conciliation procedures does not recognise discrimination-related complaints that concern the following: the professing and practising of faith or working as a person conducting religious services in religious organisations, relations in family or private life and the exercise of the right of succession. In the public sector, the Chancellor, acting as an ombudsman may deal with any questions if it is appropriate to do so.

⁵ Estonia, Penal Code (*Karistusseadustik*), RT I 2001, 61, 364, RT I 2002, 86, 504.

⁶ Estonia, Tartu Administrative Court, Judgement of 10 October 2014 in administrative case no. 3-14-164, *XXX vs. Social Insurance Board*.

The scope of activities of the Commissioner for Gender Equality and Equal Treatment is limited to the scope of application of the Equal Treatment Act and the Gender Equality Act.

5. Enforcing the law

In Estonia the following procedures exist for enforcing the principle of equal treatment:

- Judicial procedures

A victim of discrimination can use *criminal* procedures (if s/he suffered from crimes/misdemeanours), *administrative court* procedures (e.g. complaints against the action of an official or state/municipal institution, including conflicts between a public officials and his or her employer) or *civil court* procedures (e.g. labour disputes in the private sector and the issue of non-pecuniary damage).

Discrimination-related cases are solved on the basis of general rules and standards. The only exception is the application of provisions regarding a shift in the burden of proof as defined by the Equal Treatment Act, which is almost identical to that in the directives. These provisions are very rarely used in practice.

The Equal Treatment Act also entitles a victim of discrimination to demand an end to the discrimination and to compensation for the damage caused to him or her by the violation. Importantly, a victim may also demand that 'a reasonable amount of money' be paid as compensation for non-proprietary damage. Claims for compensation for damage expire within one year of the date when the victim becomes aware or should have become aware of the damage caused. There are no specific provisions, however, to guarantee that sanctions applicable to infringements of the national anti-discrimination provisions are effective, proportionate and dissuasive.

- Non-judicial procedures

- Quasi-judicial procedures at labour disputes committees

The labour dispute committees are established within the local labour branches of the Labour Inspectorate. Their decisions must be based on law and must be substantiated.

- Conciliation at the Chancellor of Justice

Conciliation procedures may be conducted by the Chancellor of Justice (in relation to discrimination in the private sector). If the conciliation procedure fails, a victim may seek the protection of his or her rights in court.

- Ombudsman-like procedures

The Chancellor of Justice (in relation to the public sector) and the Commissioner for Gender Equality and Equal Treatment (in relation to both the public and private sectors, as falls within the Commissioner's competence) are entitled to conduct ombudsman-like procedures, the results of which are not legally binding.

- Challenge proceedings at administrative authorities

A person may file a challenge if his/her rights are violated or his/her freedoms are restricted by an administrative act or measure.

In labour disputes and in conciliation procedures, a person who has a legitimate interest in monitoring compliance with the requirements for equal treatment is guaranteed the legal

right to act as a representative of a victim of discrimination. No special rules were introduced in Estonia in any other judicial or quasi-judicial procedures.

The Equal Treatment Act permits positive action measures to prevent or compensate for disadvantages linked to ethnic origin, race, colour, religion or other beliefs, age, disability or sexual orientation. In Estonia, among the most important of such measures are tax benefits and special labour market services for unemployed disabled people.

The Commissioner for Gender Equality and Equal Treatment and the Office of the Chancellor of Justice promote dialogue with the third sector and social partners.

6. Equality bodies

The body responsible for the promotion of equal treatment is the Commissioner for Gender Equality and Equal Treatment, who, from January 2009 has a mandate to deal with grounds other than sex. Historically, this role was played by the Chancellor of Justice and this institution still has some obligations relating to the promotion of the principles of equality and non-discrimination in Estonia (the relevant mandate dates from January 2004).

The Commissioner for Gender Equality and Equal Treatment is an independent expert appointed for a five-year period by the Minister of Social Affairs. His or her activities, supported by the office, are funded by the state budget. The office of the Commissioner is governed under statute enacted by the Government of the Republic. The Commissioner deals with discrimination on the grounds of sex and the grounds applicable in the context of the Equal Treatment Act, i.e. ethnic origin, race, colour, religion or other beliefs, age, disability or sexual orientation.

The Chancellor of Justice is appointed to office by the parliament, on the proposal of the President of Estonia, for a term of seven years. In directing his or her office, the Chancellor has the same rights that are granted by law to a minister in directing a ministry. The Chancellor is independent in his or her decision-making and the office has a budget of its own. The Chancellor of Justice also has other responsibilities in addition to the fight against discrimination on any ground.

The Chancellor of Justice and the Commissioner are entitled to analyse the effect of the implementation of legislation on the condition of members of society and to make proposals to governmental bodies for amendments to legislation. Both institutions are obliged to promote equal treatment, to inform the official bodies about relevant principles and to enhance cooperation in the field. However, only the Commissioner has an explicit duty to advise and provide assistance to people pursuing their complaints about discrimination. The Commissioner was made also responsible for drafting specific reports dedicated to discrimination issues.

7. Key issues

In general, Estonian law and practice are in line with the directives.

There are only a few issues that should be addressed in the context of future revision of relevant laws.

Firstly, in addition to circumstances that relate to genuine and determining occupational requirements or positive action measures, the Equal Treatment Act permits direct discrimination on the grounds of race and ethnicity in order to ensure public order and security, to prevent criminal offences, and to protect the health and the rights and freedoms of others. Those provisions are not in line with the Racial Equality Directive. Secondly, there are no specific provisions regarding the right to act as a representative of a victim of discrimination in areas outside discrimination disputes in private employment

or the conciliation procedure at the Chancellor of Justice. Relevant regulation can be enhanced to meet better the requirements of the directives.

Thirdly, there are no detailed provisions to guarantee that sanctions applicable to infringements of the national anti-discrimination provisions are effective, proportionate and dissuasive.

RÉSUMÉ

1. Introduction

L'Estonie est une société hétérogène. Le recensement national de 2011 montre en effet que des membres de plus de 150 groupes ethniques y résident – les deux groupes principaux étant formés des Estoniens (70 %) et des Russes (25 %). Selon les données tirées début 2015 du registre de la population, celle-ci comprenait 15 % de ressortissants non estoniens: 6 % d'apatrides de fait (à savoir d'anciens citoyens soviétiques dits «personnes sans citoyenneté définie») et 9 % de ressortissants étrangers.

2. Législation principale

En vertu de la Constitution estonienne,⁷ les normes stipulées par les traités internationaux ratifiés par le pays prévalent sur la législation nationale. L'Estonie a signé et ratifié la grande majorité des instruments internationaux destinés à lutter contre la discrimination.

L'article 12 de la Constitution estonienne interdit expressément la discrimination quel qu'en soit le motif. Un mécanisme souple et complet de protection contre la discrimination peut se fonder sur cette disposition, laquelle est directement applicable tant aux personnes physiques qu'aux personnes morales publiques et privées.

Outre les dispositions antidiscrimination libellées en termes généraux dans la Constitution et quelques autres lois, trois lois fondamentales structurent aujourd'hui la législation estonienne en la matière:

- la loi sur l'égalité entre les hommes et les femmes⁸ (adoptée le 7 avril 2004);
- la loi sur le Chancelier de la justice⁹ (amendements pertinents adoptés le 11 février 2003); et
- la loi sur l'égalité de traitement¹⁰ (adoptée le 11 décembre 2008 et entrée en vigueur le 1^{er} janvier 2009).

Les deux dernières ont été spécifiquement modifiées/adoptées en vue de transposer les exigences des directives européennes antidiscrimination 2000/43 et 2000/78.

La loi sur l'égalité entre les hommes et les femmes couvre tous les domaines de la vie publique et interdit la discrimination fondée sur le sexe. Elle pourrait s'avérer utile dans le contexte de la discrimination multiple.

La loi sur l'égalité de traitement a vocation d'assurer la protection des personnes contre toute discrimination fondée sur l'origine ethnique, la race, la couleur de la peau, la religion ou autres convictions, l'âge, le handicap ou l'orientation sexuelle (son champ d'application est identique à celui spécifié dans les directives 2000/43 et 2000/78 pour les motifs concernés). La loi institue un nouvel organisme en matière d'égalité, à savoir le Commissaire à l'égalité hommes-femmes et à l'égalité de traitement.

Le Chancelier de la justice est une institution analogue à celle d'un médiateur. Il peut être saisi de faits de discrimination commis par des instances et institutions publiques, quel qu'en soit le motif. Le Bureau du Chancelier de la justice est devenu en janvier 2004 une institution juridictionnelle en charge des conflits liés à des faits de discrimination de la part de personnes physiques ou de personnes morales relevant du droit privé, en raison du sexe, de la race, de l'origine ethnique, de la couleur de la peau, de la langue, de l'origine,

⁷ Constitution de la République d'Estonie (*Eesti Vabariigi põhiseadus*), Journal officiel (*Riigi Teataja* ou RT) 1992, 26, 349.

⁸ Loi sur l'égalité entre les hommes et les femmes (*Soolise võrdõiguslikkuse seadus*), RT I 2004, 27, 181.

⁹ Loi sur le Chancelier de la justice (*Õiguskantsleri seadus*), RT I 1999, 29, 406.

¹⁰ Loi sur l'égalité de traitement (*Võrdse kohtlemise seadus*), RT I 2008, 56, 315.

des convictions religieuses, politiques ou autres, de la situation patrimoniale ou sociale, de l'âge, du handicap, de l'orientation sexuelle ou d'autres motifs de discrimination visés par la loi (procédure de conciliation).

Le non-respect particulièrement grave du principe de l'égalité de traitement constitue une infraction pénale en vertu de dispositions du code pénal¹¹ telles que son article 152 (non-respect de l'égalité), son article 153 (discrimination fondée sur les caractéristiques génétiques de la personne) et son article 151 (incitation publique à la haine, à la violence ou à la discrimination fondée sur l'origine ethnique, la race, la couleur de la peau, le sexe, la langue, l'origine, la religion, l'orientation sexuelle, les convictions politiques et la situation financière ou sociale).

3. Principes généraux et définitions

C'est la Constitution (et son article 12 essentiellement) qui consacre les principes généraux d'égalité et de non-discrimination en droit estonien. Les définitions détaillées de la discrimination directe et indirecte, ainsi que du harcèlement, sont énoncées dans la loi sur l'égalité de traitement.

Les dispositions de cette dernière concernant la rétorsion, l'injonction de discriminer, les exigences professionnelles essentielles, l'aménagement raisonnable à l'intention des personnes handicapées, la charge de la preuve, les mesures d'action positive, et les dérogations accordées aux associations et autres organisations publiques ou privées dont l'éthique se fonde sur la religion ou des convictions, sont pratiquement identiques à celles contenues dans les directives.

La loi sur l'égalité de traitement ne porte pas préjudice aux préférences accordées pour les raisons suivantes: représentation des intérêts des travailleurs ou appartenance à une association qui représente les intérêts des travailleurs (le cas échéant); grossesse; accouchement; prise en charge de mineurs ou d'enfants majeurs inaptes au travail; prise en charge de parents inaptes au travail.

La loi sur les contrats de travail permet à un employeur de résilier un contrat de travail en raison, entre autres, d'une incapacité de travail de longue durée du salarié. Des dispositions analogues s'appliquent aux fonctionnaires. En 2014 cependant, le tribunal administratif de Tartu a confirmé¹² que la mise en congé d'un fonctionnaire ordinaire pour cause économique ne peut se fonder sur le critère de l'âge car il s'agirait d'une violation du principe de l'égalité de traitement (licenciement discriminatoire).

Il n'existe à ce jour en Estonie aucune règle ni projet d'adoption de règle, ni aucune jurisprudence, concernant des cas de discrimination multiple ou de discrimination par association ou par présomption.

¹¹ Code pénal (*Karistusseadustik*), RT I 2001, 61, 364, RT I 2002, 86, 504.

¹² Tribunal administratif de Tartu, arrêt du 10 octobre 2014 dans l'affaire administrative n° 3-14-164, XXX c. *Direction des assurances sociales*.

4. Champ d'application matériel

L'article 12 de la Constitution interdit la discrimination dans tous les domaines d'activité réglementés et protégés par l'État.

Le champ d'application matériel de la loi sur l'égalité de traitement est identique à celui des directives en rapport avec les motifs suivants: domaines liés à l'emploi pour ce qui concerne l'origine ethnique, la race, la couleur de la peau, la religion ou autres convictions, l'âge, le handicap ou l'orientation sexuelle; et les domaines de l'aide sociale, de la sécurité sociale, des soins de santé, de l'éducation et de l'accès et de la fourniture de biens et de services, y compris le logement, pour ce qui concerne l'origine ethnique, la race et la couleur de la peau.

Dans le domaine privé, le Chancelier de la justice ne peut, dans le contexte de procédures de conciliation, être saisi de plaintes pour discrimination portant sur la profession ou la pratique de la foi ou sur le travail d'une personne célébrant des offices religieux dans le cadre d'organisations confessionnelles; sur les relations relevant de la vie privée ou familiale; et sur l'exercice du droit de succession. Dans le domaine public, le Chancelier peut, en sa qualité de médiateur, traiter de toute question pouvant relever de sa compétence.

Le champ d'activité du Commissaire à l'égalité hommes-femmes et à l'égalité de traitement se limite au champ d'application de la loi sur l'égalité entre les hommes et les femmes et de la loi sur l'égalité de traitement.

5. Mise en application de la loi

Les procédures suivantes sont en place en Estonie pour faire appliquer le principe de l'égalité de traitement:

- Procédures judiciaires

Une victime de discrimination peut engager des poursuites *pénales* (lorsqu'il s'agit d'un crime/délit), des poursuites devant un *tribunal administratif* (lorsqu'il s'agit par exemple d'une plainte contre un acte de la part d'un fonctionnaire ou d'une instance nationale/municipale, y compris un conflit entre un agent de la fonction publique et son employeur) ou des poursuites devant une *juridiction civile* (notamment s'il s'agit d'un conflit du travail dans le secteur privé et d'une question de réparation morale).

La résolution des affaires relevant d'une discrimination s'appuie sur les normes et règles générales – la seule exception étant l'application de dispositions relatives à un renversement de la charge de la preuve, dont la définition figurant dans la loi sur l'égalité de traitement est quasiment identique à celle énoncée dans les directives. Il est très rarement fait usage de ces dispositions dans la pratique.

La loi sur l'égalité de traitement autorise aussi une victime de discrimination à réclamer la cessation de ladite discrimination et une réparation pour le préjudice subi. Il est important de signaler qu'une victime peut également réclamer qu'une «somme d'argent raisonnable» lui soit versée pour préjudice non patrimonial. La demande de réparation doit être introduite dans un délai d'un an à compter de la date à laquelle la victime prend conscience ou aurait dû prendre conscience du préjudice subi. Aucune disposition spécifique ne garantit cependant le caractère effectif, proportionné et dissuasif des sanctions applicables au non-respect des dispositions antidiscrimination nationales.

– Procédures non judiciaires

- Procédures quasi-judiciaires auprès des commissions de règlement des conflits du travail

Des commissions de règlement des conflits du travail sont instituées au sein des branches locales de l'Inspection du travail. Leurs décisions doivent se fonder sur la loi et être dûment motivées.

- Conciliation devant le Chancelier de la justice

Des procédures de conciliation peuvent être menées par le Chancelier de la justice (en rapport avec des faits de discrimination dans le secteur privé). En cas d'échec de la procédure de conciliation, une victime peut engager une action en justice pour faire protéger ses droits.

- Procédures de type «Médiateur»

Le Chancelier de la justice (en rapport avec le secteur public) et le Commissaire à l'égalité hommes-femmes et à l'égalité de traitement (en rapport à la fois avec le secteur public et le secteur privé dans les limites de ses compétences) sont habilités à mener des procédures de type «Médiateur» dont l'issue n'est pas juridiquement contraignante.

- Procédures de contestation auprès d'autorités administratives

Une personne peut déposer une contestation lorsqu'un acte administratif ou une mesure administrative ne respecte pas ses droits ou restreint ses libertés.

Dans le cadre de conflits du travail et de procédures de conciliation, la loi accorde à toute personne ayant un intérêt légitime au contrôle du respect des exigences en matière d'égalité de traitement le droit d'agir en qualité de représentant d'une victime de discrimination. L'Estonie n'a introduit aucune règle particulière de ce type en ce qui concerne les autres procédures judiciaires ou quasi-judiciaires.

La loi sur l'égalité de traitement autorise les mesures d'action positive destinées à prévenir ou à compenser des désavantages liés à l'origine ethnique, à la race, à la couleur de la peau, à la religion ou autres convictions, à l'âge, au handicap ou à l'orientation sexuelle. Parmi les mesures les plus importantes adoptées par l'Estonie à cet égard figurent des avantages fiscaux et des services spéciaux sur le marché du travail à l'intention des personnes handicapées sans emploi.

Le Commissaire à l'égalité hommes-femmes et à l'égalité de traitement et le Bureau du Chancelier de la justice promeuvent le dialogue avec le tiers secteur et les partenaires sociaux.

6. Organismes de promotion de l'égalité de traitement

L'organisme en charge de la promotion de l'égalité de traitement est le Commissaire à l'égalité hommes-femmes et à l'égalité de traitement, mandaté depuis janvier 2009 pour être saisi pour d'autres motifs que le sexe. Ce rôle était traditionnellement assuré par le Chancelier de la justice, lequel conserve certaines obligations en matière de promotion des principes d'égalité et de non-discrimination en Estonie (le mandat pertinent date de janvier 2004).

Le Commissaire à l'égalité hommes-femmes et à l'égalité de traitement est un(e) expert(e) indépendant(e) nommé(e) pour cinq ans par le ministre des Affaires sociales. Soutenues

par le Bureau, ses activités sont financées par le budget de l'État. Le statut régissant le Bureau du Commissaire est adopté par le gouvernement de la République. Le Commissaire traite des cas de discrimination fondée sur le sexe et sur les motifs visés par la loi sur l'égalité de traitement, à savoir l'origine ethnique, la race, la couleur de la peau, la religion ou autres convictions, l'âge, le handicap ou l'orientation sexuelle.

Le Chancelier de la justice est nommé pour un mandat de sept ans par le Parlement sur proposition du président d'Estonie. Le Chancelier jouit pour diriger son Bureau des mêmes droits que ceux conférés à un ministre pour diriger son ministère. Il/elle prend ses décisions en toute indépendance et son service est doté d'un budget propre. Le Chancelier de la justice a d'autres responsabilités que la lutte contre la discrimination (tous motifs confondus).

Le Chancelier de la justice et le Commissaire sont habilités à procéder à l'analyse des effets de la mise en œuvre de la législation sur la situation des membres de la société, et à formuler des propositions d'amendements législatifs à l'intention des organes gouvernementaux. Les deux institutions sont tenues de promouvoir l'égalité de traitement, d'informer les organes officiels des principes y afférents et de renforcer la coopération dans ce domaine. Seul le Commissaire est cependant expressément tenu de conseiller et d'apporter son assistance aux personnes dans le cadre de poursuites pour discrimination. Il incombe également au Commissaire de rédiger des rapports spécifiquement consacrés à des questions de discrimination.

7. Points essentiels

La législation et la pratique estoniennes sont, de façon générale, conformes aux directives.

Seuls quelques points devraient être abordés dans le cadre d'une future révision des lois concernées.

Premièrement, outre les cas relevant d'exigences professionnelles essentielles et déterminantes ou de mesures d'action positive, la loi sur l'égalité de traitement autorise une discrimination directe fondée sur la race et l'origine ethnique dans le but d'assurer l'ordre public et la sécurité, de prévenir les délits, et de protéger la santé et les droits et libertés d'autrui. Ces dispositions ne sont pas conformes à la directive sur l'égalité raciale.

Deuxièmement, aucune disposition n'est spécifiquement prévue en ce qui concerne le droit d'agir en qualité de représentant d'une victime de discrimination en dehors de conflits du travail dans le secteur privé ou de procédures de conciliation menées par le Chancelier de la justice. La réglementation pertinente devrait être améliorée pour mieux répondre aux exigences des directives.

Troisièmement, aucune disposition précise ne garantit le caractère effectif, proportionné et dissuasif des sanctions en cas de non-respect des dispositions antidiscrimination nationales.

ZUSAMMENFASSUNG

1. Einleitung

Estland ist eine heterogene Gesellschaft. Laut der Volkszählung von 2011 leben in Estland über 150 ethnische Gruppen, die beiden größten sind Esten (70 %) und Russen (25 %). Nach Daten aus dem Melderegister besaßen Anfang 2015 15 % der Einwohner nicht die estnische Staatsbürgerschaft: 6 % waren staatenlose ehemalige Bürger der Sowjetunion („Personen mit unklarer Staatsbürgerschaft“) und 9 % waren ausländische Staatsbürger.

2. Wichtigste Gesetze

Gemäß der estnischen Verfassung¹³ haben die Bestimmungen internationaler Verträge, die von Estland ratifiziert wurden, Vorrang vor estnischem Recht. Estland hat die große Mehrzahl der internationalen Abkommen unterzeichnet und ratifiziert, mit denen Diskriminierung bekämpft wird.

Artikel 12 der estnischen Verfassung enthält ein ausdrückliches Verbot von Diskriminierung aus jedwedem Grund. Diese Bestimmung bietet die Grundlage für einen flexiblen und umfassenden Schutzmechanismus vor Diskriminierung, der direkt gegen natürliche Personen und öffentliche und private Rechtspersonen eingesetzt werden kann.

Neben den allgemein formulierten Nichtdiskriminierungsklauseln in der Verfassung und weiteren Gesetzen basiert das estnische Nichtdiskriminierungsrecht heute im Wesentlichen auf drei Gesetzen:

- Geschlechtergleichstellungsgesetz¹⁴ (verabschiedet am 7. April 2004),
- Gesetz über den/die Justizkanzler/in¹⁵ (relevante Änderungen verabschiedet am 11. Februar 2003),
- Gleichbehandlungsgesetz¹⁶ (verabschiedet am 11. Dezember 2008, in Kraft seit dem 1. Januar 2009).

Die beiden letztgenannten Gesetze wurden speziell überarbeitet bzw. verabschiedet, um die Anforderungen der Nichtdiskriminierungsrichtlinien 2000/43 und 2000/78 der EU umzusetzen.

Das Geschlechtergleichstellungsgesetz gilt für alle Bereiche des öffentlichen Lebens und verbietet Diskriminierung aufgrund des Geschlechts. Dieses Gesetz kann auch bei Mehrfachdiskriminierung angewendet werden.

Das Gleichbehandlungsgesetz gewährt Schutz vor Diskriminierung aufgrund von ethnischer Herkunft, Rasse, Hautfarbe, Religion oder Weltanschauung, Alter, Behinderung oder sexueller Ausrichtung (sein Anwendungsbereich entspricht den Anwendungsbereichen der Richtlinien 2000/43 und 2000/78 für die jeweiligen Diskriminierungsgründe). Mit dem Gesetz wurde eine neue Gleichbehandlungsstelle geschaffen: der/die Kommissar/in für Geschlechtergleichstellung und Gleichbehandlung.

Der/die Justizkanzler/in entspricht in seiner/ihrer Rolle einem/r Ombudsmann/-frau und behandelt Fälle von Diskriminierung aus jedwedem Grund durch staatliche Stellen und Institutionen. Seit Januar 2004 ist das Büro des/der Justizkanzlers/Justizkanzlerin eine außergerichtliche Institution, in der Fälle mutmaßlicher Diskriminierung durch natürliche

¹³ Estland, Verfassung der Republik Estland (*Eesti Vabariigi põhiseadus*), Riigi Teataja 1992, 26, 349. Riigi Teataja (im Folgenden RT) – Amtsblatt der Republik Estland.

¹⁴ Estland, Geschlechtergleichstellungsgesetz (*Soolise võrdõiguslikkuse seadus*), RT I 2004, 27, 181.

¹⁵ Estland, Gesetz über den/die Justizkanzler/in (*Õiguskantsleri seadus*), RT I 1999, 29, 406.

¹⁶ Estland, Gleichbehandlungsgesetz (*Võrdse kohtlemise seadus*), RT I 2008, 56, 315.

Personen und zivilrechtliche Rechtspersonen aufgrund von Geschlecht, Rasse, ethnischer Herkunft, Hautfarbe, Sprache, Herkunft, religiöser, politischer oder sonstiger Überzeugung, finanziellem oder sozialem Status, Alter, Behinderung, sexueller Ausrichtung und anderen im Gesetz genannten Diskriminierungsgründen verhandelt werden (in so genannten Schlichtungsverfahren).

Gemäß den strafrechtlichen Bestimmungen des Strafgesetzbuches¹⁷ stellen besonders schwere Verstöße gegen den Gleichbehandlungsgrundsatz eine Straftat dar, z. B. Artikel 152 (Verletzung der Gleichstellung), Artikel 153 (Diskriminierung aufgrund genetischer Eigenschaften einer Person) und Artikel 151 (öffentliche Anstiftung zu Hass, Gewalt oder Diskriminierung aufgrund von ethnischer Herkunft, Rasse, Hautfarbe, Geschlecht, Sprache, Herkunft, Religion, sexueller Ausrichtung, politischer Überzeugung und finanziellem oder sozialem Status).

3. Wichtige Grundsätze und Begriffe

Die allgemeinen Grundsätze der Gleichstellung und des Diskriminierungsverbots sind in der estnischen Verfassung verankert (hauptsächlich in Artikel 12). Im Gleichbehandlungsgesetz werden die Begriffe der unmittelbaren und mittelbaren Diskriminierung und der Belästigung ausführlich definiert.

Die Bestimmungen des Gleichbehandlungsgesetzes über Viktimisierung, Anweisung zur Diskriminierung, wesentliche berufliche Anforderungen, angemessene Vorkehrungen für Menschen mit Behinderungen, Beweislast, positive Maßnahmen und Ausnahmen für öffentliche oder private Organisationen, deren Ethos auf religiösen Grundsätzen oder Weltanschauungen beruht, sind mit denen der Richtlinien beinahe identisch.

Das Gleichbehandlungsgesetz schließt eine Vorzugsbehandlung aus den folgenden Gründen nicht aus: Vertretung von Arbeitnehmerinteressen oder (gegebenenfalls) Mitgliedschaft in einer Organisation, die Arbeitnehmerinteressen vertritt, Schwangerschaft, Haft, Betreuung von minderjährigen oder von nicht erwerbsfähigen erwachsenen Kindern und Betreuung nicht erwerbsfähiger Eltern.

Gemäß dem Arbeitsvertragsgesetz können Arbeitgeber einen Arbeitsvertrag unter anderem dann kündigen, wenn ein Arbeitnehmer langfristig arbeitsunfähig ist. Ähnliche Bestimmungen gelten für Beamte. 2014 bestätigte jedoch das Verwaltungsgericht Tartu¹⁸, dass eine Kündigung von Beamten bei einem allgemeinen Personalabbau nicht aufgrund des Alters erfolgen darf, weil dies gegen das Gleichbehandlungsgebot verstößt (diskriminierender Personalabbau).

In Estland gibt es keine Rechtssprechung zu Fällen von Mehrfachdiskriminierung oder von Diskriminierung durch Assoziierung oder Vermutung und auch keine gesetzlichen Regelungen oder Pläne zur Einführung entsprechender Regelungen.

¹⁷ Estland, Strafgesetzbuch (*Karistusseadustik*), RT I 2001, 61, 364, RT I 2002, 86, 504.

¹⁸ Estland, Verwaltungsgericht Tartu, Urteil vom 10. Oktober 2014 in der Verwaltungssache Nr. 3-14-164, XXX gegen *Landesversicherungsamt*.

4. Sachlicher Anwendungsbereich

Artikel 12 der estnischen Verfassung verbietet Diskriminierung in allen Bereichen, die vom Staat reguliert und geschützt werden.

Der sachliche Anwendungsbereich des Gleichbehandlungsgesetzes entspricht bei den folgenden Gründen und sozialen Bereichen dem Anwendungsbereich der Richtlinien: im Arbeitsleben aufgrund von ethnischer Herkunft, Rasse, Hautfarbe, Religion oder Weltanschauung, Alter, Behinderung oder sexueller Ausrichtung, bei Sozialfürsorge, sozialer Sicherheit, Gesundheitswesen, Bildung und beim Zugang zu Gütern und Dienstleistungen einschließlich Wohnraum aufgrund von ethnischer Herkunft, Rasse und Hautfarbe.

Im privaten Sektor behandelt der/die Justizkanzler/in keine Fälle mutmaßlicher Diskriminierung in den folgenden Bereichen: Bekenntnis zu oder Ausübung einer Religion, Ausführung religiöser Handlungen in religiösen Organisationen, familiäre oder private Beziehungen und Ausübung des Erbrechts. Im öffentlichen Sektor kann der/die Kanzler/in als Ombudsmann/-frau jeden Fall behandeln, der in seinen/ihren Zuständigkeitsbereich fällt.

Der/die Kommissar/in für Geschlechtergleichstellung und Gleichbehandlung ist ausschließlich für die Durchsetzung des Gleichbehandlungsgesetzes und des Geschlechtergleichstellungsgesetzes zuständig.

5. Rechtsdurchsetzung

In Estland gibt es die folgenden Verfahren zur Durchsetzung des Gleichbehandlungsgrundsatzes:

- Gerichtliche Verfahren

Opfer von Diskriminierung können *strafrechtliche* Verfahren anstrengen (wenn sie Opfer einer Straftat bzw. eines Delikts geworden sind), sie können vor einem *Verwaltungsgericht* klagen (z. B. bei Klagen gegen die Handlung eines Beamten oder einer staatlichen oder kommunalen Behörde sowie bei Konflikten zwischen öffentlichen Arbeitgebern und ihren Angestellten) oder sie können eine *Zivilklage führen* (z. B. bei Arbeitsstreitigkeiten in der Privatwirtschaft und bei Schmerzensgeldansprüchen).

Bei Diskriminierungsfällen gelten die normalen Regeln und Verfahrensnormen. Die einzige Abweichung ist eine Umkehrung der Beweislast, die im Gleichbehandlungsgesetz festgelegt ist und fast wortgleich der Bestimmung der Richtlinien entspricht. Diese Bestimmungen werden in der Praxis nur selten angewendet.

Nach dem Gleichbehandlungsgesetz können Opfer von Diskriminierung außerdem ein Ende der Diskriminierung und eine Entschädigung für die durch die Diskriminierung entstandenen Schäden verlangen. Besonders wichtig ist hierbei, dass die Opfer auch eine „angemessene Summe“ als Ausgleich für immaterielle Schäden fordern können. Schadensersatzansprüche verjähren ein Jahr, nachdem das Opfer die entstandenen Schäden festgestellt hat oder hätte feststellen müssen. Es gibt jedoch keine speziellen Bestimmungen, die gewährleisten, dass die Sanktionen bei Verstößen gegen das estnische Diskriminierungsverbot wirksam, verhältnismäßig und abschreckend sind.

- Außergerichtliche Verfahren

- Schiedsverfahren vor Ausschüssen für Arbeitsstreitigkeiten

Die Ausschüsse für Arbeitsstreitigkeiten sind in den örtlichen Sektionen der estnischen Arbeitsaufsichtsbehörde angesiedelt. Ihre Entscheidungen müssen auf Gesetzen beruhen und gut fundiert sein.

- Schlichtungsverfahren des Justizkanzlers/der Justizkanzlerin

Der/die Justizkanzler/in kann Schlichtungsverfahren durchführen (in Fällen von Diskriminierung in der Privatwirtschaft). Führt die Schlichtung zu keiner Einigung, kann das Opfer seine Rechte durch eine Klage vor Gericht durchsetzen.

- Ombudsmann-ähnliche Verfahren

Der/die Justizkanzler/in (im öffentlichen Sektor) und der/die Kommissar/in für Geschlechtergleichstellung und Gleichbehandlung (im öffentlichen und privaten Sektor, sofern der Fall in die Zuständigkeit des/der Kommissars/Kommissarin fällt) sind berechtigt, ombudsmann-ähnliche Verfahren durchzuführen, deren Ergebnisse rechtlich nicht bindend sind.

- Beschwerdeverfahren gegen behördliche Entscheidungen

Jede/r kann ein Beschwerdeverfahren anstrengen, wenn eine behördliche Handlung oder Entscheidung ihre/seine Rechte verletzt oder ihre/seine Freiheit eingeschränkt hat.

Bei Arbeitsstreitigkeiten und in Schlichtungsverfahren haben Personen, die ein rechtmäßiges Interesse daran haben, für die Einhaltung des Gleichbehandlungsgrundsatzes zu sorgen, das gesetzlich festgeschriebene Recht, Opfer von Diskriminierung zu vertreten. In Estland wurden keine anderen Sonderregelungen für gerichtliche oder außergerichtliche Verfahren eingeführt.

Das Gleichbehandlungsgesetz erlaubt positive Maßnahmen mit dem Zweck, Nachteile aufgrund von ethnischer Herkunft, Rasse, Hautfarbe, Religion oder Weltanschauung, Alter, Behinderung oder sexueller Ausrichtung zu verhindern oder auszugleichen. Die wichtigsten Maßnahmen dieser Art in Estland sind Steuervergünstigungen und spezielle Arbeitsmarktdienstleistungen für arbeitssuchende Menschen mit Behinderung.

Der/die Kommissar/in für Geschlechtergleichstellung und Gleichbehandlung und das Büro des/der Justizkanzlers/Justizkanzlerin fördern der Dialog mit dem dritten Sektor und den Sozialpartnern.

6. Gleichbehandlungsstellen

Für die Durchsetzung des Gleichbehandlungsgrundsatzes wurde die Stelle des/der Kommissars/Kommissarin für Geschlechtergleichstellung und Gleichbehandlung eingerichtet, der seit Januar 2009 nicht nur für Diskriminierung aufgrund des Geschlechts, sondern für alle Diskriminierungsgründe zuständig ist. Früher war dies die Aufgabe des/der Justizkanzlers/Justizkanzlerin, der/die immer noch dafür verantwortlich ist, den Grundsatz der Gleichbehandlung und Nicht-Diskriminierung in Estland zu fördern (das entsprechende Mandat wurde im Jahr 2004 erteilt).

Der/die Kommissar/in für Geschlechtergleichstellung und Gleichbehandlung ist ein/e unabhängige/r Experte/Expertin, der/die vom Minister für Soziales für fünf Jahre ernannt wird. Seine/ihre Tätigkeit wird aus dem Staatshaushalt finanziert und er/sie wird von einem Mitarbeiterstab unterstützt. Die Satzung, nach der das Büro des/der Kommissars/Kommissarin arbeitet, wurde von der Regierung der Republik erlassen. Der/die Kommissar/in behandelt Diskriminierung aufgrund des Geschlechts und der im Gleichbehandlungsgesetz genannten anderen Diskriminierungsgründe, d. h. ethnische

Herkunft, Rasse, Hautfarbe, Religion oder Weltanschauung, Alter, Behinderung und sexuelle Ausrichtung.

Der/die Justizkanzler/in wird vom estnischen Präsidenten vorgeschlagen und vom Parlament für eine Amtszeit von sieben Jahren ins Amt gewählt. Der/die Kanzler/in verfügt in seinem/ihrer Büro über dieselbe gesetzliche Weisungsbefugnis wie ein Minister bei der Leitung eines Ministeriums. Der/die Kanzler/in ist in seinen/ihren Entscheidungen völlig unabhängig und das Büro des/der Kanzlers/Kanzlerin hat einen eigenen Haushalt. Neben dem Kampf gegen Diskriminierung jeder Art hat das Justizkanzleramt noch weitere Aufgaben.

Justizkanzler/in und Kommissar/in sind berechtigt, die Auswirkungen von Rechtsakten auf die Bürger zu untersuchen und den Regierungsstellen Änderungsvorschläge zu unterbreiten. Beide Stellen sind verpflichtet, die Gleichbehandlung zu fördern, staatlichen Stellen Informationen über die entsprechenden Grundsätze bereitzustellen und die Kooperation in diesem Bereich zu verbessern. Allerdings ist nur der/die Kommissar/in ausdrücklich verpflichtet, Opfer von Diskriminierung bei der Durchsetzung ihrer Rechte zu beraten und zu unterstützen. Der/die Kommissar/in muss außerdem Berichte über den Stand der Diskriminierung im Land erstellen.

7. Wichtige Punkte

Im Allgemeinen entspricht die Rechtslage und Rechtspraxis in Estland den europäischen Richtlinien.

Bei künftigen Überarbeitungen der einschlägigen Gesetze sollten jedoch einige Punkte beachtet werden.

Erstens sieht das Gleichbehandlungsgesetz neben Umständen, die authentische und entscheidende berufliche Anforderungen betreffen, noch weitere Ausnahmen vom Verbot der unmittelbaren Diskriminierung aufgrund der Rasse und ethnischen Herkunft vor, nämlich die Aufrechterhaltung der öffentlichen Ordnung und Sicherheit, die Verhinderung von Straftaten und den Schutz der Gesundheit, Rechte und Freiheit Dritter. Diese Bestimmungen entsprechen nicht der Richtlinie zur Gleichbehandlung.

Zweitens gibt es außer bei Arbeitskonflikten in der Privatwirtschaft und bei Schiedsverfahren vor dem/der Justizkanzler/in keine speziellen Bestimmungen, die die Vertretung von Diskriminierungsopfern durch Dritte ermöglichen. Die einschlägigen Bestimmungen können noch besser an die Vorgaben der Richtlinien angepasst werden.

Drittens gibt es keine detaillierten Bestimmungen, die gewährleisten, dass die Sanktionen bei Verstößen gegen das estnische Diskriminierungsverbot wirksam, verhältnismäßig und abschreckend sind.

INTRODUCTION

The national legal system

The Estonian national legal system is typical for continental Europe. Historically it has been influenced by German (and to a lesser degree Russian and Scandinavian) legal traditions. The main sources of normative legal rules are provisions of the Constitution, laws and by-laws (secondary legislation). Case law (court decisions) cannot be regarded as a source of normative legal rules¹⁹ in the way legislation of general application can. However, the decisions of the Supreme (National) Court²⁰ do influence local legal practice to a considerable extent (they can be used as guidelines by the local legal community).

At the top of the Estonian legal system is the Constitution,²¹ which includes the most important legal provisions (including provisions regarding fundamental human rights and freedoms and general principles of non-discrimination). The next level consists of the laws adopted by the *Riigikogu* – the Parliament. According to Article 102 of the Constitution, all laws shall be adopted in accordance with the Constitution. The third level comprises other legal acts adopted by competent authorities on the basis of laws (e.g. decrees of the Government of the Republic). Additionally, there are normative acts of local self-government, which are valid in the respective territories: '[a]ll local issues shall be resolved and managed by local self-governments, which shall operate independently pursuant to law' (Article 154(1)).

According to Article 123 of the Constitution, Estonia cannot enter into international treaties that are in conflict with its Constitution. Furthermore, '[i]f laws or other legislation of Estonia are in conflict with international treaties ratified by the Parliament, the provisions of the international treaty shall apply'. Additionally, at a referendum held on 14 September 2003, the people of Estonia amended the Constitution with the following provision:²² 'As of Estonia's accession to the European Union, the Constitution of the Republic of Estonia applies taking account of the rights and obligations arising from the Accession Treaty'. Furthermore, 'generally recognised principles and rules of international law are an inseparable part of the Estonian legal system' (Article 3(1)). Estonia has signed and ratified the vast majority of international instruments aimed at combating discrimination (see Annex 2 to this report).

In Estonia justice is administered by the courts solely in accordance with the Constitution and the law (Article 146 of the Constitution). The court will not apply any law or other legislation that is in conflict with the Constitution. The Supreme Court will declare invalid any law or other legislation that is in conflict with the provisions and spirit of the Constitution (Article 152).

A request to review the constitutionality of legislation of general application or international treaties may be filed with the Supreme Court by the President of the Republic, the Chancellor of Justice,²³ the Parliament or a local council. Additionally, a court may initiate proceedings by delivering its judgment or ruling to the Supreme Court (Article 4 of the Constitutional Review Court Procedure Act).²⁴

¹⁹ The exception to this is decisions of the Supreme Court in issues that are not regulated by other sources of criminal procedural law but which arise in the application of law – Article 2(4) of the Code of Criminal Procedure (Estonia, Code of Criminal Procedure (*Kriminaalmenetluse seadustik*), Riigi Teataja I 2003, 27, 166, RT I 2004, 65, 456). Riigi Teataja (hereinafter RT) – Official State Gazette. For texts of Estonian legal acts and English translation of most of them: <http://www.riigiteataja.ee>, accessed 22 April 2015.

²⁰ *Riigikohus*, the court of highest instance in Estonia.

²¹ Estonia, Constitution of the Republic of Estonia (*Eesti Vabariigi põhiseadus*), RT 1992, 26, 349

²² RT I 2003, 64, 429. Valid since 14 December 2003.

²³ *Õiguskantsler*.

²⁴ Estonia, Constitutional Review Court Procedure Act (*Põhiseaduslikkuse järelevalve kohtumenetluse seadus*), RT I 2002, 29, 174.

To sum up, provisions of the Constitution and international treaties (including those against discrimination) are directly applicable in Estonian courts and further legislation shall not violate these provisions. In the frame of certain procedures, laws and other legal acts that violate the Constitution may be proclaimed invalid by the Supreme Court.

List of main legislation transposing and implementing the directives

In addition to generally worded anti-discrimination provisions in the Constitution and other laws, the structure of Estonian anti-discrimination law is shaped by three basic acts:

- Gender Equality Act²⁵ (adopted 7 April 2004; entered into force 1 May 2004; latest amendments 16 June 2014). Grounds covered: sex; material scope: All spheres of public life (excluding professing and practising faith or working as a minister of religion in a registered religious association and relations in family or private life).
- Chancellor of Justice Act²⁶ (adopted 25 February 1999; entered into force on 1 June 1999; latest amendments on 9 December 2014; first relevant amendments adopted on 11 February 2003). Grounds covered (conciliation procedure): sex, race, ethnic origin, colour, language, origin, religious, political or other belief, property or social status, age, disability, sexual orientation or other ground of discrimination provided for in the law; material scope (conciliation procedure): private sector except for 1) the professing and practising of faith or working as a minister of religion in religious associations with registered articles of association; 2) relations in family or private life; 3) the exercising of the right of succession.
- Equal Treatment Act²⁷ (adopted on 11 December 2008; entered into force on 1 January 2009; latest amendments on 16 June 2014). Grounds covered: ethnic origin, race, colour, religion or other beliefs, age, disability or sexual orientation; material scope: identical with Directives 2000/43 and 2000/78 for respective grounds. The Equal Treatment Act has introduced a new equality body: the Commissioner for Gender Equality and Equal Treatment.

The two latter acts were specifically amended/adopted to transpose the requirements of the anti-discrimination Directives 2000/43 and 2000/78.

The Chancellor of Justice is an institution similar to an ombudsman, which can deal with cases of discrimination on any grounds by public bodies and institutions. In January 2004, the Chancellor of Justice's Office became a quasi-judicial institution for disputes regarding discrimination by natural persons and legal persons in private law on the grounds of sex, race, ethnic origin, colour, language, origin, religious, political or other belief, property or social status, age, disability, sexual orientation or other grounds of discrimination provided for in the law (conciliation procedure).

Furthermore, the Penal Code²⁸ bans activities which publicly incite people to hatred, violence or discrimination on the basis of ethnic origin, race, colour, sex, language, origin, religion,²⁹ sexual orientation, political opinion or financial or social status (Article 151). Article 152 of the Code penalises 'violation of equality', which is referred to as 'unlawful restriction of the rights of a human being or granting of unlawful preferences to a human being (*inimene*) on the basis of his or her ethnic origin, race, colour, sex, language, origin, religion, sexual orientation, political opinion or financial or social status.'

Additionally, Article 153 of the Code banned discrimination based on the genetic characteristics of the person, and Articles 154-155 provide for the protection of freedom

²⁵ Estonia, Gender Equality Act (*Soolise võrdõiguslikkuse seadus*), RT I 2004, 27, 181.

²⁶ Estonia, Chancellor of Justice Act (*Õiguskantsleri seadus*), RT I 1999, 29, 406.

²⁷ Estonia, Equal Treatment Act (*Võrdse kohtlemise seadus*), RT I 2008, 56, 315.

²⁸ Estonia, Penal Code (*Karistusseadustik*), RT I 2001, 61, 364, RT I 2002, 86, 504.

²⁹ In the Estonian context the term 'religion' (*usutunnistus*) would refer to any religious belief.

of religion. Emphasis should be placed on the fact that such grounds as age and disability are not referred to in Articles 151 and 152 of the Penal Code.

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

The Estonian constitution includes the following article dealing with non-discrimination:

'Article 12.

Everyone is equal before the law. No one shall be discriminated against on the basis of ethnic origin, race, colour, sex, language, origin, religion, political or other opinion, property or social status, or on other grounds.

The incitement of ethnic, racial, religious or political hatred, violence or discrimination shall, by law, be prohibited and punishable. The incitement of hatred, violence or discrimination between social strata shall, by law, also be prohibited and punishable.'

These provisions apply to all areas covered by the directives.

Their material scope is broader than those of the directives. In one of its judgments the Constitutional Review Chamber of the Supreme Court claimed that the general principle of equality is applicable to 'all spheres of life'.³⁰ An Estonian scholar who studied the application of this provision by the Supreme Court made the following summary:

'Article 12 of the Constitution does ban unequal treatment in all spheres of activities which are regulated and protected by the State. Legislative, executive and judicial powers should observe the principle of equal treatment. (...) The principle of equal treatment is valid for all laws regardless of their scope of application.'³¹

The constitutional anti-discrimination provisions are directly applicable.

The constitutional equality clauses can be enforced against private actors (as opposed to the state).

³⁰ Decision of the Constitutional Review Chamber of the Supreme Court of 6 March 2002; published in RT III 2002, 8, 74 (section 13).

³¹ Lõhmus, K. (2003) 'Võrdsusõiguse kontroll Riigikohtus ja Euroopa Inimõiguste Kohtus' (Control over Equality in the Supreme Court and in the European Court of Human Rights), *Juridica*, no.2, vol. 11, p. 109.

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination explicitly covered

The following grounds of discrimination are explicitly prohibited in national law:

2.1.1 Definition of the grounds of unlawful discrimination within the directives

The Equal Treatment Act (Article 5) stipulates a definition of 'disability', which includes:

'For the purposes of this act, disability is the loss of or an abnormality in an anatomical, physiological or mental structure or function of a person which has a substantial and long-term adverse effect on the performance of everyday activities.'

The Estonian definition seems to be in line with the concept of disability as worded in Joined Cases C-335/11 and C-337/11. However, in the European Court of Justice cases the approach to disability as a socially constructed phenomenon is much more articulated.

In the context of the disability definition there might be concerns since Estonian legislation makes a reference to the consequences of impairment in day-to-day activities, not in professional life. This is a trace of the initially inclusive approach of the lawmakers. The first version of the draft Equal Treatment Act (then bill No. 67) was to protect against disability discrimination in all areas of social life. Later the Parliament decided to limit the protection to professional life only. However, the wording of definition of 'a disability' remained unaltered and it was used for the draft No. 384, which was finally adopted. As a result, Estonian legislation defines disability in quite inclusive terms.

The explanatory note that was attached to the draft Equal Treatment Act included the following clarifications regarding the protected grounds:³²

- race (*rass*) – a group of people with certain hereditary features;
- ethnicity (*rahvus*) – ethnic origin; not to be mixed with *nationality/citizenship* ('*kodakondsus*');;
- religious, political and other beliefs (*usutunnistus, poliitilised või muud veendumused*) - religious beliefs refer to a religious 'world view'; political and other beliefs are all non-religious beliefs.

The explanatory note does not define the terms 'age' and 'sexual orientation'.

'Sexual orientation' has not been defined in the Gender Equality Act.

No specific definition of the grounds of unlawful discrimination can be found in case law.

2.1.2 Multiple discrimination

In Estonia prohibition of multiple discrimination is not included in the law. There are no plans to adopt or modify legal rules to this end.

In Estonia the following case law deals with multiple discrimination:

- Tallinn Circuit Court,³³ Decision of 23 January 2013 in civil case 2-12-32-921 (S.S. vs. *Transparency International*)

Late middle-aged S.S. was a person of Russian ethnic origin who applied for a position but failed to get through the initial round. The selected candidature was of a young person of

³² See explanatory note attached to the Draft no. 384 SE (11th *Riigikogu*); available at: <http://www.riigikogu.ee>.

³³ *Tallinna Ringkonnakohus*.

majority ethnic origin who had recently graduated from the university. S.S. claimed ethnic and/or age discrimination in this case arguing that he was in possession of better skills and experience for the position at stake. The Tallinn Circuit Court established that S.S. failed to meet all the main requirements for a vacancy position and therefore there were good reasons for a potential employer not to let him through the initial round and not to invite him for an interview. In this case the court did not reject the concept of multiple discrimination as such; however, it did not analyse the situation from this perspective using another chain of argumentation.

- Tallinn Circuit Court, Decision of 23 January 2014 in administrative case 3-13-510 (*L.J. vs. Tallinn Prison*)³⁴

L.J. was a prison public official of minority origin. He was released from service due to his unsuitability for the position as he did not have a document that is a mandatory requirement for employment in a particular position (Estonian language proficiency certificate for the level C1). He claimed to be a victim of discrimination on the grounds of ethnic origin and age. The second instance court did not find ethnic and age discrimination in this case: L.J. was not treated less favourably than all other public officials without C1 proficiency certificates; the treatment of all officials was similar regardless of their ethnic origin or age. In this case the court did not use the concept of multiple discrimination but analysed age and ethnic origin as two separate grounds.

2.1.3 Assumed and associated discrimination

a) Discrimination by assumption

In Estonia the Equal Treatment Act does not prohibit discrimination based on perception or assumption of what a person is.

No case law addresses this issue. However, it is quite probable that the court may decide that discrimination by assumption is covered by the definition of direct discrimination as provided in Article 1 (1) of the Equal Treatment Act (see below section 2.2).

b) Discrimination by association

In Estonia the Equal Treatment Act does not prohibit discrimination based on association with persons with particular characteristics.

No case law addresses this issue. However, it is quite probable that the court may decide that discrimination by association is covered by the definition of direct discrimination as provided in Article 1(1) of the Equal Treatment Act (see below section 2.2).

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

a) Prohibition and definition of direct discrimination

In Estonia direct discrimination is prohibited in national law. It is defined identically with the definition of the directives.

According to the Equal Treatment Act 'direct discrimination' shall be taken to occur where, on the basis of an attribute specified in Article 1(1) of this act (i.e. ethnic origin, race, colour, religion or other beliefs, age, disability or sexual orientation), one person is treated less favourably than another is, has been or would be treated in a comparable situation (Article 3(2)).

³⁴ See more details in section 12.2.

b) Justification of direct discrimination

According to the Equal Treatment Act (Article 9 (3)):

The following is not deemed to be discrimination in labour relations:

- 1) grant of preferences on grounds of representing the interests of employees or membership in an association representing the interests of employees if this is objectively and reasonably justified by a legitimate aim, and if the means of achieving that aim are appropriate and necessary;³⁵
- 2) grant of preferences on grounds of pregnancy, confinement, giving care to minors or adult children incapacitated for work and parents who are incapacitated for work.

The current Equal Treatment Act has also introduced provisions (Article 10) regarding occupational requirements, which are almost identical with that in Directives 2000/43 and 2000/78 (including rules established in the interests of organisations the ethos of which is based on religion or belief). These provisions are completely in line with the directives.

The Equal Treatment Act (and its provisions regarding genuine occupational requirement) is applicable in case of discrimination on the grounds of ethnic origin, race, colour, religion or other beliefs, age, disability or sexual orientation.

Importantly, the Equal Treatment Act has also established a general exception in Article 9(1):

This act shall be without prejudice to measures laid down by law which are necessary for the maintenance of public order, for public security, for the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others. These measures achieving the aim shall be proportionate to it.

This wording is seemingly based on two provisions:

- Article 2(5) of Directive 2000/78 (however, there are no references to 'a democratic society' but to the principle of proportionality).³⁶
- Article 11 of the Estonian Constitution ('Rights and freedoms may be restricted only in accordance with the Constitution. Such restrictions must be necessary in a democratic society and shall not distort the nature of the rights and freedoms restricted').

In general, the exception provided in Article 9(1) of the Equal Treatment Act cannot be regarded as being in line with Directive 2000/43, which provides more advanced protection against ethnic or racial discrimination.

Difference in treatment on the basis of ethnic or racial origin in the form of *direct* discrimination is justified in case of genuine and determining occupational requirement (Article 4 (1) of Directive 2000/43 and Article 10 of the Equal Treatment Act). Differential treatment in the framework of the positive action measures is another possibility (Article 5 of the directive). No other exceptions are possible. It is not clear how this provision will be treated by courts given that there is no relevant case law so far.

³⁵ In practical terms this provision was designed to protect the specific status of trade union members and trade union activists/officials in employment relations.

³⁶ Initial version of the draft law (bill. 67) did not permit these measures in the context of ethnic and racial discrimination. As stated in the explanatory note, this approach was based on understanding of the directives. This initial version, however, was amended by the parliament without any public debates. This amended version was used for the drafts nos. 262 and 384 (the latter was adopted in December 2008).

Article 9(1) of the Equal Treatment Act does not contradict Directive 2000/78 in the context of discrimination on the grounds of religion or belief, disability, age or sexual orientation. Article 9(1) is based on the exception provided in Article 2(5) of the directive.

2.2.1 Situation testing

a) Legal framework

In Estonia situation testing is not clearly permitted in national law.

The national law does not specifically address the use of 'situational testing'. There is no case law on this matter either.

The Code of Civil Procedure³⁷ provides for the following concept of evidence (Article 229):

'(1) Evidence in a civil matter is any information which is in a procedural form provided by law and on the basis of which the court, pursuant to the procedure provided by law, ascertains the existence or lack of facts on which the claims and objections of the parties and other participants in the proceedings are based and other facts relevant to the just adjudication of the matter.

(2) Evidence may be the testimony of a witness, statements of participants in a proceeding given under oath, documentary evidence, physical evidence, inspection or an expert opinion (...).'

The formal interpretation of these provisions leads us to believe that situation testing could be recognised by Estonian courts.

b) Practice

In Estonia situation testing is not used in practice.

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

a) Prohibition and definition of indirect discrimination

In Estonia indirect discrimination is prohibited in national law. It is defined in Article 3(4) of the Equal Treatment Act; the definition is identical to the definition of indirect discrimination in the directives. Indirect discrimination is taken to occur where an apparently neutral provision, criterion or practice would put persons, on grounds of ethnic origin, race, colour, religion or other beliefs, age, disability or sexual orientation, at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

b) Justification test for indirect discrimination

As mentioned above, Article 3(4) of the Equal Treatment Act stipulates that indirect discrimination is taken to occur where an apparently neutral provision, criterion or practice would put persons, on grounds of ethnic origin, race, colour, religion or other beliefs, age, disability or sexual orientation, at a particular disadvantage compared with other persons unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. According to Article 9(1) of the Equal Treatment Act, the act does not prejudice measures laid down by law that are necessary for the maintenance of public order, for public security, for the prevention of

³⁷ Estonia, Code of Civil Procedure (*Tsiviilkohtumenetluse seadustik*), RT I 2005, 26, 197; 2005, 49, 395.

criminal offences, for the protection of health and for the protection of the rights and freedoms of others. Such measures shall be proportionate to achieving their aims.

The relevant provisions of the Equal Treatment Act are in line with the directives.

Some concerns may be raised in the context of official Estonian language proficiency requirements. In Estonia, language proficiency requirements may be officially established in both public and private sectors of employment (Article 23 of the Language Act).³⁸ In general, they are interpreted in Estonia as officially established occupational requirements.

As language (language proficiency) discrimination may constitute indirect discrimination on the grounds of racial or ethnic origin, it is appropriate to check whether officially established linguistic requirements can be objectively justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary (Article 2(2) of Directive 2000/43).

In general the Language Act established the standards to ensure that official linguistic requirements are justified and proportionate.

As regards the sphere of private employment,

'The requirement for employees of companies, non-profit associations and foundations and for sole proprietors, as well as the members of the board of the non-profit associations with the compulsory membership to be proficient in Estonian to the level that is necessary to perform their employment duties shall be applied if it is *justified in the public interest*'. (Article 23(2)) (italics added).

The Language Act does not include a justification of linguistic requirements for public officials. However, Estonian is the only official language (*riigikeel*) in Estonia and such requirements are presumably legitimate. The law also includes standards to ensure the principle of proportionality:

'Public servants and employees of state agencies and of local government authorities, as well as employees of legal persons in public law and agencies thereof, members of legal persons in public law, notaries, bailiffs, sworn translators and the employees of their bureaus shall be able to understand and use Estonian *at the level which is necessary to perform their service or employment duties*.' (Article 23(1)) (italics added).

Within the limits of its competence (as provided for in the Language Act, Article 23(4)) language requirements are stipulated by decrees of the Government of the Republic. Alternatively, employers are supposed to monitor the language proficiency of their employees if required to do so by valid legislation.³⁹

The European Commission against Racism and Intolerance (ECRI), a Council of Europe (CoE) body, has previously strongly recommended that the Estonian authorities further strengthen the Equal Treatment Act by prohibiting discrimination based on language and citizenship.⁴⁰

To sum up, official Estonian language proficiency requirements are permissible in the context of Directive 2000/43 if they meet the criteria established to justify indirect

³⁸ Estonia, Language Act (*Keeleseadus*), RT I, 18.03.2011, 1.

³⁹ The justification tests for linguistic requirements were developed in the context of heated debates in the 1990s and early 2000s. The general understanding in Estonia is that the state has more rights to interfere in the public sector than in the private one.

⁴⁰ CoE, European Commission against Racism and Intolerance (2010), Report on Estonia (4th monitoring cycle), adopted 15 December 2009, published 2 March 2010, ECRI (2010)3, Section 51.

discrimination on the grounds of racial or ethnic origin. Given the specific provisions of the Language Act, such requirements should meet the criteria of legitimacy and proportionality. If they fail to meet those criteria, they may be regarded as discriminatory (and courts are ready to use the legitimacy and proportionality test in individual cases). In general, however, in the context of linguistic regulations, Estonian courts often demonstrate a lack of awareness of the concepts of proportionality and indirect discrimination:

- Tallinn Circuit Court, Decision of 23 January 2014 in administrative case 3-13-510 (*L.J. vs. Tallinn Prison*)⁴¹

L.J. was a prison public official of minority origin. He was released from service due to his unsuitability for the position as he did not have a document that is a mandatory requirement for employment in a particular position (an Estonian language proficiency certificate for the level C1). He claimed to be a victim of discrimination on the grounds of ethnic origin and age.

According to Article 23(1), (4) of the Language Act, officials and employees of state agencies must be able to understand and use Estonian at the level that is necessary to perform their service or employment duties. The requirements for proficiency in and use of the Estonian language are established by a regulation of the Government of the Republic. Proficiency in the Estonian language is assessed by the Estonian language proficiency examinations (Article 24). Initially, for the position held by L.J. the Government established a requirement to possess an Estonian language proficiency certificate for the level B2. The applicant possessed an equivalent certificate. However, from February 2011 the requirement was raised to level C1. L.J. failed to pass the required exam in due time.

L.J. appealed against the decision to release him from service claiming it to be unsubstantiated and discriminatory. The court of first instance found that L.J. was doing his work pretty well and his work was repeatedly praised by his superiors. The decision to release him from service due to the lack of a single document was found to be unlawful. This decision was appealed by Tallinn Prison (the employer).

The appeal court emphasised that public institutions must follow official legal requirements. Therefore the release from service due to the lack of the language proficiency certificate was inevitable. The court did not find ethnic and age discrimination in this case: L.J. was not treated less favourably than all other public officials without C1 proficiency certificates regardless of their ethnic origin or age. This decision became final.

It is worth emphasising that the court did not analyse the proportionality of the linguistic requirements in this particular case in order to establish their (non-)discriminatory nature.⁴²

c) Comparison in relation to age discrimination

The Equal Treatment Act does not stipulate how a comparison is to be made in cases of age discrimination. Similar provisions cannot be either found in other valid or draft legislation.

2.3.1 Statistical evidence

a) Legal framework

⁴¹ See more details in section 12.2.

⁴² See further analysis of Estonian law and practice in: Kochenov, D., Poleshchuk, V., Dimitrovs, A. (2013) 'Do Professional Linguistic Requirements Discriminate? – A Legal Analysis: Estonia and Latvia in the Spotlight', *European Yearbook of Minority Issues*, vol. 10.

In Estonia there are national rules permitting data collection. These are set out in the Personal Data Protection Act.⁴³ Data on ethnic or racial origin, state of health and disability, religion or belief or sexual orientation are regarded as sensitive personal data by the Personal Data Protection Act (Article 4(2)), and quite rigid rules are stipulated for their processing.

The Employment Contracts Act (2009) provides that in pre-contractual negotiations or upon preparation of an employment contract in another manner, including in a job advertisement or job interview, an employer may not ask the person applying for employment for any data with regard to which the employer does not have any legitimate interest. The absence of the employer's legitimate interest is presumed first of all in the case of questions which disproportionately concern the private life of the person applying for employment or which are not related to their suitability for the job offered (Article 11 (1)-(2)).

Under such circumstances it is rather difficult for employees or clients to get any statistical evidence to prove cases of indirect discrimination. Furthermore, there is no information about attempts by any employers to collect data in order to design positive action measures. Without the appropriate administrative practice we may only *presume* that the fight against discrimination could be recognised as a legitimate purpose for personal data processing: in its 2008 communication, the Data Protection Inspectorate does not question the legitimacy of the intended collection of sensitive personal data by an NGO that would like to operate a hotline to deal with cases of discrimination covered by Directives 2000/43 and 2000/78.⁴⁴

Estonian law does not explicitly ban the use of statistical evidence in courts (Article 229 of the Code of Civil Procedure). The explanatory note to the draft Equal Treatment Act refers to statistical and sociological data in the context of indirect discrimination (although without providing any details or explanations).⁴⁵

b) Practice

In Estonia statistical evidence in order to establish indirect discrimination is not used in practice.

2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

In Estonia harassment is prohibited in national law. It is defined by the Equal Treatment Act.

In Estonia harassment does explicitly constitute a form of discrimination

According to the Equal Treatment Act, harassment is a form of direct discrimination when unwanted conduct related to ethnic origin, race, colour, religion or other beliefs, age, disability or sexual orientation takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment (Article 3(3)).

Most probably the court would not use the definition of direct discrimination (Article 3(2) of the Equal Treatment Act) in the context of harassment, as the definition provided in Article 3(3) would be interpreted as *lex specialis*.

⁴³ Estonia, Personal Data Protection Act (*Isikuandmete kaitse seadus*), RT I 2007, 24, 127.

⁴⁴ Data Protection Inspectorate; Written communication no. 2.1-5/08/214 of 3 April 2008.

⁴⁵ See explanatory note attached to the draft no. 384 SE (11th Riigikogu); available at: <http://www.riigikogu.ee>.

It is worth mentioning that Article 151 of the Penal Code penalises 'incitement of hatred', i.e. activities which publicly incite hatred, violence or discrimination on the basis of ethnic origin, race, colour, sex, language, origin, religion, sexual orientation, political opinion, or financial or social status if this results in danger to the life, health or property of a person.

b) Scope of liability for harassment

Where harassment is perpetrated by an employee, in Estonia the employer may be liable.

The Estonian Equal Treatment Act is silent about these issues. According to the Obligations Act, however,

'[i]f one person engages another person in the person's economic or professional activities on a regular basis, the person shall be liable for any damage unlawfully caused by the other person on the same basis as for damage caused by the person, if the causing of damage is related to the person's economic or professional activities.'

Additionally, if one person 'engages another person in the performance of the person's duties', the person shall be liable for any relevant damage unlawfully caused by the other person on the same basis as for damage caused by him or her. Similar rules are applicable if 'a person performs an act at the request of another person', if the latter has control over the behaviour of the person who causes the damage due to the relationship between him or her and the person who causes the damage (Article 1054). Furthermore, special provisions are introduced to deal with liability for damage caused by children and persons placed under curatorship (Article 1053).

Trade unions or other professional associations cannot be normally held liable for the actions of their members.

2.5 Instructions to discriminate (Article 2(4))

a) Prohibition of instructions to discriminate

In Estonia, instructions to discriminate are prohibited in national law. Instructions are defined.

In Estonia, instructions do explicitly constitute a form of discrimination.

According to the Equal Treatment Act, an instruction to discriminate against persons on grounds of ethnic origin, race, colour, religion or other beliefs, age, disability or sexual orientation is deemed to be discrimination (Article 3(5)).

Incitement to discrimination on the basis of ethnic origin, race, colour, sex, language, origin, religion, sexual orientation, political opinion, or financial or social status is also penalised by Article 151 of the Penal Code if 'this results in danger to the life, health or property of a person'.

b) Scope of liability for instructions to discriminate

In Estonia the instructor is liable, according to formal interpretation of Article 3 (5) of the Equal Treatment Act. The law provides no further details.

In the context of criminal offences, provisions regarding accomplices (abettors) may be used. 'An abettor is a person who intentionally induces another person to commit an intentional unlawful act' (Article 22(2) of the Penal Code). According to the general rules, 'a punishment shall be imposed on an accomplice pursuant to the same provision of law

which prescribes the liability of the principal offender'. These provisions can be applied in the context of Article 151 (incitement to hatred, violence or discrimination) and Article 152 (violation of equality) of the Penal Code.

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

- a) Implementation of the duty to provide reasonable accommodation in the field of employment

In Estonia the duty to provide reasonable accommodation is included in the law. It is defined.

Article 11 of the Equal Treatment Act defines reasonable accommodation as follows:

'(1) Grant of preferences to disabled persons, including measures aimed at creating facilities for safeguarding or promoting their integration into the working environment, shall not constitute discrimination.

(2) Employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer.

(3) Upon determining whether the burden on the employer is disproportionate as specified in subsection 2, the financial and other costs of the employer, the size of the agency or enterprise and the possibilities to obtain public funding and funding from other sources shall also be taken into account.'

No other details or explanations are available in the text of the law.

- b) Practice

There are good reasons to believe that reasonable accommodation is rarely applied in practice. In addition, no case law can be cited.

The Labour Market Services and Benefits Act⁴⁶ provides unemployed disabled people with special services, including adaptation of premises and equipment. This service might be granted on the basis of an administrative contract between the Unemployment Insurance Fund⁴⁷ and an employer, in which the state will compensate the employer for 50-100% of the reasonable expenses that are necessary for that adaptation (Article 20). Another service, namely 'providing free use of a technical appliance necessary for work', might be offered on the basis of an administrative contract between the Unemployment Insurance Fund and an employer or a disabled person (Article 21). Two other services are communication support at the interview with a potential employer and work with the assistance of a support person (Articles 22-23). According to Article 9(5) of the act, all of these services will only be granted to disabled persons if they are necessary to overcome the disability-related obstacle to his or her employment, and if other employment services (e.g. information on the situation in the labour market, employment mediation, vocational training, etc.) have been ineffective.

The provisions of this law might be of added value for a worker who has become partially incapacitated for work in the employer's enterprise as a result of an occupational accident or occupational disease. According to the Occupational Health and Safety Act⁴⁸ (Article 10¹ (3)), an employer is required to enable such a worker to continue work suitable for him or her in the enterprise, pursuant to the procedure provided in employment law.

⁴⁶ Estonia, Labour Market Services and Benefits Act (*Tööturuteenuste ja -toetuste seadus*), RT I 2005, 54, 430.

⁴⁷ *Eesti Töötukassa*.

⁴⁸ Estonia, Occupational Health and Safety Act (*Töötervishoiu ja tööohutuse seadus*), RT I 1999, 60, 616.

In late 2013, the Commissioner for Gender Equality and Equal Treatment (equality body) published a report, *Creation of Employment Opportunities for Disabled People in Ministries*, which included an overview of the results of a questionnaire study conducted in Estonian ministries as well as recommendations for employers in both public and private sectors. According to the results of the questionnaire study, Estonian ministries did not consider in an appropriate manner the interests of disabled persons under the duty in relation to the creation of working conditions. In 11 ministries there were only two disabled employees (probably meaning persons with visible disabilities). Many ministries were not accessible for people with physical impairment (or only the ground floor was accessible). However, there were also several patterns of positive practices. The Office of the Commissioner for Gender Equality and Equal Treatment has issued several recommendations (with relevant explanations) to employers in the public and private sectors. First, to draft action plans to recruit workers with disabilities. Secondly, to state clearly in recruitment notices that disabled persons may also apply. Thirdly, to ensure that people with disabilities have unimpeded access to and accessible paths inside a building. Fourthly, that the web pages of public authorities must be readable and understandable for disabled people. Fifthly, that the organisation of work must meet the specific needs of people with disabilities (including opportunities to work half-time). Sixthly, the principles of universal design should be promoted in working environments.⁴⁹

c) Definition of disability and non-discrimination protection

The definition of a disability for the purposes of claiming a reasonable accommodation is the same as for the protection from discrimination in general (Article 5 of the Equal Treatment Act).

d) Duties to provide reasonable accommodation outside the field of employment

In Estonia, there is no duty to provide reasonable accommodation for people with disabilities outside the employment field.

e) Failure to meet the duty of reasonable accommodation

In Estonia failure to meet the duty of reasonable accommodation does not count as discrimination.

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

In Estonia there is no duty to provide reasonable accommodation in respect of other grounds in the public and/or the private sector.

g) Accessibility of services, buildings and infrastructure

In Estonia national law requires buildings and infrastructure to be designed and built in a disability-accessible way. There are no relevant provisions regarding the accessibility of services.

According to Article 3(9) of the Building Act,⁵⁰

⁴⁹ Soolise võrdõiguslikkuse ja võrdse kohtlemise voliniku kantselei (2013) *Puuetega inimestele töötamise võimaluste loomine ministeeriumides* (Creation of Employment Opportunities for Disabled People in Ministries), Tallinn, 2013, available at: http://www.vordoiqusvolinik.ee/wp-content/uploads/2015/01/Puuetega-inimeste-toovoimalused-ministeeriumides_kusitus-ja-soovitused.pdf.

⁵⁰ Estonia, Building Act (*Ehitusseadus*), RT I 2002, 47, 297.

'[i]f required for the purpose of use of the construction works, the works, parts thereof which are for public use and the premises and sites thereof shall be accessible to and usable by persons with reduced mobility and by visually impaired and hearing impaired persons.'

The detailed requirements are established in the decree of 28 November 2002 by the Minister of Economic Affairs and Communications⁵¹ for both public places (including infrastructure) and public buildings (e.g. administrative buildings, hospitals, educational institutions etc.). According to Article 19 of the decree, the rules regarding the accessibility of buildings for disabled people are equally applicable to existing public buildings if they are renovated.

The Building Act does not relate to the transposition of the anti-discrimination directives.⁵² Violation of its norms would not be treated in Estonia as discrimination on the ground of disability.

The Traffic Act⁵³ stipulates specific norms to organise mobility for physically disabled people and parking for vehicles servicing such people. Tallinn bus terminal is the only terminal in Estonia where, in accordance with Regulation (EU) No. 181/2011 of the European Parliament and of the Council, assistance is provided to disabled persons and persons with reduced mobility.

In Estonia national law does not contain a general duty to provide accessibility by anticipation for people with disabilities.

h) Accessibility of public documents

Article 8(2) of the Language Act foresees the right of deaf and hearing impaired persons to communicate in Estonian sign language and signed Estonian in state agencies, including the foreign representation of Estonia, local government authorities, at the notaries, bailiffs and sworn translators and their bureaux, cultural autonomy bodies and other agencies, companies, non-profit associations and foundations. This right is ensured by providing translation services pursuant to the provisions provided by legislation. In practice, this rule is not properly observed. Deaf and hearing impaired persons may make use of social protection services, state legal aid service or services of publicly funded NGOs.

In the context of official procedures, the use of sign language is mostly guaranteed to the participants in court proceedings.

The use of Braille is very limited in Estonia, even in the public sector. Public authorities have no official duty to provide information or forms in Braille.

⁵¹ Estonia, The requirements to ensure that persons with reduced mobility and visually impaired and hearing impaired persons are able to move in public construction works (*Nõuded liikumis-, nägemis- ja kuulmispuudega inimeste liikumisvõimaluste tagamiseks üldkasutatavates ehitistes*), RTL 2002, 145, 2120.

⁵² See explanatory note attached to draft no. 805 SE (9th Riigikogu); available at: <http://www.riigikogu.ee>.

⁵³ Estonia, Traffic Act (*Liiklusseadus*), RT I 2010, 44, 261.

3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

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

In Estonia, there are no residence or citizenship/nationality requirements for protection under the relevant national laws transposing the directives.

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

a) Natural and legal persons

In Estonia the personal scope of anti-discrimination law covers only natural persons for the purpose of protection against discrimination.

In Estonia the personal scope of anti-discrimination law covers all natural and legal persons for the purpose of liability for discrimination

The Equal Treatment Act (which was adopted to transpose Directives 2000/43 and 2000/78) uses the term 'persons' (*isikud*). Article 2, which deals with the scope of application of the law, seems to refer to natural persons (unless proven otherwise by Estonian judiciary in future case law). The same law provides for definitions of 'an employee' (using the term 'a person') and 'an employer' (using the phrase 'a natural or legal person'). Article 24(1) (compensation for damage) refers to the rights of a person (*isik*).

The general anti-discrimination clause of the Constitution (Article 12) seems to cover both natural and legal persons for the purpose of protection against discrimination. The Supreme Court recognised equality before the law (the first sentence of Article 12 of the Constitution) as a right belonging to both natural and legal persons.⁵⁴ There have been no similar cases as regards prohibition of discrimination (the second sentence of Article 12 of the Constitution).

b) Private and public sector including public bodies

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

In Estonia the personal scope of anti-discrimination law covers private and public sector including public bodies for the purpose of liability for discrimination.

The Equal Treatment Act (Articles 2 and 24(1)) and other relevant provisions are applicable to both private and public sectors without any limitations (including those relating to public bodies).

⁵⁴ Decision of the Constitutional Review Chamber of the Supreme Court of 6 March 2002; published in RT III 2002, 8, 74 (point 13).

3.2 Material scope

3.2.1 Employment, self-employment and occupation

In Estonia, national legislation applies to all sectors of private and public employment, self-employment and occupation, including contract work, self-employment, military service, holding statutory office, for the five grounds.

The scope of the Equal Treatment Act (Article 2) as regards employment, self-employment and occupation is identical with that in the directives.

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

In Estonia, national legislation includes conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy for the five grounds in both private and public sectors as described in the directives (Article 2(1)1 and 2(2)1 of the Equal Treatment Act).

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

In Estonia, national legislation includes working conditions including pay and dismissals, for all five grounds and for both private and public employment (Articles 2(1)2 and (2)2 of the Equal Treatment Act).

- Occupational pensions constituting part of pay

There are no specific discrimination-related provisions regarding occupational pensions in Estonia. The general provisions of the Equal Treatment Act seem to be applicable in this context.

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

In Estonia, national legislation applies to vocational training outside the employment relationship, such as that provided by technical schools or universities, or such as adult lifelong learning courses (Articles 2(1)3 and (2)3 of the Equal Treatment Act).

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

In Estonia, national legislation includes membership of, and involvement in workers or employers' organisations as formulated in the directives for all five grounds and for both private and public employment (Articles 2 (1) 4 and (2) 4 of the Equal Treatment Act).

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

In Estonia, national legislation includes social protection, including social security and healthcare as formulated in the Racial Equality Directive (Article 2(1)5 of the Equal Treatment Act). Ethnic origin, race and colour are the only grounds that are covered.

- Article 3.3 exception

The Equal Treatment Act does not rely on the exception in Article 3.3 of the Employment Equality Directive in relation to religion or belief, age, disability and sexual orientation.

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

In Estonia, national legislation includes social advantages (translated as social benefits - *sotsiaaltoetus*) (Article 2(1)5 of Equal Treatment Act). Ethnic origin, race and colour are the only grounds that are covered.

In Estonia, the lack of definition of social advantages does not raise problems; in the Estonian context, the term 'benefits' will cover most of the probable social advantages available.

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

In Estonia, national legislation includes education as formulated in the Racial Equality Directive (Article 2(1)6 of the Equal Treatment Act). Ethnic origin, race and colour are the only grounds that are covered.

No other legislation addresses the issue of discrimination in education. There are no practices of ethnic or religious segregation, including in private schools.

- Pupils with disabilities

In Estonia the general approach to education for pupils with disabilities does not raise problems.

The dominant understanding among authorities is that disabled pupils should study in mainstream classes/schools whenever possible. According to the data of the Estonian Educational Information System, in the academic year 2011/2012, there were 110 854 pupils of compulsory school age in Estonia and 6,530 of them were pupils with special educational needs (SEN).⁵⁵ Out of 6 530 SEN pupils, 3 370 studied in segregated special schools and 1 103 in segregated special classes in mainstream schools. However, 2 057 SEN pupils studied in fully inclusive settings. In addition there were 16 945 pupils with no official decision of SEN who received some form of SEN support in mainstream schools.⁵⁶

- Trends and patterns regarding Roma pupils

In Estonia, there are no specific patterns existing in education regarding Roma pupils such as segregation. In the academic year 2014/2015 there were as few as 45 pupils in Estonian basic schools who spoke Roma language at home.⁵⁷

⁵⁵ Pupils with special educational needs are pupils whose outstanding talent, learning or behavioural difficulties, health problems, disabilities or long-term absence from studies creates the need to make changes or adaptations in the content of studies, the study processes or the learning environment (study aids, classrooms, language of communication, including alternative communications, specially trained teachers, support staff, etc.), or in the work plan prepared by the teacher for work with the relevant class (Article 46 (1) of the Basic School and Upper Secondary School Act).

⁵⁶ Data published by the European Agency for Development in Special Needs Education at <http://www.european-agency.org/country-information/estonia> (08.03.2014).

⁵⁷ Ministry of Education and Research; Written communication no 4-2/15/871-2 of 9 March 2015.

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

In Estonia, national legislation includes access to and supply of goods and services as formulated in the Racial Equality Directive (Article 2(1)7 of the Equal Treatment Act). Ethnic origin, race and colour are the only grounds that are covered.

- Distinction between goods and services available publicly or privately

In Estonia national law distinguishes between goods and services available to the public and those only available privately but provides no further details (Article 2(1)7 of the Equal Treatment Act). Ethnic origin, race and colour are the only grounds that are covered.

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

In Estonia, national legislation includes housing as formulated in the Racial Equality Directive (Article 2(1)7 of the Equal Treatment Act). Ethnic origin, race and colour are the only grounds that are covered.

Some groups may be vulnerable in the context of access to municipal housing, e.g. disabled people (accessibility of housing), same-sex partners (re-registration/transfer of tenancy), etc.

- Trends and patterns regarding housing segregation for Roma

In Estonia there are no patterns of housing segregation and discrimination against the Roma.

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

In Estonia national legislation provides for an exception for genuine and determining occupational requirements.

The Equal Treatment Act stipulates a provision regarding genuine and determining occupational requirements (Article 10(1)), which is worded almost identically to that in the directives: a difference of treatment which is based on an attribute related to ethnic origin, race, colour, religion or other beliefs, age, disability or sexual orientation shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such an attribute constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

In Estonia there is no case law to clarify this legal concept so far.

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

- Exception for employers with an ethos based on religion or belief

In Estonia national law provides for an exception for employers with an ethos based on religion or belief.

The Equal Treatment Act stipulates in Articles 10(2) and 10(3) the relevant provisions regarding employers with an ethos based on religion or belief, which are worded almost identically to that in the directives:

'(2) In the case of occupational activities within religious associations and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos.

(3) This Act shall thus not prejudice the right of religious associations and other public or private organisations, the ethos of which is based on religion or belief, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.'

There are no other provisions in Estonian law that ban or permit discrimination/unequal treatment by organisations, the ethos of which is based on religion or belief. By default, Articles 10(2) and 10(3) of the Equal Treatment Act provide the only exception to the general ban of discrimination by such organisations. As explained above, Article 12 of the Constitution provides for equality before law and bans discrimination on any ground. The Constitutional Review Chamber of the Supreme Court has confirmed that the general principle of equality is applicable to 'all spheres of life'.⁵⁸

There is no case law to clarify these issues so far. There is no information about any major challenges posed by religious associations and the like to the fight against discrimination in the country. The number of public or private organisations the ethos of which is based

⁵⁸ Decision of the Constitutional Review Chamber of the Supreme Court of 6 March 2002; published in RT III 2002, 8, 74 (section 13).

on religion or belief (other than parishes/churches) is very small and they do not play any significant social role. It should be noted that Estonian society is not religious as such: only 29.3 % of all people aged 15 and older reported themselves to be followers of a particular faith (2011 national census).⁵⁹

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

In Estonia national legislation does not address the issue of an exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78).

Article 9(2) of the Equal Treatment Act stipulates that

'Differences of treatment on grounds of age shall not constitute discrimination, if, within the context of law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market, vocational training and social insurance objectives, and if the means of achieving that aim are appropriate and necessary.'

For certain groups of public officials, maximum age limits have previously been established, for example: 50-60 years of age for military servicemen (Article 112 of the Military Defence Service Act);⁶⁰ 55-60 years of age for policemen (on the basis of Article 96 of the Police and Border Guard Act);⁶¹ and 58-60 years of age for some categories of prison officials (Article 152 of the Imprisonment Act).⁶² In exceptional circumstances, service may be prolonged. Military servicemen are entitled to special pensions under the above-mentioned Military Defence Service Act. In Estonia some categories of workers (policemen, pilots, sailors, minors etc.) may receive pensions on the grounds of the Superannuated Pension Act⁶³ before reaching ordinary pensionable age.

The Minister of Defence (for military servicemen) and the Government (for policemen) establish the requirements concerning the state of health necessary for the performance of duties (Article 79 (5) of the Military Defence Service Act and Article 71(4) of the Police and Border Guard Act). According to Article 111 of the Military Defence Service Act, a serviceman shall be released from contractual service within one month of the date of the decision of the medical committee by which 's/he was declared unfit for active service for health reasons'.

On the basis of Article 93(1) of the Public Service Act,⁶⁴ a public official may be released from the service due to a decrease in the capacity for work if he or she is not capable of performing the functions, based on the certificate of the incapacity for work, for over four consecutive months or over five months within a year. This provision is valid for policemen, prison officers and most other groups of public officials.

4.4 Nationality discrimination (Article 3(2))

a) Discrimination on the ground of nationality

In Estonia national law does not include exceptions relating to difference of treatment based on nationality.

⁵⁹ Statistics Estonia, information provided at: pub.stat.ee.

⁶⁰ Estonia, Military Defence Service Act (*Kaitseväeteenistuse seadus*), RT I 2000, 28, 167; RT I 2003, 31, 195.

⁶¹ Estonia, Police and Border Guard Act (*Politsei ja piirivalve seadus*), RT I 2009, 26, 159.

⁶² Estonia, Imprisonment Act (*Vangistusseadus*), RT I 2000, 58, 376, RT I 2002, 84, 492.

⁶³ Estonia, Superannuated Pension Act (*Väljateenitud aastate pensionide seadus*), RT 1992, 21, 294.

⁶⁴ Estonia, Public Service Act (*Avaliku teenistuse seadus*), RT I, 06.07.2012, 1

As regards protection against discrimination on all five grounds, Estonian law does not differentiate between the status of a foreign citizen, a stateless person or a person with 'undefined citizenship' (mostly former Soviet citizens).

In Estonia, nationality (citizenship) is not explicitly mentioned as a protected ground in national anti-discrimination law. Lack of citizenship and language as a protected ground has previously been criticised by CoE bodies. For example, the European Commission against Racism and Intolerance (ECRI) strongly recommended that the Estonian authorities further strengthen the Equal Treatment Act by, inter alia, prohibiting discrimination based on language and citizenship.⁶⁵

According to the data of the Population Registry,⁶⁶ in 1992 only 68 % of the whole population were citizens of Estonia. In April 2015, persons who are not citizens of Estonia (non-citizens) made up 15.7 % of the total population: 6.3 % were de facto stateless former Soviet citizens ('persons with undefined citizenship') and 9.4 % were citizens of foreign states.⁶⁷ The largest group of foreign citizens in Estonia are citizens of the Russian Federation, who are mostly former Soviet citizens who adopted Russian citizenship after 1991, while remaining resident in Estonia.

b) Relationship between nationality and 'race or ethnic origin'

In Estonia the terms 'ethnic origin' (*etniline päritolu*) and 'nationality' (*rahvus*) are normally used as synonyms while ethnic affiliation is understood by many policymakers and ordinary persons in primordial terms. Conversely, the term 'citizenship' (*kodakondsus*) is ethnically neutral.

According to the 2011 national census results, there were representatives of more than 150 ethnic groups residing in Estonia (including Roma as a single ethnic group). However, more than 80 % of members of minority groups were ethnic Russians.⁶⁸

In Estonia people of minority origin normally speak Russian or another minority language as their first language. In the national context difference in treatment on the grounds of mother tongue and proficiency in Estonian may be quite widespread. In the course of the 2007 national survey, 23 % of the respondents of Russian minority origin claimed to have had such an experience within the last three years; 42 % cited ethnicity and only 13 % cited citizenship as a ground of their experience of unequal treatment.⁶⁹

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

a) Benefits for married employees

In Estonia it is not clear whether it constitutes unlawful discrimination in national law when an employer provides benefits only to those employees who are married.

The Equal Treatment Act does not include any detailed provisions regarding family benefits. Discrimination on the ground of sexual orientation is prohibited in relation to the establishment of working conditions and remuneration (Article 2(2)2). It is not obvious whether (all) employer's benefits are covered by these provisions.

⁶⁵ CoE, European Commission against Racism and Intolerance (2010), *Report on Estonia (4th monitoring cycle)*, adopted 15 December 2009, published 2 March 2010, ECRI (2010)3, Section 51.

⁶⁶ *Rahvastikuregister*.

⁶⁷ Population Registry; data published at: <http://estonia.eu/about-estonia/society/citizenship.html>.

⁶⁸ Statistical Office of Estonia; public database available at: <http://www.stat.ee>.

⁶⁹ Lagerspetz, M. et al. *Isiku tunnuste või sotsiaalse positsiooni tõttu aset leidev ebavõrdne kohtlemine: elanike hoiakud, kogemused ja teadlikkus*, Tallinn, 2007, p. 25. See also section 2.3.b for more information on discrimination on the ground of language.

It is worth mentioning that Estonian tax legislation does not promote the payment of benefits by employers and they are not so widespread in comparison with Western European countries.

In 2014 the Estonian Parliament adopted the Registered Partnership Act.⁷⁰ This law will enter into force on 1 January 2016 together with implementing legislation (Article 26). As no implementing legislation has been adopted so far, the practical effect of new legislation in the area of work-related benefits is still not clear.

b) Benefits for employees with opposite-sex partners

In Estonia it is not clear whether it constitutes unlawful discrimination in national law when an employer provides benefits only to those employees with opposite-sex partners.

As explained above, the Equal Treatment Act does not include any detailed provisions regarding family benefits. Discrimination on the ground of sexual orientation is prohibited in relation to establishment of working conditions and remuneration (Article 2(2)2). It is not obvious whether (all) employer's benefits are covered by these provisions.

Again, such benefits are rarely paid in practice in Estonia.

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

a) Exceptions in relation to disability and health/safety

In Estonia there are exceptions in relation to disability and health and safety. Thus, Article 9(1) of the Equal Treatment Act stipulates that it does not

'prejudice the maintaining or adopting of specific measures which are in accordance with law and are necessary to ensure public order and security, prevent criminal offences, and protect health and the rights and freedoms of others. Such action shall be in proportion to the objective being sought.'

There are no other specific *general* exceptions to health and safety rules applying to people with disabilities.

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

4.7.1 Direct discrimination

In Estonia national law provides an exception for direct discrimination on the ground of age (Article 9 of the Equal Treatment Act).

– Justification of direct discrimination on the ground of age

In Estonia it is possible, generally, or in specified circumstances, to justify direct discrimination on the ground of age. The Equal Treatment Act (Article 9(2)) introduced provisions almost identical with that of Article 6(1) of Directive 2000/78 (the first sentence):

'Differences of treatment on grounds of age shall not constitute discrimination, if, within the context of law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market, vocational training and

⁷⁰ Registered Partnership Act (*Kooseluseadus*), RT I, 16.10.2014, 1.

social insurance objectives, and if the means of achieving that aim are appropriate and necessary.'

a) Permitted differences of treatment based on age

In Estonia national law permits differences of treatment based on age for any activities within the material scope of Directive 2000/78 (Articles 2(2) and 9(2) of the Equal Treatment Act). Nevertheless, this unequal treatment is subject to the strict proportionality test.

- Supreme Court en banc, Judgement of 7 June 2011 in case 3-4-1-12-10 (verification of the constitutionality)

In this court case, a working 67 year-old, old-age pensioner was not provided with sickness benefits on an equal footing with younger persons (by virtue of Article 57(6) of the Health Insurance Act⁷¹ (insured persons are those who work on the basis of a contract of employment and for whom the employer is required to pay social tax). A constitutionality control procedure was initiated by the Tartu Circuit Court (court of second instance).

In this case the Supreme Court used a proportionality test (which has been largely borrowed from Germany by the Estonian courts), as it considers itself permitted to do under the general provisions of Article 11 of the Constitution relating to the restriction of rights. Similar to the approach to proportionality assessments taken when considering whether the limitation of rights can be justified that is widely recognised in other jurisdictions' interpretations of their own non-discrimination provisions, the Court reviewed the conformity of the restriction to the proportionality principle through the three characteristics thereof: suitability, necessity and proportionality in the narrowest sense.⁷²

The Court delivered the judgment that neither the worse-than-average state of health of the elderly nor the receipt of an old-age pension nor the health insurance fund's need to save money could justify the unequal treatment on grounds of age in relation to the receipt of sickness benefit. Finally, the Supreme Court en banc declared that the relevant provision of the Health Insurance Act was unconstitutional and invalid.

b) Occupational pension schemes' fixed ages for admission or entitlements

In Estonia national law allows occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits, taking up the possibility provided for in Article 6 (2) of Directive 2000/78.

According to Article 66(1) of the Funded Pensions Act,⁷³ persons born before 1 January 1983 are not required to make contributions to a mandatory funded pension. However, persons born between 1942 and 1982 are entitled to make contributions to a mandatory funded pension only if they submitted a choice application⁷⁴ in 2002-2010 (the deadline was different for various age groups (Article 66(2))).

The same law provides for the conditions and procedure in relation to funded pensions for a person to receive additional income, besides state pension insurance, after reaching *pensionable age* (Article 1).

⁷¹ Estonia, Health Insurance Act (*Ravikindlustuse seadus*), RT I 2002, 62, 377.

⁷² On the test of proportionality in other jurisdictions see: Grimm, D. (2007) 'Proportionality in Canadian and German Constitutional Jurisprudence', *University of Toronto Law Journal*, vol. 57.

⁷³ Estonia, Funded Pensions Act (*Kogumispensionide seadus*), RT I 2004, 37, 252.

⁷⁴ An application must be submitted in order to acquire units of a pension fund. Most importantly, it must include the name of the pension fund chosen by the person (Articles 14(1) and 15(1) of the Funded Pensions Act). This application is necessary to join the system of funded pensions.

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

In Estonia there are special conditions set by law for older and younger workers in order to promote their vocational integration, and for persons with caring responsibilities to ensure their protection.

The Equal Treatment Act (Article 9(2)) introduced provisions that are almost identical to those of Article 6(1) of Directive 2000/78 (the first sentence). The Equal Treatment Act (Article 9(3)2) does not treat as discrimination privileges related to pregnancy and birth; taking care of minor children, disabled adult children and parents.

According to the Employment Contracts Act (Articles 56-57), an extended annual holiday (35 calendar days) shall be granted to minors and persons who are granted a pension for incapacity to work or the national pension on the basis of incapacity to work pursuant to the State Pension Insurance Act.⁷⁵ The mother or father of a disabled child is entitled to child care leave of one working day per month until the child reaches the age of 18 years, which is paid for on the basis of the average wage (Article 63(2)). Furthermore, mothers or fathers who are raising a child of up to 14 years of age or a disabled child of up to 18 years of age are entitled to child care leave without pay of up to 10 working days per calendar year (Article 64). Compensation of (extended) paid holiday is paid from the state budget (Article 66).

Women have the right to paid pregnancy and maternity leave (Article 59), while fathers have the right to receive up to 10 working days of paid paternity leave (Article 60). A mother or father is entitled to paid parental leave until their child reaches the age of three years (Article 62). Each calendar year a mother or father⁷⁶ also has the right to receive child leave which is remunerated on the basis of the official minimum wage for three working days if s/he has one or two children under 14 years of age and for six working days if s/he has at least three children under 14 years of age or at least one child under three years of age (Article 63). Upon cancellation of an employment contract due to a lay-off, except in cases of bankruptcy, employees raising children under three years of age have the preferential right of keeping their job (Article 89(5)).

The Employment Contracts Act imposes certain limitations for minors' employment in the interests of protecting their health and moral integrity (Article 7). The act also bans overtime for minors (Article 44(2)) and bans or imposes limits on work in the evening or at night (Article 49). The same act introduces a general reduction in working time for minors (Article 43(4)).

According to Articles 10(1)) and 10¹(1) of the Occupational Health and Safety Act, an employer shall create suitable working and rest conditions for disabled workers, pregnant women, women who are breastfeeding, and minors.

4.7.3 Minimum and maximum age requirements

In Estonia there are rare exceptions permitting minimum and maximum age requirements in relation to access to employment (mostly in the public sector).

According to the Employment Contracts Act, a minor could be an employee only under certain circumstances, which may vary for different age groups (Article 7). The minimum age requirement for higher and senior officials is 21, while other officials must be aged 18 or older (Article 14 of the Public Service Act).

⁷⁵ Estonia, State Pension Insurance Act (*Riikliku pensionikindlustuse seadus*), RT I 2001, 100, 648.

⁷⁶ Biological mothers or fathers and people equated to them by law.

By way of exception, Estonian law has provided other minimum age requirements for several important public positions (such as the President of the Republic under Article 79 (3) of the Constitution). Additionally there may also be maximum age requirements (e.g. for military servicemen, policemen and prison officers; see section 4.3 for details). For safety reasons upper age limits (65) for pilots of commercial airlines have also been established.⁷⁷

Some laws may require both minimum age and a minimum number of years of work in a particular area for certain positions as a precondition of employment (e.g. Article 15 of the Prosecutor's Office Act).⁷⁸

4.7.4 Retirement

a) State pension age

In Estonia there is no state pension age, at which individuals *must* begin to collect their state pensions.

The State Pension Insurance Act (Article 7) stipulates (for both men and women) that persons who have attained 63 years of age⁷⁹ and whose pension-qualifying period earned in Estonia is 15 years have the *right* to receive an old-age pension. The same article provides a transition period for women born between 1944 and 1952. Old-age pensions with favourable conditions can be received by people with a certain type of disability, people who have raised disabled children or three or four children (Article 10).

A person who receives a state old-age pension may work and collect his or her pension. However, the survivor's pension and national pension⁸⁰ will not normally be paid to people who are employed (Article 43(1) of the State Pension Insurance Act). Additionally, an early-retirement pension⁸¹ will not be paid to a working pensioner before s/he has attained pensionable age (Article 43(1¹)).

b) Occupational pension schemes

In Estonia after reaching pensionable age (see previous section) people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements (Article 1 of the Funded Pensions Act).

Payments from such occupational pension schemes cannot be deferred if an individual wishes to work longer, i.e. an individual can collect a pension and work (there are no limits in the Funded Pensions Act).

c) State imposed mandatory retirement ages

⁷⁷ Estonia, The requirements for the age and qualifications, training and examination of aviation specialists, and the rules for the issue of aviation personnel licences and recognition of aviation licences issued by foreign states (*Lennundusspetsialistide vanusele ja kvalifikatsioonile, nende koostamisele ja eksamineerimisele esitatavad nõuded ning lennundusspetsialistidele lennunduslubade väljaandmise ja välisriikides väljaantud lennunduslubade tunnustamise eeskiri*), RTL 2002, 5, 52, Article 5.

⁷⁸ Estonia, Prosecutor's Office Act (*Prokuratuuriseadus*), RT I 1998, 41/42, 625; RT I 2004, 66, 457.

⁷⁹ 65 years from 1 January 2017; a transition period was established for those born in 1953-1960. RT I 2010, 18, 97.

⁸⁰ A national pension is paid to a person of pensionable age, a disabled person etc. with an insufficient pension qualifying period (State Pension Insurance Act, Article 22 (1)).

⁸¹ "A person who has worked for the pension qualifying period ... for grant of an old-age pension has the right to receive an early-retirement pension up to three years before attaining the pensionable age" (State Pension Insurance Act, Article 9 (1)).

In Estonia there are no state-imposed mandatory retirement ages. There are a few exceptions, however, stipulated for some categories of military and law-enforcement officials (see section 4.3 for details) as well as for some specific professions, e.g. judges (Article 48 of the Courts Act).⁸²

- Constitutional Review Chamber of the Supreme Court, Judgement of 1 October 2007 in case 3-4-1-14-07

In October 2007, the Supreme Court held that Article 120 of the *old* Public Service Act (redundancy of public officials on the ground of age) and related provisions violated Article 12 of the Constitution, which provides for equality before the law and bans discrimination on any ground. The case in the Constitutional Review Chamber of the Supreme Court was initiated by the Tallinn Administrative Court, which refused to recognise as constitutional Article 120 of the Public Service Act (it was a case of two officials released from service due to age on the basis of this provision). The Tallinn Administrative Court and the Chancellor of Justice (ombudsman and equality body) in their opinion to the Supreme Court argued that Article 120 violates, inter alia, Directive 2000/78/EC.

In its judgment the Supreme Court did not refer to the directive but to its own previous judgment that the prohibition to treat equal persons unequally would be violated if two persons, groups of persons or situations were treated arbitrarily unequally. An unequal treatment can be regarded as arbitrary if there is no reasonable cause therefore. If there is a reasonable and appropriate cause, unequal treatment in legislation is justified. However, in this particular case unequal treatment is neither reasonable nor justified and evidently arbitrary.⁸³

d) Retirement ages imposed by employers

In Estonia national law does not permit employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract and/or collective bargaining and/or unilaterally. No such provision can be found in Estonian laws.

e) Employment rights applicable to all workers irrespective of age

In Estonia the legal provisions on protection against dismissal apply to all workers irrespective of age, if they remain in employment.

Neither the Employment Contract Act nor the Public Service Act permits redundancy of workers or public officials on the ground of age alone.

f) Compliance of national law with CJEU case law

In Estonia national legislation is in line with the CJEU case law on age regarding compulsory retirement. There are no provisions or regulations similar to those at stake in the relevant cases of the European Court of Justice.

4.7.5 Redundancy

a) Age and seniority taken into account for redundancy selection

In Estonia national law does not permit age or seniority to be taken into account in selecting workers for redundancy (Article 89 of the Employment Contracts Act and Article 90 of the Public Service Act).

⁸² Estonia, Courts Act (*Kohtute seadus*), RT I 2002, 64, 390.

⁸³ See for more details: Poleshchuk, V. (2014) 'Older Age, Employment and Equality in Legislation: A "Progressive" Estonian Approach?', *The Equal Rights Review*, vol. 12, available at: <http://www.equalrightstrust.org/ertdocumentbank/vadim.pdf>.

b) Age taken into account for redundancy compensation

In Estonia, national law provides compensation for redundancy but it is not affected by the age of the worker (Article 89 of the Employment Contracts Act and Article 90 of the Public Service Act).

- Tartu Administrative Court, Judgement of 10 October 2014 in administrative case no. 3-14-164, *XXX vs. Social Insurance Board*⁸⁴

XXX was an official who was released from service (dismissed) on the ground of redundancy. She appealed against the decision claiming it to be unsubstantiated and discriminatory. XXX provided an e-mail message from her immediate superior who stated, inter alia, that her redundancy was decided 'basically on the age criteria'. The employer failed to prove that there was no breach of the principle of equal treatment. XXX was awarded compensation for non-patrimonial damage caused by the violation of her rights (discriminatory redundancy).

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

In Estonia national law includes exceptions that seek to rely on Article 2(5) of the Employment Equality Directive.

Article 9(1) of the Equal Treatment Act stipulates that it

'does not prejudice the maintaining or adopting of specific measures which are in accordance with law and are necessary to ensure public order and security, prevent criminal offences, and protect health and the rights and freedoms of others. Such action shall be in proportion to the objective being sought.'

This provision does not contradict Directive 2000/78 (Article 2(5)) in the context of discrimination on the grounds of religion or belief, disability, age or sexual orientation. Although 'democratic society' is not mentioned in Article 9(1) of the Equal Treatment Act, it includes the principle of proportionality.

4.9 Any other exceptions

In Estonia, other exceptions to the prohibition of discrimination on the ground of employment status provided in national law are the following: the Equal Treatment Act bans the unequal treatment of full-time and part-time employees and people working on the basis of permanent and temporary employment contracts. However, differential treatment is possible if it is justified by objective reasons under laws and collective agreements. The act also provides for some guarantees for employees who perform duties by way of temporary agency work (conditions of occupational health and safety, working and rest time and remuneration for work, use of the benefits of the user undertaking⁸⁵) (Articles 11¹).

In Estonia, there are other exceptions to the prohibition of discrimination on the grounds of ethnic origin, race and colour provided in national law (Article 9(1) of the Equal Treatment Act - see full text in previous section). This provision is not in line with Directive 2000/43. Difference in treatment on the basis of ethnic or racial origin in the form of *direct* discrimination is justified in the case of genuine and determining occupational requirement (Article 4(1) of the directive and Article 10 of the Equal Treatment Act). Other exceptions

⁸⁴ See more details in section 12.2.

⁸⁵ For instance, food coupons, etc.

are possible only in the frame of positive action measures (Article 5 of the directive). However, Article 9(1) of the Equal Treatment Act provides for several other exceptions (public order and security, prevention of criminal offences, protection of health and the rights and freedoms of others).

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

a) Scope for positive action measures

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

The Equal Treatment Act (Article 6) does not prejudice the maintaining or adopting of specific measures to prevent or compensate for disadvantages linked to ethnic origin, race, colour, religion or other beliefs, age, disability or sexual orientation. Such action shall be in proportion to the objective being sought. No other clarifications can be found in the text of the law.

b) Main positive action measures in place on national level

Risk groups (disability, ethnic origin and older and younger age)

The Labour Market Services and Benefits Act stipulates the so-called wage allowance. For six months the state will pay, within certain limits, 50 % of a wage of a person who belongs to a risk group (unemployed persons who were registered unemployed for more than 12 months running—six months in case of persons aged 16-24—or who were released from a prison within 12 months before registration as unemployed (Article 18)). In practice, disabled people, older and younger people and people of minority origin benefit from this regulation because the unemployment rate among those groups (including long-term unemployment) is traditionally higher than average. These are broad social policy measures.

Disability

The Labour Market Services and Benefits Act provides unemployed disabled people with special services (Articles 20-23). According to Article 9(5) of the act, all such services will only be granted to disabled persons if they are necessary to overcome the disability-related obstacle to his or her employment, and if other employment services are not effective for finding work.⁸⁶

⁸⁶ See for more details section 2.6.b of this report.

6 REMEDIES AND ENFORCEMENT

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

- a) Available procedures for enforcing the principle of equal treatment

In Estonia the following procedures exist for enforcing the principle of equal treatment:

- Judicial procedures

A victim of discrimination can use *criminal* procedures (if s/he suffered from crimes/misdemeanours), *administrative court* procedures (e.g. complaints against the action of an official or state/municipal institution, including conflicts between a public officials and his or her employer) or *civil court* procedures (e.g. labour disputes in the private sector, the issue of non-pecuniary damage and protection of consumer rights).

Discrimination-related cases are solved on the basis of general rules and standards. The only exception is the application of provisions regarding a shift in the burden of proof established by the Equal Treatment Act (see section 6.3 for details).

- Non-judicial procedures
 - Quasi-judicial procedures at labour disputes committees

Article 23 of the Equal Treatment Act stipulates that discrimination disputes⁸⁷ shall be resolved by court and labour disputes committees.⁸⁸ The labour dispute committees are established within the local labour branches of the Labour Inspectorate (Article 11(1) of the Resolution of Individual Labour Disputes Act). They follow a procedure established in the respective law and the Code of Civil Procedure. Their decisions are based on law and must be substantiated (Article 22(2)). If the parties do not agree with a decision of a labour dispute committee, they have recourse to the courts, which may hear the same labour dispute (Article 24(1)).

- Conciliation

Conciliation procedures may be conducted by the Chancellor of Justice (in relation to discrimination in private sector). If the conciliation procedure fails, a victim may seek the protection of his or her rights in court.

- Ombudsman-like procedures

The Chancellor of Justice (in the public sector) and the Commissioner for Gender Equality and Equal Treatment (in the public and private sectors as falls within the Commissioner's competence) are entitled to conduct ombudsman-like procedures, the results of which are not legally binding (see below).

A decision of a court, a labour dispute committee decision or an agreement between parties in a conciliation procedure is legally binding (see below).

- Challenge proceedings

⁸⁷ An individual labour dispute is a private dispute between an employer and an employee which arises under an employment contract. An individual labour dispute is also a dispute over a claim arising from the preparation of an employment contract (Article 2 of the Resolution of Individual Labour Disputes Act). Estonia, Resolution of Individual Labour Disputes Act (*Individuaalse töövaidluse lahendamise seadus*), RT I 1996, 3, 57.

⁸⁸ *Töövaidluste komisjonid*.

A person who finds that his/her rights are violated or his/her freedoms are restricted by an administrative act or in the course of administrative proceedings may file a challenge with an administrative authority that exercises supervisory control over the administrative authority that issued the challenged act or took the challenged measure (Chapter 5 of the Administrative Procedure Act⁸⁹). The annulment of a decision on a challenge may be requested in an appeal filed with an administrative court (Article 87(2)).

b) Barriers and other deterrents faced by litigants seeking redress

– Equality bodies

There are very few obstacles as regards access to both equality bodies.

The Chancellor of Justice is almost free to decide whether s/he wants to deal with any discrimination-related complaint. In practice, victims of discrimination may be advised to address the Commissioner for Gender Equality and Equal Treatment or other institutions. For instance, in 2011, the Chancellor of Justice received a conciliation-related application from a person who had allegedly been discriminated against on the grounds of origin and colour in gaining access to a café. The Chancellor recommended that the victim should use more effective legal remedies and that they should sue the café owner in civil court.⁹⁰

Although there are no major problems with access to the Commissioner for Gender Equality and Equal Treatment, this body used to suffer from a lack of funding and personnel. However, in 2013 the situation radically improved (at least temporarily) thanks to the EEA and Norway Grants.⁹¹

– Judicial and quasi-judicial procedures

As for judicial and quasi-judicial procedure, in Estonia, state legal aid is granted on the basis of the State Legal Aid Act⁹² to insolvent natural or legal persons in connection with proceedings in an Estonian court or administrative authority.

In Estonia about a fifth of the population does not speak Estonian (most of those speak Russian),⁹³ although Estonian is the only official language of court procedure. Nevertheless, exceptions to this rule are possible (Article 5 of the Courts Act). According to Article 10(2) of the Code of Criminal Procedure, the assistance of a translator or interpreter shall be ensured for the participants in court proceedings and for those parties who are not proficient in Estonian.

Article 34(1) of the Code of Civil Procedure stipulates that if a participant in a proceeding is not proficient in Estonian and s/he does not have a representative,

‘the court shall involve, if possible, an interpreter or translator in the proceeding at the request of such a participant in the proceeding or at the court’s own initiative. An interpreter or translator need not be involved if the statements of the participant in the proceeding can be understood by the court and the other participants in the proceeding.’

⁸⁹ Estonia, Administrative Procedure Act (*Haldusmenetluse seadus*), RT I 2001, 58, 354.

⁹⁰ Chancellor of Justice; Written communication no. 5-3/1200127 of 1 February 2012.

⁹¹ EUR 700 000 was allocated to the office and the Commissioner for capacity building (for the period up to December 2015). As a result, the number of staff members at the Commissioner’s office has increased from two to eight. Laas, A. (2013) ‘Estonia’, *European Gender Equality Law Review*, no. 2, p. 50.

⁹² Estonia, State Legal Aid Act (*Riigi õigusabi seadus*), RT I 2004, 56, 403.

⁹³ 2011 Population and Housing Census, database of Statistics Estonia, available at: <http://pub.stat.ee>.

If the court is not able to immediately involve an interpreter or translator, it can make a ruling to require the participant in the proceeding needing the assistance of an interpreter or translator to find an interpreter, translator or a representative proficient in Estonian for himself or herself.

Failure to comply with the demand of the court does not prevent the court from adjudicating the matter. If the claimant fails to comply with the demand of the court, the court may refuse to hear the action (Article 34(2)). Similar rules are valid for administrative court procedures on the basis of Article 82(1)-(2) of the Code of Administrative Court Procedure.⁹⁴

In civil court procedure, representatives and advisors of a participant in a procedure (including persons who have a legitimate interest to check compliance with the requirements for equal treatment—see section 6.2) are not entitled to use translators/interpreters (Article 34(5) of the Code of Civil Procedure). The civil and administrative court may remove from proceedings or prohibit from making statements a representative (and/or adviser in a civil procedure) due to his or her insufficient knowledge of Estonian (Article 45(2) of the Code of Civil Procedure and Article 32(4)) of the Code of Administrative Court Procedure).

To a certain extent, language-related problems may be solved through the State Legal Aid Act. Applications for state legal aid should be submitted in Estonian (EU citizens and residents of EU countries can also submit them in English) (Article 12(5)).

In 2008 the Supreme Court re-emphasised the requirements regarding the language of application (a Russian speaker unsuccessfully contested this requirement with reference to Article 11 of the Universal Declaration of Human Rights).⁹⁵

As for people with disabilities, the use of sign language in courts is quite widespread in Estonia. According to the Code of Administrative Court Procedure (Article 82(4)) and the Code of Civil Procedure (Article 35), if a participant in the proceedings is deaf, or s/he is unable to speak or s/he is deaf and unable to speak, the course of the proceeding shall be communicated to him or her in writing, or an interpreter or translator shall be involved in the proceeding. We are not aware of any instances of the use of Braille.

Public buildings (including courts) are normally wheelchair accessible (see also information about the Building Act in section 2.6). Additionally, the Traffic Act establishes a legal framework for the organisation of road mobility for physically disabled people and parking for vehicles used by them, and special rights for physically disabled drivers and drivers of vehicles servicing physically disabled or blind people.

c) Number of discrimination cases brought to justice

In Estonia there are no available statistics on the number of cases related to discrimination brought to justice.

– Labour disputes commissions

In recent years the number of complaints with demands related to the issue of discrimination has increased considerably: in 2006, seven complaints were received by labour disputes commissions whereas 26 complaints were received in 2014.⁹⁶

⁹⁴ Estonia, Code of Administrative Court Procedure (*Halduskohtumenetluse seadustik*), RT I, 23.02.2011, 3.

⁹⁵ Ruling of the Criminal Law Chamber of the Supreme Court of 29 April 2008; published in RT III 2008, 18, 122; case no. 3-1-1-24-08.

⁹⁶ Labour Inspectorate; Written communications of 9 January 2007, no. 1-05/17675-1 of 26 September 2006, and no. 1.4-1/272-2 of 13 March 2015.

– Equality bodies

In 2009, the Chancellor of Justice started two conciliation procedures related to alleged discrimination (including one procedure related to alleged discrimination on the grounds of ethnicity). In 2010, there was one application regarding alleged discrimination on the ground of pregnancy. In 2011 there were two applications. None of these applications resulted in a final agreement. In 2012, 2013 and 2014 there were no conciliation procedures conducted by the Chancellor of Justice.⁹⁷

The number of applications filed with the Commissioner for Gender Equality and Equal Treatment has rapidly increased. In 2009, the Commissioner received 161 applications, out of which 49 were classified as 'possible cases of discrimination'.⁹⁸ In 2014, 475 applications were filed with the Commissioner, including 52 'possible cases of discrimination'; the biggest share of all applications was related to gender discrimination issues.⁹⁹

d) Registration of discrimination cases by national courts

In Estonia discrimination cases are not registered as such by national courts.

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

a) Standing to act on behalf of victims of discrimination (representing them)

In Estonia associations/organisations/trade unions are not entitled to act on behalf of victims of discrimination with a few exceptions:

- 1) Upon resolution of discrimination-related individual labour disputes, a person (meaning both a legal and a natural person) who has a legitimate interest in checking compliance with the requirements for equal treatment may also act as a representative (Individual Labour Disputes Act¹⁰⁰ (Article 14 (2¹)).
- 2) In conciliation proceedings for the resolution of discrimination disputes (in the private sector) at the Chancellor of Justice, a person (meaning both a legal and a natural person) who has a legitimate interest in checking compliance with the requirements for equal treatment may also act as a representative (Article 23 (2)).¹⁰¹

There are no other specific provisions. Therefore it is not clear who is considered to have a legitimate interest in checking compliance with the requirements for equal treatment. Estonian laws provide no criteria or other guidance. In practice, human rights NGOs have been recognised by the Chancellor of Justice as associations that have a legitimate interest in the issue.

In civil and administrative court procedures, an association's staff member or representative may make use of Article 228 of the Code of Civil Court Procedure: a participant in a proceeding may use an advisor who may appear in court together with the participant in the proceeding and provide explanations (but an adviser cannot perform procedural acts or file petitions). However, considering the peculiarities of Estonian

⁹⁷ Chancellor of Justice; Written communications no. 5-3/1000381 of 16 February 2010, no. 5-3/0904988 of 27 August 2009, no. 5-3/1100239 of 7 February 2011, no. 5-3/1004232 of 26 July 2010, no. 5-3/1200127 of 1 February 2012, no. 5-3/1300180 of 4 February 2013, no. 5-3/1400234 of 7 February 2014, and no. 5-3/1500612 of 13 March 2015.

⁹⁸ Commissioner for Gender Equality and Equal Treatment; Written communication of 9 April 2010.

⁹⁹ Estonia, Soolise võrdõiguslikkuse ja võrdse kohtlemise voliniku 2014. aasta tegevuse aruanne, Tallinn, 2015, p. 50-51.

¹⁰⁰ Estonia, Individual Labour Disputes Act (*Individuaalse töövaidluse lahendamise seadus*), RT I 1996, 3, 57.

¹⁰¹ In general, a petitioner must file a petition with the Chancellor of Justice in person or through an authorised representative (Article 23(1) of the Chancellor of Justice Act).

procedural law, the right to be an advisor can be realised by staff members of relevant associations rather than by the associations themselves.

b) Standing to act in support of victims of discrimination

In Estonia associations/organisations/trade unions are not specifically entitled to act in support of victims of discrimination.

Engagement in support or on behalf of the victim (even at later stage, i.e. joining existing proceedings) is regulated by general procedural rules, e.g. rules on involvement of a third party who does not have an independent claim concerning the object of the proceeding but has legal interest in having the dispute resolved in favour of one of the parties in civil court procedure, also at the request of a party (Article 216 of the Code of Civil Procedure). It is not completely clear whether associations/organisations/trade unions will be recognised as such third parties in the context of discrimination-related civil cases. As for administrative court procedure, the relevant code seems to apply a fairly restrictive approach to third parties.¹⁰²

Given Estonian law and practice, NGOs and other relevant associations prefer to act through their staff members as legal representatives or advisers of victims in court procedure.

c) Actio popularis

In Estonia national law does not allow associations / organisations / trade unions to act in the public interest on their own behalf, without a specific victim to support or represent (*actio popularis*).

d) Class action

In Estonia national law does not allow associations / organisations / trade unions to act in the interest of more than one individual victim (*class action*) for claims arising from the same event.

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

In Estonia national law requires a shift of the burden of proof from the complainant to the respondent (the national term is shared burden of proof – *jagatud tõendamiskohustus*).

The Equal Treatment Act (Article 8) states the following:

‘(1) An application of a person addressing a court, a labour dispute committee or the Commissioner for Gender Equality and Equal Treatment shall set out the facts on the basis of which it can be presumed that discrimination has occurred.

(2) In the course of proceedings, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment. If the person refuses to provide proof, such refusal shall be deemed to be equal to acknowledgement of discrimination by the person.

(3) The shared burden of proof does not apply in administrative court¹⁰³ or criminal proceedings.’

¹⁰² ‘In the case that the administrative court’s decision *may affect the rights or obligations of a person* who is not a party to the matter, the court must join such a person to the proceedings as a third party’. Article 20 (1) of the Code of Administrative Court Procedure.

¹⁰³ The jurisdiction of administrative courts is the adjudication of disputes in public law and other matters which are placed within the competence of administrative courts by law (Code of Administrative Court Procedure, Article 4).

The Equal Treatment Act bans discrimination on all five grounds plus colour (Article 1(1)). This principle is not applicable to conciliation procedures at the Chancellor of Justice (one of the possible reasons for this decision is that a conciliation procedure is voluntary).

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

In Estonia there are legal measures of protection against victimisation. According to Article 3(6) of the Equal Treatment Act,

'Discrimination includes also a situation where one person is treated less favourably than others or negative consequences follow because he or she has filed a complaint regarding discrimination or has supported a person who has filed such complaint.'

- Judgment of Harju County Court¹⁰⁴ of 23 December 2011 in civil case 2-11-15080, *E.B. vs. EEAS*

Employee E.B. handed the chief manager a letter signed 'Workers of Hall A'. The letter accused a production manager of an enterprise of sexual and ethnic harassment, humiliating and rude behaviour, and violation of workers' rights and interests and of neglecting production problems. E.B. was not an author of this letter but she edited and translated it into English. The employer decided that the letter was ill-founded and defamatory by nature. The employer also argued that E.B. distributed this letter among other staff members and provoked tensions at the enterprise. The employer extraordinarily terminated the employment contract with E.B. on the grounds of Article 88(1)5 of the Employment Contract Act, which permits an employer to fire a worker for theft, fraud or an act bringing about the loss of the employer's trust in the employee.

E.B. claimed that the termination of her employment contract was illegal and void. Furthermore, she claimed to have suffered from victimisation banned by the Gender Equality Act and the Equal Treatment Act in that she suffered adverse treatment because she had submitted a complaint regarding discrimination and/or had supported other people who had submitted such complaint. E.B. also claimed that she should have been protected against victimisation even if the letter did not include correct and/or detailed information about discrimination.

The court agreed that the termination of the employment contract was illegal and void given that there were no good reasons for such a termination. However, the letter at stake could not be regarded as a discrimination complaint as it did not include any facts or references to any concrete incidents. E.B. also failed to provide similar information in court and to report whose complaints she supported. The court considered that E.B. should present a *prima facie* discrimination case (the same standards as in the provisions on shift in the burden of proof) in order to enjoy protection against victimisation. The court concluded that as the letter could not be regarded as a discrimination complaint, there was no victimisation of E.B.

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

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

The Equal Treatment Act provided for the right of an injured party to demand compensation for damage and for the discrimination to end. Furthermore, a victim may demand that a 'reasonable amount of money' be paid as compensation for non-pecuniary damage caused by the violation (Article 24(1)-(2)). 'Upon determination of the amount of compensation,

¹⁰⁴ *Harju Maakohus*.

a court shall take into account, inter alia, the scope, duration and nature of the discrimination' (Article 24(3)). The limitation period of such claims is one year from the date when the injured party became aware or should have become aware of the damage caused (Article 25).

The above-mentioned provisions are applied within the material scope of the Equal Treatment Act (as the latter is *lex specialis*).

b) Ceiling and amount of compensation

No upper limits were explicitly established in the Equal Treatment Act.

The Public Service Act (Article 105(3)) provides that the upper limit of the compensation provided for the illegal termination of an employment or service does not apply when there has been a violation of the principle of equal treatment.

As for ordinary employment, the court or labour dispute committee may change the standard amount of the compensation (three months' wages), taking into consideration the circumstances of the cancellation of employment and the interests of both parties (Article 109(1) of the Employment Contract Act).

There are no relevant statistics. Compensation may vary from EUR 500 to EUR 8 200 depending on the case.

There are no rules on the amount of compensation or any ceiling on the maximum amount of compensation in discrimination cases outside the area of employment.

c) Assessment of the sanctions

The relevant provisions in the Equal Treatment Act, Public Service Act *and* Employment Contract Act are quite general and concise. They cannot be regarded as a solid basis for effective, proportionate and dissuasive sanctions considering the low level of awareness of discrimination issues in Estonian society. The fact that there is a very low number of discrimination court cases appears to support this supposition.

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

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

The body in Estonia for the promotion of equal treatment is the Commissioner for Gender Equality and Equal Treatment.

The Chancellor of Justice has historically played this role and this institution still has some obligations relating to the promotion of the principles of equality and non-discrimination in Estonia. Furthermore, this body conducts conciliation procedures (in respect of discrimination in private sphere).

- b) Status of the designated bodies – general independence

According to the Equal Treatment Act, the Commissioner for Gender Equality and Equal Treatment is an independent expert appointed for a five-year period by the Minister of Social Affairs. His or her activities, supported by the office, are funded by the state budget. The office of the Commissioner is governed under statute enacted by the Government of the Republic (Article 15).

The Chancellor of Justice is appointed by the Parliament, on the proposal of the President of the Republic, for a term of seven years (Article 140(1) of the Constitution). In directing his or her office, the Chancellor of Justice has the same rights that are granted by law to a minister in directing a ministry (Article 141(1)). The Chancellor is independent in his or her decision-making, and the office has a budget of its own (fixed in the annual state budget). This body comes under the control of the State Audit Office, which is an independent state body exercising economic control (on the basis of Article 7(1) of the State Audit Office Act). Criminal charges may be brought against the Chancellor only on the proposal of the President of the Republic, and with the consent of the majority of the membership of the Parliament (Article 145).

In terms of independence it might be important that both the Chancellor of Justice and the Commissioner for Gender Equality and Equal Treatment cannot, during their term of office: hold any other state or local government office or an office of a legal person in public law; belong to the management board, supervisory board or supervisory body of a commercial undertaking; engage in enterprise, except his or her personal investments and the interest and dividends received therefrom and income received from the disposal of his or her property. They are permitted to engage in research or teaching unless this hinders the performance of their functions. In addition, the Chancellor of Justice cannot participate in the activities of political parties (Article 12 of the Chancellor of Justice Act and Article 22 of the Equal Treatment Act). The Chancellor of Justice Act established the same restrictions for Deputy Chancellor of Justice-Advisers and for advisers to the Chancellor of Justice (Article 39).

- c) Grounds covered by the designated body/bodies

The Commissioner for Gender Equality and Equal Treatment deals with discrimination on the grounds of sex, ethnic origin, race, colour, religion or other beliefs, age, disability or sexual orientation (within the material scope similar to Directives 2000/43 and 2000/78 for the respective grounds).

The Chancellor of Justice deals with unspecified—in fact, any—ground of discrimination in the public sector, through ombudsman-like procedures. Furthermore, he or she deals with conciliation in the private sector in cases of discrimination on the grounds of sex, ethnic and racial origin, colour, language, origin, religious, political or other belief, property or

social status, age, disability, sexual orientation or other ground of discrimination provided for in the law.

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

In a comparative context we can summarise the main tasks of the two bodies (under Articles 19 and 35¹⁶ of the Chancellor of Justice Act and Article 16 of the Equal Treatment Act) as follows:

First, victims of discrimination in the **public sector** are able to address one of these institutions. The Chancellor and the Commissioner may conduct an *ombudsman-style* procedure and issue a legally non-binding decision (Commissioner) or recommendation (Chancellor).

Secondly, victims of discrimination in the **private sector** may address the Chancellor with the request to start a *conciliation procedure*. If successful, the procedure will end in a legally binding decision. Alternatively, the Commissioner may be addressed to conduct an *ombudsman-style* procedure. In that procedure, his or her decision will not be binding in legal terms.

Thirdly, only the Commissioner has an explicit duty **to advise and provide assistance** to people pursuing their complaints about discrimination.

Fourthly, both the Chancellor and the Commissioner are entitled to **analyse** the effect of the implementation of legislation on the condition of members of society and to make **proposals** to governmental bodies for amendments to legislation. However, only the Commissioner is responsible for drafting specific **reports** dedicated to discrimination issues.

Finally, both institutions are obliged to **promote equal treatment, to inform** official bodies about the relevant principles and to enhance cooperation in the field. The activities of the Commissioner are mostly limited to the scope of application of the Equal Treatment Act and the Gender Equality Act. The relevant competence of the Chancellor is based on Article 12 of the Constitution and therefore the Chancellor has few limits as regards material scope and grounds of discrimination.

e) Legal standing of the designated body/bodies

In Estonia the designated bodies have no legal standing to bring discrimination complaints (on behalf or not of identified victim(s)) or to intervene in legal cases concerning discrimination.

f) Quasi-judicial competences

The *Chancellor of Justice* is a quasi-judicial body and may deal with cases of alleged discrimination by a natural person or a legal person in private law (on the basis of sex, race, ethnic origin, colour, language, origin, religion or religious beliefs, political or other opinion, property or social status, age, disability, sexual orientation or other grounds specified by law).

According to Article 23 of the Chancellor of Justice Act, a petitioner shall file a complaint in person or through an authorised representative. The Chancellor cannot initiate the so-called conciliation procedure without an application from a victim (Article 35⁵). However, an alleged discriminator is not obliged to participate in the procedure (Article 35¹¹ (1)). The agreement between parties in a conciliation procedure is obligatory and enforceable by bailiff (Article 35¹⁴). It may also include an obligation to pay compensation (Article 35¹²).

According to the approach of Estonian legislation, the *Commissioner for Gender Equality and Equal Treatment* does not deal with the 'resolution of disputes concerning discrimination' (Article 23 of the Equal Treatment Act). Nevertheless, the Commissioner drafts legally non-binding opinions concerning possible cases of discrimination on the basis of the applications submitted by persons or on his or her own initiative.

g) Registration by the bodies of complaints and decisions

In Estonia the bodies register the number of complaints and decisions (by ground, field, type of discrimination, etc.). These data are available to the public (often on request). In 2014, for instance, there were 475 applications filed with the Commissioner for Gender Equality and Equal Treatment, including 52 communications about 'possible cases of discrimination'.¹⁰⁵

h) Roma and Travellers

Equality bodies do not treat Roma and Travellers as a priority issue.

¹⁰⁵ Estonia, Soolise võrdõiguslikkuse ja võrdse kohtlemise voliniku 2014. aasta tegevuse aruanne, Tallinn, 2015, p. 50-51.

8 IMPLEMENTATION ISSUES

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

- Dissemination of information

In 2014 Estonian authorities continued to support the project, diversity enriches, (*Erinevus rikastab*) which is managed by the Tallinn Law School at Tallinn University of Technology in cooperation with the Human Rights Centre. The project is co-financed by the European Union (PROGRESS 2007-2013), the Ministry and the Tallinn University of Technology. In 2014 the project paid special attention to non-discrimination on the grounds of disability and sexual orientation.

The diversity enriches project is the main channel for Estonian public authorities to promote equality and non-discrimination in Estonia on the grounds provided in the directives. In 2014, an impact assessment analysis was conducted in the frame of the project in order to study how the principles of equality were promoted by Estonian public officials. The analysis proved that the Equal Treatment Act has insufficiently influenced the activities of the ministries and that the awareness level of many public officials must be increased.¹⁰⁶

In 2014 various activities were undertaken within the project to disseminate information about legal protection against discrimination: several seminars and workshops were organised, there was a film week dedicated to LGBT and relevant information materials were published. More information about the project can be found online.¹⁰⁷

In 2014 Estonian public authorities did not pay any special attention to the situation of the very small community of Roma and Travellers. However, a special study on young Roma in education and in employment¹⁰⁸ was conducted in the frame of the diversity enriches project (see above).

- Dialogue with NGOs and between social partners

The Commissioner for Gender Equality and Equal Treatment mostly concentrates on issues related to gender equality. However, her office, like the Office of the Chancellor of Justice, deemed it necessary to promote dialogue with the third sector. This dialogue has also been promoted by state and municipal institutions, especially in the context of social integration activities.

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

a) Mechanisms

Without doubt, the principles of *lex specialis derogat legi generali* and *lex posteriori derogat legi priori* are known to Estonian law.

The provisions of the Estonian Constitution are directly applicable and the basic principle of equality and non-discrimination is provided for in Article 12.

¹⁰⁶ See for details: Eik, L., Ender, J., Hillep, P., Kulla, K., Pärnamets, R. (2014) *Võrdse kohtlemise edendamise kohustuse teadlikkus ja rakendamine ministeeriumides* (Awareness Regarding Obligations to Promote and Apply Equal Treatment in the Ministries), Tellija: TTÜ Õiguse Instituut, available at: http://issuu.com/erinevusrikastab/docs/v_rdse_kohtlemise_edendamise_kohus.

¹⁰⁷ More information is available on the site of the project, diversity enriches, <http://www.erinevusrikastab.ee>.

¹⁰⁸ Civitta Eesti AS (2014) *Roma rahvusest noorte olukord Eesti Vabariigis: haridus ja töökeskkond* (The Situation of Roma Youth in the Republic of Estonia: Education and Work Environment), Tellija: Tallinna Tehnikaülikool, 2014.

According to the common rule in relation to undertaking transactions (including treaties of any kind) as stipulated in Articles 86 and 87 of the General Principles of the Civil Code Act,¹⁰⁹ a transaction that is contrary to the public order, good morals or the law is void. A breach of the constitutional provision will obviously be recognised as being contrary to good morals or as a significant violation of the law.

As for cases of unlawful discriminatory practice against employees, the Employment Contracts Act stipulates that cancellation of an employment contract without legal basis or in conflict with legal norms is void (Article 104(1)).

In general, employers must ensure the protection of employees against discrimination, follow the principle of equal treatment and promote equality (Article 3 of the Employment Contracts Act and Article 13 of the Public Service Act).

According to Article 4(2) of the Collective Agreements Act,¹¹⁰ the terms and conditions of a collective agreement that are 'less favourable to employees than those prescribed by an Act or other legislation' are invalid unless exceptions are permitted by an act.

b) Rules contrary to the principle of equality

We are not aware of any regulations or rules that are manifestly contrary to the principle of equality and still in force in Estonia.

¹⁰⁹ Estonia, General Principles of the Civil Code Act (*Tsiviilseadustiku üldosa seadus*), RT I 2002, 35, 216.

¹¹⁰ Estonia, Collective Agreements Act (*Kollektiivlepingu seadus*), RT I 1993, 20, 353.

9 COORDINATION AT NATIONAL LEVEL

The main bodies that deal with anti-discrimination issues are the Commissioner for Gender Equality and Equal Treatment and, to a much lesser extent, the Chancellor of Justice. The functions and tasks of these institutions were described in section 7.

According to the Government of the Republic Act,¹¹¹ it is within the area of government of the Ministry of Social Affairs¹¹² to promote equal treatment as well as equality of men and women, including coordination of activities in this field, and the preparation of the corresponding draft legislation (Article 67(1)).

However, each ministry, within its area of government, should monitor compliance with the requirements of the Equal Treatment Act and cooperate with other persons and agencies in the promotion of the principle of equal treatment (Article 14 of the Equal Treatment Act). In practical terms that means that the Ministry of Culture deals with issues related to discrimination on the grounds of racial and ethnic origin (within social integration policies), the Ministry for the Interior¹¹³ deals with discrimination on the ground of religion or belief, and the Ministry of Social Affairs, in addition to general coordination of all relevant anti-discrimination work, concentrates on issues related to the grounds of age, disability, sexual orientation and sex.¹¹⁴

As yet, there is no anti-discrimination Action Plan in Estonia. However, on 11 July 2014 the Government of the Republic decided to draft a document entitled *Action Plan for Social Security, Inclusion and Equal Opportunities 2016-2023* (*Sotsiaalse turvalisuse, kaasatuse ja võrdsete võimaluste arengukava 2016-2023*).¹¹⁵

¹¹¹ Estonia, Government of the Republic Act (*Vabariigi Valitsuse seadus*), RT I 1995, 94, 1628.

¹¹² *Sotsiaalministeerium*

¹¹³ *Siseministeerium*. The area of government of the Ministry for the Interior includes the management of issues relating to churches and congregations.

¹¹⁴ Ministry of Social Affairs; Written communication no. 1.2-3/1884 of 9 April 2012.

¹¹⁵ Ministry of Social Affairs; Information provided at: <http://www.sm.ee/et/sotsiaalse-turvalisuse-kaasatuse-ja-vordsete-voimaluste-arengukava-2016-2023>.

10 CURRENT BEST PRACTICES

In 2012-2014 in the context of the project, diversity enriches (see above section 8.1), 31 companies and organisations signed the Estonian Diversity Charter, i.e. they agreed to follow the principles of diversity and equal treatment in the context of their human resources policy.¹¹⁶

¹¹⁶ Diversity Enriches; Press release of 21 February 2014, available at: <http://www.erinevusrikastab.ee/news/mitmekesisuse-kokkulepe-2013>.

11 SENSITIVE OR CONTROVERSIAL ISSUES

11.1 Potential breaches of the directives (if any)

There are *issues of concern* in the context of the transposition of Directives 2000/43 and 2000/78:

- Article 9(1) of the Equal Treatment Act permits direct discrimination on the grounds of race and ethnicity in circumstances other than genuine and determining occupational requirements or positive action measures. This provision is hardly in line with the requirements of Directive 2000/43. See section 2.2.b of this report for analysis.
- There are no specific provisions regarding the legal standing of 'a person who has a legitimate interest in checking compliance with the requirements for equal treatment' (the right to act as a representative of a victim of discrimination) in the areas outside 1) discrimination disputes in private employment and 2) the conciliation procedure at the Chancellor of Justice (regarding discrimination by natural persons and legal persons in private law). Furthermore, the notion of 'a person who has a legitimate interest' was not defined by law. For more details see section 6.2 of this report.
- There are no provisions to guarantee that sanctions applicable to infringements of the national anti-discrimination provisions are effective, proportionate and dissuasive. See more details in section 6.5. of the report.

11.2 Other issues of concern

- The awareness level of policy makers and the general public's tolerance of anti-discrimination still remains low, which was evident, inter alia, during heated public debates on the draft Registered Partnership Act (adopted October 2014).
- In 2014 the number of discrimination cases was very small. Courts prefer to dismiss the discrimination-related arguments of the parties involved and to solve cases with references to other provisions. It is noticeable, however, that more discrimination cases are now reported to the Commissioner for Gender Equality and Equal Treatment and to labour dispute committees (quasi-judicial institutions).
- All issues related to Russians and Russian-speaking minorities are highly politicised, especially the issue of linguistic discrimination in the labour market. There is no or very limited political will to deal with ethnic and linguistic discrimination against the Russian population in the foreseeable future, nor in the context of ongoing projects and initiatives. Tense international relations are a new challenge in this context.

12 LATEST DEVELOPMENTS

12.1 Legislative amendments

There were no changes in anti-discrimination law (few amendments were of purely technical nature, e.g. changes of official names/titles).

It is worth mentioning that on 9 October 2014 the Registered Partnership Act¹¹⁷ was adopted. A registered partnership contract may be entered into between two natural persons of whom at least one has residence in Estonia (Article 1(1)). The law will come into force from 1 January 2016.

12.2 Case law

Name of the court: Tartu Administrative Court¹¹⁸

Date of decision: 10 October 2014

Name of the parties: XXX vs. Social Insurance Board

Reference number: administrative case no. 3-14-164

Address of the webpage:

https://www.riigiteataja.ee/kohtuteave/maa_ringkonna_kohtulahendid/menetlus.html?kohtuasjaNumber=3-14-164/38

Brief summary: age discrimination is proven when the employer (or his or her representative) specifically refers to age as a reason for the redundancy of the employee.

XXX was an official who was released from service due to redundancy. She appealed against the decision claiming it to be unsubstantiated and discriminatory.

According to Article 90(5) of the Public Service Act, if upon redundancy the selection is to be made between at least two officials performing similar functions, the person whose education, work experience, knowledge and skills meet best the requirements established for the performance of the functions shall have a preferential right to remain in the service. If it is impossible to differentiate between the officials on the basis of the specified criterion, an official who is raising a child under seven years of age shall have a preferential right to remain in the service, followed by the representative of the officials or an official whose legitimate expectations need higher protection, taking account of the number of dependants of the official.

In the case of XXX, the court found violation of the principles of selection upon redundancy (XXX was compared with only two other officials from her sub-unit, not the entire regional office). XXX had legitimate expectations which needed higher protection. Therefore the court declared her release from service unlawful and she was awarded compensation in the amount of her three months' average salary.

The court also established direct discrimination on the ground of age in the case of XXX. The applicant set out the facts on the basis of which it could be presumed that discrimination had occurred. Namely, she provided an email message from her immediate superior who stated, inter alia, that her redundancy was decided 'basically on the age criteria'. The employer failed to prove that there was no breach of the principle of equal treatment.

No upper limits to the compensation are applied if an official has been released from service violating the principle of equal treatment (Article 105(3) of the Public Service Act). Therefore XXX was additionally awarded compensation for non-patrimonial damage caused by the violation of her rights in the amount of one year's average salary.

¹¹⁷ Estonia, Registered Partnership Act (*Kooseluseadus*), RT I, 16.10.2014, 1.

¹¹⁸ *Tartu Halduskohus*.

In this case the court was able to apply legal provisions that are quite rarely used in practice in Estonia: shift in the burden of proof, compensation for non-patrimonial damage caused by discrimination and the absence of upper limits to the compensation applied in discrimination cases.

Name of the court: Tallinn Circuit Court¹¹⁹

Date of decision: 23 January 2014

Name of the parties: *L.J. vs. Tallinn Prison*

Reference number: administrative case no. 3-13-510

Address of the webpage:

https://www.riigiteataja.ee/kohtuteave/maa_ringkonna_kohtulahendid/menetlus.html?kohtuasjaNumber=3-13-510/24

Brief summary: no ethnic discrimination if the public official is fired due to the lack of an officially required language proficiency certificate.

L.J. was a prison public official of minority origin. He was released from service on the grounds of Article 117(1)5 of the 'old' Public Service Act (valid until March 2013). On the grounds of this provision an official may be released from the service due to his or her unsuitability for the position if he or she does not have a document that is a mandatory requirement for employment in a particular position. In this case, L.J. failed to provide an Estonian language proficiency certificate for the level C1.

According to Articles 23(1) and 23(4) of the Language Act, officials and employees of state agencies must be able to understand and use Estonian at the level that is necessary to perform their service or employment duties. The requirements for proficiency in and use of the Estonian language are established by a regulation of the Government of the Republic. Proficiency in the Estonian language is assessed by the Estonian language proficiency examinations (Article 24). Initially, for the position held by L.J., the Government established a requirement to possess an Estonian language proficiency certificate for the level B2. The applicant possessed an equivalent certificate. However, from February 2011 the requirement was raised to the level C1. L.J. failed to pass the required exam in due time.

L.J. appealed against the decision to release him from service claiming it to be unsubstantiated and discriminatory. The first court instance found that L.J. was doing his work pretty well and the work was repeatedly praised by his superiors. The decision to release him from service due to the lack of a single document was found to be unlawful. This decision was appealed by the prison (his employer).

The court of second instance emphasised that public institutions must follow official legal requirements. Therefore the release from service due to the lack of a language proficiency certificate was inevitable. The court did not find ethnic and age discrimination in this case: L.J. was not treated less favourably than other public officials without C1 proficiency certificates regardless of their ethnic origin or age. This decision became final.

It is worth emphasising that the court did not analyse the proportionality of linguistic requirements in this particular case in order to establish their (non-)discriminatory nature.

¹¹⁹ *Tallinna Ringkonnakohus.*

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

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

Country: Estonia

Date: 1 January 2015

Title of legislation (including amending legislation)	<p>Title of the law: Constitution of the Republic of Estonia (<i>Eesti Vabariigi põhiseadus</i>)</p> <p>Abbreviation: CRE</p> <p>Date of adoption: 28 June 1992</p> <p>Latest amendments: 13 April 2011</p> <p>Entry into force: 3 July 1992</p> <p>Web link: https://www.riigiteataja.ee/en/eli/530102013003/consolide</p> <p>Grounds covered: unlimited (ethnic origin, race, colour, sex, language, origin, religion, political or other opinion, property or social status, or other grounds)</p> <p>Civil/administrative/criminal law: administrative</p> <p>Material scope: Not specified</p> <p>Principal content: Equality before the law; prohibition of discrimination</p>
Title of legislation (including amending legislation)	<p>Title of the law: Equal Treatment Act (<i>Võrdse kohtlemise seadus</i>)</p> <p>Abbreviation: ---</p> <p>Date of adoption: 11 December 2008</p> <p>Latest amendments: 16 June 2014</p> <p>Entry into force: 1 January 2009</p> <p>Web link: https://www.riigiteataja.ee/en/eli/530102013066/consolide</p> <p>Grounds covered: ethnic origin, race, colour, religion or other beliefs, age, disability or sexual orientation</p> <p>Civil/administrative/criminal law: Civil/administrative</p> <p>Material scope: identical with Directives 2000/43 and 2000/78 for respective grounds</p> <p>Principal content: definitions of direct and indirect discrimination, harassment, provisions regarding victimisation, instruction to discriminate, genuine occupational requirements, reasonable accommodation, burden of proof, positive action measures, exceptions for associations and other public or private organisations the ethos of which is based on religion or belief. Detailed provisions regarding one of the specialised bodies (Commissioner for Gender Equality and Equal Treatment)</p>
Title of legislation (including amending legislation)	<p>Title of the law: Chancellor of Justice Act (<i>Õiguskantsleri seadus</i>)</p> <p>Abbreviation: ---</p> <p>Date of adoption: 25 February 2002</p> <p>Latest amendments: 9 December 2014</p> <p>Entry into force: 1 September 2002</p> <p>Web link: https://www.riigiteataja.ee/en/eli/505012015001/consolide</p> <p>Grounds covered: not specified (public sector); sex, race, ethnic origin, colour, language, origin, religious, political or other belief, property or social status, age, disability, sexual orientation or other ground of discrimination provided for in the law (conciliation procedure, private sector)</p> <p>Civil/administrative/criminal law: Administrative (with elements of civil)</p> <p>Material scope: Not specified (public sector); the Chancellor will ignore discrimination-related complaints that concern 1) the professing and practising of faith or working as a minister of religion in religious associations with registered articles of association; 2) relations in family or private life; 3) the exercising of the right of succession (private sector)</p>

	Principal content: Procedure in cases of discrimination by 1) state agency, local government agency or body, legal person in public law, natural person or legal persons in private law performing public duties; 2) a natural person or a legal person in private law; responsibilities of the Chancellor as a body for the promotion of equality
Title of legislation (including amending legislation)	Title of the law: Penal Code (<i>Karistusseadustik</i>) Abbreviation: PC Date of adoption: 6 June 2001 Latest amendments: 16 December 2014 Entry into force: 1 September 2002 Web link: https://www.riigiteataja.ee/en/eli/522012015002/consolide Grounds covered: Ethnic origin, race, colour, sex, language, origin, religion, sexual orientation, political opinion, financial or social status (incitement and discrimination), genetic risks (discrimination)
	Civil/administrative/criminal law: criminal
	Material scope: Not specified; acts of incitement should be public
	Principal content: Prohibition of incitement and discrimination (incitement to hatred, violence or discrimination and unlawful restriction of rights or granting of unlawful preferences)
Title of legislation (including amending legislation)	Title of the law: Gender Equality Act (<i>Soolise võrdõiguslikkuse seadus</i>) Abbreviation: --- Date of adoption: 7 April 2004 Latest amendments: 19 June 2014 Entry into force: 1 May 2004 Web link: https://www.riigiteataja.ee/en/eli/530102013038/consolide Grounds covered: sex
	Civil/administrative/criminal law: Administrative/ civil
	Material scope: All spheres of public life (excluding professing and practising faith or working as a minister of religion in a registered religious association and relations in family or private life)
	Principal content: Prohibition of direct and indirect discrimination, harassment, instruction to discriminate, changes regarding burden of proof, victimisation etc.; responsibilities of public and private actors regarding the implementation of gender mainstreaming strategy.

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Country: Estonia

Date: 1 January 2015

Instrument	Date of signature (if not signed please indicate)	Date of ratification (if not ratified please indicate)	Derogations/ reservations relevant to equality and non- discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	14 May 1993	16 April 1996	No	Yes	Yes
Protocol 12, ECHR	4 November 2000	No	---	---	---
Revised European Social Charter	4 May 1998	11 September 2000	No	collective complaints - No	Yes
International Covenant on Civil and Political Rights	(accession)	21 October 1991 (accession)	No	Yes	Yes
Framework Convention for the Protection of National Minorities	2 February 1995	6 January 1997	No; however, according to the Estonian declaration only Estonian citizens may be recognised as national minority members	---	Yes (in the case of self-executing norms)
International Covenant on Economic, Social and Cultural Rights	(accession)	21 October 1991 (accession)	No	---	Yes
Convention on the Elimination of All Forms of Racial Discrimination	(accession)	21 October 1991 (accession)	No	Yes	Yes
Convention on the Elimination of Discrimination	(accession)	21 October 1991 (accession)	No	No	Yes

Instrument	Date of signature (if not signed please indicate)	Date of ratification (if not ratified please indicate)	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
tion Against Women					
ILO Convention No. 111 on Discrimination	Irrelevant	8 June 2005	No	---	Yes
Convention on the Rights of the Child	(accession)	21 October 1991 (accession)	No	---	Yes
Convention on the Rights of Persons with Disabilities	25 September 2007	30 May 2012	No	Yes	Yes

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