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Non-discrimination

Bulgaria

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including summary



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Country report

Non-discrimination

Transposition and implementation at national level of
Council Directives 2000/43 and 2000/78

Bulgaria

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Reporting period 1 January 2019 – 31 December 2019

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EXECUTIVE SUMMARY

1. Introduction

The ruling party currently governs the country in coalition with a party that the European Commission against Racism and Intolerance (ECRI) has termed 'ultranationalist/fascist': VMRO-BND.^{1 2} Bulgaria is a multi-ethnic and religiously diverse society. According to the 2011 census (the most recent one), the Turkish community amounts to 8.8 % of the population and the Roma community 4.9 %.³ Muslims represent 10 % of the population; Protestants 1.1 % and Catholics 0.8 %.⁴ The majority self-define as Eastern Orthodox. Vulnerable groups include the Roma; refugees/migrants; people with disabilities, especially intellectual disabilities; people of non-traditional faiths; LGBT people; Muslims; Turks; Jews; and Macedonians. Discrimination and hatred, including hate speech and hate crime, against the Roma is pervasive, radical and unsanctioned. High-ranking public officials engage in overt incitement to hatred and discrimination against the Roma, portraying them as subhuman. In such cases, the Prosecutor's Office, competent under the law for hate crime and hate speech, takes no action. The equality body does not commence *ex officio* proceedings in such cases.

Roma live in segregated housing in dire conditions, often suffering collective arbitrary forced evictions. The European Court of Human Rights (ECtHR) found Bulgaria liable in such a case.⁵ This ruling has not been implemented, and as a result Bulgaria is under enhanced supervision by the Committee of Ministers of the Council of Europe. Roma are plagued by long-term unemployment, with no access to training and jobs. They face discrimination, including harassment, in access to healthcare and services. Children study in segregated, substandard schools or have no schooling at all. The criminal justice system targets them disproportionately for prosecution and denies them equal protection under the law, including from hate crime by officials and civilians. They lack representation and have no access to decision-making at any level.

Jews, Muslims, those of non-traditional faiths and Turks suffer from manifestations of hate, such as desecration of places of worship and violent demonstrations. The ECtHR found Bulgaria liable in one such case.⁶ Macedonians are denied recognition of their identity (they are considered to be Bulgarian) and the courts refuse to register their organisations. Local authorities interfere with their peaceful assemblies. The ECtHR has found Bulgaria liable in several such cases.⁷ Bulgaria is under enhanced supervision by the Committee of Ministers of the Council of Europe for failing to implement these judgments.

People with disabilities suffer from exclusion and disadvantage in education, employment, access to services and participation. The architectural environment for service provision is commonly inaccessible. The Supreme Administrative Court has found many enterprises and public bodies liable for keeping their buildings inaccessible.⁸ LGBT people suffer from hate speech and hate crime, as well as discrimination.

Equality case law is vibrant, albeit ridden with misconceptions and contradictions. Disability rights enjoy an especially favourable reception by adjudicators. In 2018, driven by

¹ Internal Macedonian Revolutionary Organisation – Bulgarian National Movement (Вътрешна Македонска Революционна Организация - Българско Национално Движение).

² European Commission against Racism and Intolerance (ECRI), *Report on Bulgaria*, 16 September 2014.

³ National Statistical Institute, *Преброяване 2011* (Census 2011) p. 4, available at: <https://www.nsi.bg/census2011/NPDOCS/Census2011final.pdf>.

⁴ National Statistical Institute, *Преброяване 2011* (Census 2011) p. 5, available at: <https://www.nsi.bg/census2011/NPDOCS/Census2011final.pdf>.

⁵ *Yordanova and Others v. Bulgaria*, No. 25446/06, 24 April 2012.

⁶ *Karaahmed v. Bulgaria*, No. 30587/13, 24 February 2015.

⁷ See, *inter alia*, the judgment in *United Macedonian Organisation Ilinden and Others v. Bulgaria* (No. 2), No. 34960/04, 18 October 2011.

⁸ See, *inter alia*, Supreme Administrative Court (SAC), Decision No. 356 of 10 January 2018 in Case No. 8993/2016; Decision No. 4931 of 17 April 2018 in Case No. 10370/2016.

communal mobilisation, three important disability rights laws were created – most notably, the People with Disabilities Act (PDA) (in force as of 1 January 2019). A strong body of case law on hate speech has developed. However, Roma and LGBT rights protection in other cases is virtually non-existent.

2. Main legislation

The Protection Against Discrimination Act (PADA) 2004 is the main anti-discrimination law, enacted to transpose the directives.⁹ It is a single equality law universally banning discrimination on a range of grounds, including race/ethnicity, sex, religion/belief, sexual orientation, disability and age, and providing uniform standards of protection and remedies. The PADA as a whole complies with the directives, going beyond them in significant aspects: universal material scope, an extended, open-ended list of grounds, additional forms of discrimination, extended equality body powers and special judicial redress. The PADA is actively invoked by individuals before the equality body and the courts and the case law is extensive and growing.

Another equality law is the ground-specific People with Disabilities Act (PDA)¹⁰ (in force as of 1 January 2019), listing positive and reasonable accommodation duties in a number of fields. The PDA was adopted to secure rights under the Convention on the Rights of Persons with Disabilities (CRPD). Other laws, governing specific fields, such as education, employment and public procurement, provide for positive measures on grounds of disability and age.

Older abstract bans on discrimination exist in laws governing specific fields, as well as in the Constitution, but implementation is lacking. Bulgaria is bound by international instruments banning discrimination, including the European Convention on Human Rights (ECHR) (but not Protocol 12), the European Social Charter (Revised), the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Elimination of All Forms of Race Discrimination and the Convention on the Rights of the Child. The Constitution and binding international law are directly applicable by domestic courts and supersede conflicting legislation. They are enforceable against private parties, as well as public bodies.

3. Main principles and definitions

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

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

⁹ Protection Against Discrimination Act (PADA) (*Закон за защита от дискриминация*), adopted September 2003, entered into force January 2004, last amended January 2018.

¹⁰ People with Disabilities Act (PDA) (*Закон за хората с увреждания*), adopted 18 December 2018, entered into force 1 January 2019.

length of service for purposes of retirement. Positive measures aimed at disadvantaged groups are allowed.

The PADA defines indirect discrimination as, 'placing a person or persons who have a [protected] characteristic, or, who without having such a characteristic, together with the former suffer less favourable treatment, or are placed at a particular disadvantage deriving from an apparently neutral provision, criterion, or practice, unless the provision, criterion, or practice are objectively justified with a view to a legitimate aim and the means to achieving that aim are appropriate and necessary'.

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

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

The PADA defines racial segregation, providing that it is a form of discrimination. It provides for reasonable accommodation for people with disabilities in employment and education. The limit of this duty is when, 'the costs are unreasonably high and would seriously hinder' the employer or educator. According to the PDA, children with disabilities are entitled to general support and to additional support in the pre-school and school education system. This support is a means to ensure for them conditions for equal access to quality education and to inclusion. The corresponding duty for educational institutions is an absolute one.

Under the PADA, authorities, employers and educators have duties to mainstream equality and to take positive measures on all grounds. Liability is provided for abettors of discrimination, as well as vicarious liability for employers and educators who fail to prevent discrimination by third parties in places of work or study. A shift of the burden of proof is envisaged: 'In proceedings for protection against discrimination, after the party claiming to have been discriminated against, *produces (presents)* facts from which an *inference* of discrimination can be made, the respondent party must prove that the principle of equal treatment was not breached.'

The case law is contradictory with regard to intent, with several decisions in 2019 effectively requiring intent. In cases concerning various grounds, the Supreme Administrative Court (SAC) has held that there was no discrimination as, *inter alia*, the treatment was not proven to be 'conscious'.¹¹ Importantly, in a case where the lower court

¹¹ SAC, Decision No. 2922 of 27 February 2019 in Case No. 10318/2016 (age and personal status grounds); Decision No. 6577 of 7 May 2019 in Case No. 10380/2017 (ethnicity/national origin (Armenian)); Decision No. 6946 of 9 May 2019 in Case No. 8352/2017 (disability).

had found no discrimination as the treatment was not intentional, and the complainant had applied for cassation review, asking the Supreme Court of Cassation (SCC) to address specifically the question of the relevance or otherwise of intent, the SCC declined to review the case without giving reasons.¹² The case concerned a ground not protected under EU law – namely, the specific prison where a person is serving their sentence (alleged different treatment across prisons).

In 2019, the two supreme courts, the SAC (the final instance court for reviewing PADC decisions) and the SCC (the final instance court for PADA civil court cases) ruled in cases of anti-Roma hate speech that, for harassment or incitement to discrimination to be found, the claimant needs to have been specifically targeted and affected by the impugned statements.¹³ In addition, a concrete, specifically defined hostile environment needs to have been created for them personally (their workplace, place of study, a place where services are provided, a place of worship, a place of residence, an authority's premises, etc.). It is on the claimant to prove such specific impact. No assumptions can be made based on the content of the impugned speech or the fact that it was mediatised, even if it is found to be offensive. Similarly, no intent to harass on the part of the respondent can be established based on the content of statements. 'Abstract' statements targeting an unidentified circle of persons, including a racial, ethnic or religious community, are not banned under the concept of harassment or other forms of discrimination, including less favourable treatment, victimisation and racial segregation. In essence, discrimination requires a specific victim.

In line with this new restrictive trend, a lower instance ruling denied harassment found by the PADC as the complainant had failed to prove that she had been personally affected, and it was not proven that the respondent had manifested a negative attitude towards a specific person based on ethnicity. The lack of a specific victim meant the lack of a violation under the PADA. In addition, the impugned statements needed to be 'objectively' and not 'subjectively' offensive.¹⁴

These decisions, clearly marked by anti-Roma bias, arguably contravene the *Firma Feryn* principle that wholesale discriminatory statements are outlawed regardless of whether an individual victim is identified. They have precedents. However, other decisions in 2019 and previously, including by the SAC and the SCC, have recognised PADA violations where categories of people and not specific individuals were targeted. The case law is inconsistent and arguably unreliable.

The case law is contradictory in terms of banning all discrimination, including such provided for under legal norms. On the one hand, in 2019, the SAC and the SCC jointly held that every administrative act, including a piece of secondary legislation, is unlawful if it is discriminatory, and a discriminatory administrative act gives rise to standing to claim protection before the administrative court, including for damages resulting from the said act.¹⁵ The SCC separately ruled that, to find discrimination, established inequality was relevant, regardless of whether it was according to legal norms, as the PADA aims at finding and imposing sanctions on all inequality.¹⁶ The Varna Regional Court issued a similar ruling.¹⁷ However, in at least two other cases, the SAC held that the impugned treatment could not be discriminatory as it was based on the applicable law and other legal

¹² Supreme Court of Cassation (SCC), Ruling No. 596 of 22 July 2019 in Case No. 680/2019.

¹³ SCC, Decision No. 2 of 19 June 2019 in Case No. 3203/2018, Decision No. 819 of 29 November 2019 in Case No. 2596/2019; SAC, Decision No. 636 of 15 January 2019 in Case No. 7229/2018, SAC, Decision No. 14026 of 21 October 2019 in Case No. 12163/2018.

¹⁴ Sofia City Administrative Court (SCAC), Decision No. 4590 of 3 July 2019 in Case No. 4299/2019 (concerning an anti-Roma newspaper publication).

¹⁵ SAC and SCC, joint Ruling No. 28 of 2 April 2019 in Case No. 5A/2019.

¹⁶ SCC, Ruling No. 424 of 31 May 2019 in Case No. 919/2019.

¹⁷ Varna Regional Court (VRC), Decision No. 1486 of 11 December 2019 in Case No. 1872/2019.

standards.¹⁸ The SAC has problematically held that 'hypothetical' unequal treatment is excluded from the concept of discrimination (where a company employee had stated to the complainant that he would be unequally treated if he applied).¹⁹ In respect of a hypothetical comparator, the SAC has erred, holding that it must be established that a specific person has been treated more favourably.²⁰

In respect of identifying a proper comparator and ground, the SAC has reiterated its long-standing problematic case law:²¹ in cases of dismissal based on employees or civil servants having become entitled to an old age and seniority pension, dismissed persons are compared with others with pension entitlements (as opposed to those without such entitlements, i.e. different age groups).²² According to the SAC, dismissed individuals were not discriminated against on the ground of age because, under the law, the ground for their dismissal was not their age but their entitlement to a pension, and their entitlement to a pension was not based on age, as seniority was also taken into account. In line with its established flawed case law on this issue, the SAC starkly differentiated this criterion from age as a protected ground, and held that having acquired pension rights was not a protected ground under the PADA.²³ None of these rulings discussed proportionality or any other justification.

In respect of *causality - mixed reasons*, the SAC has repeatedly held that the reason for alleged unequal treatment must 'in all cases be a protected ground', arguably excluding cases where a protected ground was at play among other reasons.²⁴ The Sofia City Administrative Court (SCAC) has copied that approach.²⁵ In one case, the SAC explicitly held that age was 'only one of a series of criteria', denying on this and other (equally problematic) bases that any discrimination had occurred.²⁶

However, in another 2019 case, the SAC correctly stated that 'it is enough to establish that [a protected] ground constitutes a basic, meaningful reason for less favourable treatment'.²⁷

In respect of recognising discrimination *by perception*, in 2019, as in 2018-2017, the courts have more often than not required *obiter* that a protected ground be actual, thereby excluding assumed ones.²⁸

4. Material scope

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

5. Enforcing the law

¹⁸ SAC, Decision No. 6946 of 9 May 2019 in Case No. 8352/2017, Decision No. 8325 of 4 June 2019 in Case No. 45/2019.

¹⁹ SAC, Decision No. 12865 of 1 October 2019 in Case No. 5114/2018.

²⁰ SAC, Decision No. 2922 of 27 February 2019 in Case No. 10318/2016.

²¹ SAC, Decision No. 611 of 12 July 2016 in Case No. 1541/2016; Decision No. 4418 of 14 April 2016 in Case No. 4245/2016; Decision No. 2988 of 9 March 2018 in Case No. 13638/2017; Decision No. 4727 of 12 April 2018 in Case No. 2769/2018. SCC, Ruling No. 368 of 18 May 2018 in Case No. 483/2017; Ruling No. 401 of 28 May 2018 in Case No. 188/2018. For more detail, see Section 4.7.1 a) above.

²² SAC, Ruling No. 2711 of 25 February 2019 in Case No. 5704/2017.

²³ SAC, Ruling No. 2711 of 25 February 2019 in Case No. 5704/2017.

²⁴ SAC, Decision No. 6577 of 7 May 2019 in Case No. 10380/2017, Decision No. 6946 of 9 May 2019 in Case No. 8352/2017, Decision No. 14026 of 21 October 2019 in Case No. 12163/2018.

²⁵ SCAC, Decision No. 8325 of 20 December 2019 in Case No. 11063/2019, Decision No. 4590 of 3 July 2019 in Case No. 4299/2019.

²⁶ SAC, Decision No. 12865 of 1 October 2019 in Case No. 5114/2018.

²⁷ SAC, Decision No. 8758 of 11 June 2019 in Case No. 1014/2019.

²⁸ SCC, Ruling No. 41 of 25 January 2019 in Case No. 4570/2018. SAC, Decision No. 636 of 15 January 2019 in Case No. 7229/2018, Decision No. 14026 of 21 October 2019 in Case No. 12163/2018, Decision No. 2922 of 27 February 2019 in Case No. 10318/2016.

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

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

Under the PADA, the PADC assists victims of discrimination. In practice, complainants are provided with procedural advice on filing their complaints. The PADC has standing to initiate court proceedings, as well as to join proceedings. It has not used these possibilities. NGOs actively litigate discrimination cases. They have standing to represent complainants in court, as well as to intervene in proceedings in their support. NGOs have standing to take public interest court action on their own behalf where the rights of many people are infringed without authorisation from a victim. They have standing to initiate proceedings before the PADC without identifying any victim. NGOs have brought a range of public interest cases. This has enhanced public attention. Certain strong decisions were rendered, with the potential to bring about social change. Discrimination litigation, especially by NGOs, receives media coverage.

Statistical data have been considered as regular proof by both the equality body and judges. The PADC has *ex officio* looked at statistical data.

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

According to labour law, people with disabilities are entitled to employment quotas and employer subsidies. Younger and older workers, as well as people with caring responsibilities, also enjoy preferential treatment in employment. Roma people are nominally the beneficiaries of a number of positive programmes in education, housing and other fields, but the impact of these measures in practice has been limited. Under the PDA, more employment quotas for people with disabilities are provided for. In terms of positive action for Roma, in 2018, a court struck down as discriminatory targeted scholarships for Roma students.²⁹

²⁹ SCAC, Decision No. 7471 of 10 December 2018 in Case No. 9628/2018. For further information, please see section 5 – Positive action.

According to SAC case law, public interest (*actio popularis*) litigants expressly have no standing to appeal against PADC decisions, as such litigants are said to lack 'a legal interest', not being personally affected by a PADC decision.³⁰ This means that public interest NGOs and minority activists bringing PADC proceedings in cases where the rights of many unspecified victims were infringed are excluded from access to judicial review of unfavourable PADC decisions. This is a serious hindrance for public interest litigation.

The case law has been inconsistent and unreliable as regards the competence of the administrative courts as opposed to the civil courts in anti-discrimination claims against public bodies.

6. Equality bodies

The Protection Against Discrimination Commission (PADC) is the national specialised equality body. It was set up under the PADA as an independent collegiate semi-judicial authority with adjudicating powers. The PADC deals with discrimination on all protected grounds. It has a mandate to: hear and investigate complaints by victims and communications by third parties; initiate its own proceedings; find discrimination by legally binding decisions; impose financial sanctions; issue mandatory instructions for remedial or preventative redress; review and give opinions on draft legislation; make recommendations to public authorities, including for legislative change; assist victims of discrimination; and carry out independent research and publish independent reports. The PADC has a vast and growing body of case law, some of it effective. Its decisions are reviewed by two instances of courts, including the SAC.

7. Key issues

- The PADA defines indirect discrimination in an unclear, confusing way, thwarting implementation.
- The definition of incitement to discrimination in the PADA, including instructions to discriminate, expressly requires direct intent.
- The definition of racial segregation in the PADA expressly requires the state of separation to be 'compelled'.³¹ The European Court of Human Rights has consistently held in Roma segregation cases that no waiver of the right to non-discrimination is possible.³²
- The PADC does not use its powers, including its competence to start *ex officio* proceedings, in any strategic way, except for disability rights. It has no defined priorities and has failed to target structural issues, other than inaccessibility.
- There is no reliable measurement of the implementation rate of PADC decisions. In cases of non-compliance, the PADC has no formal powers other than to impose further fines.
- SAC case law, while evolving, has featured a number of interpretations which are arguably not compliant with the directives, curtailing access to justice in various ways (requiring intent, limiting *actio popularis* standing and providing erroneous legal qualifications).

³⁰ For instance, SAC, Decision No. 7863 of 12 June 2018 in Case No. 697/2017; Ruling No. 6491 of 17 May 2018 in Case No. 5486/2018. See also, among many other authorities from previous years, SAC, Ruling No. 14203 of 22 November 2017 in Case No. 11583/2017.

³¹ PADA, Additional Provision, § 1(6).

³² For instance, *D.H. v. Czech Republic*, No. 57325/00, 13 November 2007; *Sampanis v. Greece*, No. 32526/05, 5 June 2008; *Oršuš v. Croatia* [GC], No. 15766/03, 16 March 2010.

INTRODUCTION

The national legal system

Bulgaria is a unitary state where the Constitution³³ and ratified international instruments are directly enforceable by the courts and take precedence over conflicting national provisions. All courts are bound to apply constitutional and international norms instead of contradicting primary legislation. The legal system is continental, with no *stare decisis*. The Constitutional Court has exclusive authority to bindingly interpret the Constitution. Only a limited number of public institutions have standing to initiate proceedings with this Court. There is no right to individual petition. Secondary legislation may not contradict primary legislation. If it does, it is subject to being repealed by the administrative courts. All courts have a duty to apply primary legislation instead of contradicting secondary legislation.

The Protection Against Discrimination Act 2004 (PADA)³⁴ is the main anti-discrimination law, adopted to transpose the EU anti-discrimination directives. It is a single equality law universally banning discrimination on a range of grounds, providing uniform standards of protection and remedies, complete with specific bans in particular fields. The PADA establishes an equality body – the Protection Against Discrimination Commission (PADC) – with the mandate of a quasi-jurisdiction to decide cases and sanction discrimination. Its decisions are subject to two-instance judicial review before the administrative courts. The PADA also provides for parallel judicial recourse to the civil courts.

In parallel, pre-existing schematic discrimination bans are in place under laws governing specific fields and in the Constitution. Older legislative bans on discrimination are not harmonised with the PADA, differing in terms of protected grounds, exceptions and definitions. Furthermore, there is inconsistency between the PADA and laws governing particular fields providing for direct or indirect discrimination.³⁵

The law on (equal) disability rights, the new People with Disabilities Act (PDA),³⁶ provides for accessibility, positive action and (reasonable) accommodation duties in a number of fields. Furthermore, a number of laws governing specific fields, such as education, employment, public procurement and taxation, provide for positive measures on grounds of disability and age.

List of main legislation transposing and implementing the directives

The Protection Against Discrimination Act,³⁷ adopted in 2003. Grounds: sex, race, national origin, ethnicity, human genome, nationality, origin, religion or faith, education, beliefs, political affiliation, personal or social status, disability, age, sexual orientation, family status,³⁸ property status or any other ground provided for by law or by international treaty to which Bulgaria is a party. Scope: universal.

People with Disabilities Act,³⁹ adopted 18 December 2018. Ground: disability. Scope: universal.

³³ Constitution (*Конституция*), adopted July 1991, last amended December 2015.

³⁴ PADA.

³⁵ Examples include Article 141 of the Defence and Armed Forces Act (age and mental/physical ability requirements for access to service) and Article 155(1.4) and Article 155 of the Ministry of the Interior Act (age and mental/physical ability requirements for access to service; maximum age for service).

³⁶ Integration of People with Disabilities Act (*Закон за интеграция на хората с увреждания*), adopted 2004, in force as of 2005, last amended 20 July 2018. Repealed 18 December 2018 (repeal in force as of 1 January 2019).

³⁷ PADA.

³⁸ LGBT families would be protected under 'sexual orientation', as well as possibly under 'family status'. No case has yet dealt with this issue. Accordingly, judicial interpretation would be required to determine whether 'family status' would be effectively applicable to LGBT families.

³⁹ PDA, adopted 18 December 2018, in force as of 1 January 2019.

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

The Constitution of Bulgaria includes the following article dealing with non-discrimination.

Article 6 is a general clause of universal application, covering race, national origin, ethnicity, sex, origin, religion, education, beliefs, political affiliation, personal and social status, and property status. Age, sexual orientation and disability are not covered. 'Personal status' could potentially be used to cover those grounds, but no case law to that effect exists. Therefore, judicial interpretation would be required to determine whether age, disability and sexual orientation would be covered under 'personal status'.

This provision applies to all areas covered by the directives. Its material scope is broader than that of the directives. It is directly applicable. This provision can be enforced against private individuals (and private legal persons) (as well as against the state).

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination explicitly covered

The following grounds of discrimination are explicitly prohibited in the main legislation transposing and implementing the directives (listed in the Introduction) transposing the two EU anti-discrimination directives: sex, race, national origin, ethnicity, human genome, nationality, origin, religion or faith, education, beliefs, political affiliation, personal or social status, disability, age, sexual orientation, family status, property status or any other ground provided for by law or by international treaty to which Bulgaria is a party (Constitution, Article 6(2); PADA, Article 4).⁴⁰

2.1.1 Definition of the grounds of unlawful discrimination within the directives

National legislation only defines disability and sexual orientation. In national case law, definitions of certain other grounds also exist, as discussed below.

a) Racial or ethnic origin

In national legislation, neither racial nor ethnic origin are defined. In national case law, there was a recent attempt to clarify 'ethnic origin'. In 2018, the Supreme Administrative Court (SAC) held that there was a difference between 'ethnic origin' ('ethnic belonging' or 'ethnic affiliation' in the language of the PADA (*етническа принадлежност*)) and 'origin' (*произход*), also a protected ground in the PADA.⁴¹ The SAC held that 'ethnic origin' ('ethnic affiliation') was 'linked to the idea of a social community distinct in terms of tribal affiliation, a common language and a cultural and traditional foundation'. Therefore, the SAC held, treatment allegedly based on belonging to the Roma ethnicity was on grounds of 'ethnic affiliation' ('ethnic origin'). This reasoning was clearly based on the CJEU definition in *Chez* (Case C-83/14).

However, in 2019, in a case in which a local mayor had engaged in what was alleged to be hate speech against the residents of the local Roma neighbourhood, the SAC held that the protected ground of ethnicity was not established as it was not proven that the residential area in question was a predominantly Roma one, and even if that were to be considered a publicly known fact, the respondent in question had been referring not to the Roma but to the area as a whole, and not differentiating between residents on protected grounds.⁴² Therefore, no protected ground was established.

There has been no (recent) case law interpretation of 'racial origin'.

b) Religion and belief

Neither the PADA nor other national legislation defines religion or belief. The Religious Denominations Act (RDA) defines a 'denomination' as 'a set of beliefs and principles, a religious community and its religious institution'.⁴³ A 'religious community' is defined as a 'voluntary union of natural persons for purposes of manifestation of a certain religion and performance of worship, religious rituals and ceremonies'.⁴⁴ The RDA further defines a 'religious institution' as 'a religious community registered in accordance with [the RDA] that has the capacity of a legal person, governing bodies and a statute'.⁴⁵ There is no

⁴⁰ Mostly, the grounds overlap but some, like sexual orientation and 'any other ground provided for by law or by international treaty to which Bulgaria is a party', are protected only under the PADA and not under the Constitution.

⁴¹ SAC, Decision No. 12620 of 18 October 2018 in Case No. 115/2018.

⁴² SAC, Decision No. 14026 of 21 October 2018 in Case No. 12163/2018.

⁴³ Religious Denominations Act (RDA) (*Закон за вероизповеданията*), adopted December 2002, last amended 29 December 2018, Additional Provisions, § 1(1).

⁴⁴ RDA, Additional Provisions, § 1(2).

⁴⁵ RDA, Additional Provisions, § 1(3).

defined relationship, in legislation or case law, between these definitions and religion as a protected ground in the PADA. In 2018, the Supreme Administrative Court relied *obiter* on the above definitions in the RDA in a PADA case concerning hate speech in a TV broadcast targeting a minority religious community.⁴⁶ While the court did not clarify the relevance of the RDA definitions for the case at hand, it clearly viewed them as relevant for PADA purposes.

c) Disability

The PADA does not define disability. The PDA defines 'people with disabilities' and 'people with long-term disabilities', and those definitions are applicable to the PADA across fields and forms of discrimination. Under the PDA, Additional Provisions, § 1(1), people with disabilities are 'persons with physical, mental, intellectual and sensory impairment which in interaction with their environment may hinder their full and effective participation in society'. Furthermore, under the PDA, Additional Provisions, § 1(2), people with long-term disabilities are 'persons with long-term physical, mental, intellectual and sensory insufficiency which in interaction with their environment may hinder their full and effective participation in society, and whom the medical expertise authorities have certified with a type and degree of disability of 50 % and above 50 %'.

If the fact of disability is disputed in a case under the PADA, the above definitions will determine the issue. According to the case law, it is expected that disability will be proven by a medical certificate. In 2019, as in 2018, the SAC continued to consistently rely on medical certificates when discussing the fact of disability in a discrimination case in order to determine whether an individual has a disability.⁴⁷ In 2019, an appeals court explicitly held that the burden was on the appellant to prove that he was a person with a disability by producing a medical certificate.⁴⁸

In 2019, as in 2018, the SAC continued to rely on (now repealed) IPDA definitions, alongside new PDA definitions, as well as CRPD definitions, for the purposes of PADA cases.⁴⁹ The SAC noted that its approach was one of expansive interpretation of 'disability', which it held to be consistent with the approach by the ECtHR.⁵⁰ In a case concerning diabetes, the SAC reversed the lower court's decisions to the effect that the latter condition did not constitute disability.⁵¹ The SAC reasoned that, while disability was not the same as sickness, with no protection being provided for the latter, in that specific case, an insufficiency caused by the sickness (highly impaired vision, general weakness, [dependency on] life-long insulin therapy) hindered the party's full and effective participation in society on a par with others.⁵² The SAC interpreted the CRPD as not differentiating between degrees of insufficiency (impairments), noting the usage of '*may be hindered*'. The court held that it was enough if the impairment caused a hindrance at a given moment in any sphere of social life, including employment, or a probable hindrance that would not be there for others.⁵³

⁴⁶ SAC, Decision No. 4238 of 2 April 2018 in Case No. 70/2017.

⁴⁷ For instance, SAC, Decision No. 896 of 21 January 2020 in Case No. 1934/2019 (after the cut-off date for this report), Decision No. 4151 of 30 March 2018 in Case No. 494/2015, Decision No. 4931 of 17 April 2018 in Case No. 10370/2016, Decision No. 6558 of 17 May 2018 in Case No. 12550/2017.

⁴⁸ VRC, Decision No. 1486 of 11 December 2019 in Case No. 1872/2019.

⁴⁹ For instance, SAC, Decision No. 896 of 21 January 2020 in Case No. 1934/2019 (after the cut-off date for this report), Decision No. 2138 of 16 February in Case No. 13552/2016; Decision No. 10724 of 3 September in Case No. 2220/2017.

⁵⁰ See, SAC, Decision No. 896 of 21 January 2020 in Case No. 1934/2019 (after the cut-off date for this report).

⁵¹ See, SAC, Decision No. 896 of 21 January 2020 in Case No. 1934/2019 (after the cut-off date for this report).

⁵² See, SAC, Decision No. 896 of 21 January 2020 in Case No. 1934/2019 (after the cut-off date for this report).

⁵³ See, SAC, Decision No. 896 of 21 January 2020 in Case No. 1934/2019 (after the cut-off date for this report).

In 2018, similarly, the SAC held that an illness was not equivalent to a disability.⁵⁴

In practice, where a person's disability is factually a long-term disability, and they can have it medically certified, they will do so, as long-term disability is linked to enhanced monetary and other (material) entitlements (not better non-discrimination protection) in the PDA. Under the PDA, equality rights are the same for disability and long-term disability across fields and forms of discrimination. In a discrimination case, a person with a disability would be expected to present a medical certificate of their disability and that certificate would determine whether their disability is long-term or not. In practice, a litigant with a disability would not have to deal with the elements of either definition, nor would the court have to establish whether the facts of the case correspond to any of the definitions, as a medical certificate would be used as proof and that certificate would be considered indisputable. A medical certificate would provide proof of a medical condition and its longevity. A medical certificate is an expert decision handed down by the relevant Territorial Expert Physicians' Commission, which officially assesses people in terms of long-term reduced working ability (type and degree of disability). In terms of societal impact, the court would hear (expert) witnesses and gather other evidence as it saw fit.

The PDA definition of disability is arguably more liberal and inclusive than the one elaborated by the CJEU in the case of *Ring and Skouboe Werge* as it covers any limitation, regardless of whether it is long-term or not.

Other legislation, outside the field of non-discrimination, also includes disability-related definitions. In the Automobile Transport Act,⁵⁵ Additional Provisions, § 1(42), 'a person with disabilities' and 'a person with reduced mobility' are defined within the meaning of Regulation (EU) No. 181/2011. In the Rail Transport Act,⁵⁶ Additional Provisions, § 1(41), 'a person with disabilities' or 'a person with reduced mobility' is defined as a person within the meaning of Article 3(15) of Regulation (EC) No. 1371/2007. In the Pre-School and School Education Act (PSEA), there are definitions of 'a pupil with chronic illnesses' and of 'special educational needs'.⁵⁷ In the Ordinance on Inclusive Education issued under the PSEA, there is a definition of 'communication impairments'.⁵⁸

Furthermore, a piece of secondary legislation defines 'persons with reduced mobility' as including, among others, people with physical, sensory, mental and combined disabilities, people temporarily hindered in their movements (in plaster or using crutches) and people shorter than 150 cm.⁵⁹ A further piece of secondary legislation defines 'persons with hearing or speaking impairments' for the purposes of providing such people with access to special conditions of use of the 112 European emergency number.⁶⁰ Another piece of secondary legislation defines 'persons of reduced mobility' as including people with disabilities within the meaning of the PDA, among others.⁶¹ A further piece of secondary

⁵⁴ SAC, Decision No. 10724 of 3 September 2018 in Case No. 2220/2017.

⁵⁵ Automobile Transportation Act (*Закон за автомобилните превози*), adopted September 1999, last amended 18 December 2018.

⁵⁶ Rail Transport Act (*Закон за железопътния транспорт*), adopted November 2000, last amended 18 September 2018.

⁵⁷ Pre-School and School Education Act (*Закон за предучилищното и училищното образование*), entry into force 1 August 2016, last amended 29 December 2018, Additional Provisions, § 1(29) and § 1(27).

⁵⁸ Ordinance on Inclusive Education (*Наредба за приобщаващото образование*), entry into force 27 October 2017, last amended 18 December 2018, Additional Provisions, § 1(2).

⁵⁹ Ordinance No. 4 of 1 July 2009 on Planning, Implementing and Maintaining Buildings (*Наредба № 4 от 1 юли 2009 г. за проектиране, изпълнение и поддържане на строежите в съответствие с изискванията за достъпна среда за населението, включително за хората с увреждания*; adopted July 2009, last amended July 2011), Additional Provisions, § 1(1). This ordinance applies universally in respect of architectural and infrastructural accessibility.

⁶⁰ Ordinance No. 81213-238 of 6 March 2018 (*НАРЕДБА № 81213-238 от 6 март 2018 г. за условията и реда за достъп на хората със слухови или говорни увреждания до единния европейски номер за спешни повиквания 112*), Additional Provision § 1(1).

⁶¹ Ordinance No. 20 of 8 September 2011 Concerning Safety Rules and Standards for Passenger Ships (*Наредба № 20 от 8 септември 2011 г. относно правилата за безопасност и стандартите за*

legislation defines 'a person with reduced mobility' as 'a person whose mobility is reduced in using transport due to physical inability (sensory or locomotor, permanent or temporary), intellectual disability, age or any other reason for inability and whose position requires special attention and adaptation of the services offered to all passengers to the needs of this person'.⁶²

All these definitions would be applicable in a discrimination case within their material scope. For example, in a transport discrimination case, the court or equality body would take into consideration disability definitions in the relevant transport legislation, along with PADA definitions.

d) Age

National legislation does not define age. The Employment Promotion Act (EPA),⁶³ Additional Provisions, § 1(4a) defines 'groups of unequal status on the labour market', using age as a component, along with other protected grounds.⁶⁴ This definition is relevant for the purposes of the positive measures provided for in the EPA. In terms of the PADA, positive measures in the EPA, including ones on grounds of age, constitute an express exception.⁶⁵ The EPA, Additional Provisions, § 1(18) also defines 'adult', which is applicable to positive measures in the EPA.⁶⁶

In 2018, the SAC held that the protected ground of 'age' in the PADA was not the same thing as age as an element of the requirements for pension entitlement under social security legislation (both age and years of service being required).⁶⁷ Accordingly, there was no less favourable treatment on grounds of age in the cases of the complainants who were dismissed after becoming entitled to a pension. The SAC held that age discrimination would require less favourable treatment of people on grounds of age *alone*, thereby sweepingly excluding 'mixed reasons' cases. The court declared that the legislation allowing people entitled to a pension to be dismissed on that basis did not set age-based conditions.

As Bulgaria has a continental legal system, and not one based on legal precedent, these problematic rulings do not determine the law or preclude legal redress in other cases. Therefore, mixed grounds cases are still litigable under the law; potentially successfully before other courts or judges.

Moreover, the rulings in question do not contradict the ban on multiple discrimination, as the latter concerns cases where more than one protected ground played a role, whereas in mixed reasons cases, such as the retirement cases discussed above, a protected ground

пътническите кораби), adopted September 2011, last amended June 2017, Additional Provision § 1(22). This ordinance applies to passenger ships.

⁶² Ordinance No. 261 of 13 July 2006 on the General Rules for Compensating and Assisting Passengers in Cases of Refusal by an Air Carrier to Let Them on Board an Aircraft and in Cases of Cancellation or Delay of a Flight (*Наредба № 261 от 13.07.2006 г. за общите правила за обезщетяване и оказване съдействие на пътници при отказ на въздушен превозвач да ги допусне на борда на въздухоплавателното средство и при отменяне или забавяне на полет*), adopted July 2006, no amendments, Additional Provisions, § 1(3).

⁶³ Employment Promotion Act (*Закон за насърчаване на заетостта*), adopted December 2001, entry into force January 2002, last amended 2 November 2018.

⁶⁴ "Groups of unequal status on the labour market" shall be groups of unemployed people of lower competitiveness on the labour market, including: unemployed young people; unemployed young people with permanent disabilities; unemployed young people educated in social care institutions; long-term unemployed persons; unemployed persons with permanent disabilities; unemployed persons – single parents (adoptive parents) and/or mothers (adoptive mothers) with children not older than three years; unemployed persons who have served a prison sentence; unemployed persons older than 50 years; unemployed persons with elementary or lower levels of schooling and no vocational qualifications; other groups of unemployed persons."

⁶⁵ PADA, Article 7(1.9).

⁶⁶ "Adult" shall be a person of working age who is not being educated in [school] or [university] and who has not reached the respective retirement age for women and men provided for under the Social Security Code'.

⁶⁷ SAC, Decision No. 2988 of 9 March 2018 in Case No. 13638/2017, Decision No. 4727 of 12 April 2018 in Case No. 2769/2018.

(age) is coupled with a factor that is not a protected ground (seniority/years of service). Multiple discrimination cases are undisputedly litigable.

e) Sexual orientation

Sexual orientation is defined in the PADA, Additional Provisions, § 1(10), as 'heterosexual, homosexual or bisexual orientation'. This would potentially include all aspects of 'orientation', including all relevant types of attraction. As no case law dealing with such specifics exists yet, this would be subject to judicial interpretation. The existing definition of sexual orientation does not refer to any sexual categories of people, nor does it imply inclusion in such categories for the purposes of non-discrimination protection. In 2018, the SAC held that a denial of a certificate of no impediment to marriage by a notary public on the grounds of domestic legislation not recognising same-sex marriage was not made on the grounds of sexual orientation.⁶⁸ The notary public had refused to issue a no-impediment certificate for the purpose of same-sex marriage in another country, stating that there was no legal basis for such a certificate to be issued as domestic legislation recognised no such marriage.

2.1.2 Multiple discrimination

In Bulgaria, multiple discrimination is prohibited by law. The PADA defines multiple discrimination as 'discrimination based on more than one [protected] ground'.⁶⁹ The PADA places a statutory duty on public authorities to give priority to positive measures for the benefit of multiple discrimination victims.⁷⁰ The PADC hears multiple discrimination cases sitting with an extended panel of five members (rather than three).⁷¹ The law does not provide for higher compensation levels in cases of multiple discrimination. The case law of the courts and of the PADC accepts that multiple grounds cases are litigable, with many such cases being heard and decided. In some cases only, a court has said that the contested treatment needed to be based on a (single) protected ground only (age, for instance), as opposed to a combination of a protected ground and another characteristic (as in retirement cases, where age is taken into account together with seniority/years of service). Bulgaria has a continental legal system, and not one based on legal precedent, which means that individual court rulings do not determine the law, or preclude legal redress.

In Bulgaria, there is no case law effectively dealing with the concept of multiple discrimination. While cases where complainants have alleged more than one ground have been decided by the PADC and the courts, and sometimes multiple discrimination has been found, their rulings have discussed none of the conceptual or evidentiary implications of a plurality of grounds.

2.1.3 Assumed and associated discrimination

a) Discrimination by assumption

In Bulgaria, discrimination based on a perception or assumption of a person's characteristics, is prohibited in national law. The PADA defines 'on [protected] grounds' as 'on grounds of the actual, past or present, or *presumed* fact of one or more of these characteristics [...]'.⁷² Therefore, discrimination on perceived or assumed grounds is explicitly prohibited. However, more often than not, in 2019, as in 2018 and 2017, in various unrelated factual contexts, the courts have required *obiter* that a protected ground

⁶⁸ SAC, Decision No. 12113 of 10 October 2018 in Case No. 5381/2017.

⁶⁹ PADA, Additional Provisions, § 1(11).

⁷⁰ PADA, Article 11(2). Under Article 11(1), authorities are placed under a general statutory duty to take positive action whenever necessary to achieve the legislation's goals.

⁷¹ PADA, Article 48(3).

⁷² PADA, Additional Provisions, § 1(8).

be actual, thereby excluding assumed ones (a claimant must allege having a protected ground which was the reason for their unequal treatment);⁷³ a person subjected to harassment must be a bearer of a protected ground;⁷⁴ proving discrimination requires the undisputed (proven) presence of a protected ground as a reason for it; a protected ground must be at hand.⁷⁵

In 2018, the SAC held that discrimination on grounds of sexual orientation was not proven in a case concerning a contract termination allegedly based on the complainant's sexual orientation as, *inter alia*, 'the objective fact of such a protected ground was not established'.⁷⁶ In other words, the SAC implicitly required the complainant to prove that he was 'objectively' gay, thereby excluding the potential for discrimination by perception. Similarly, in 2017, the SAC ruled that, 'not every unfavourable treatment represents discrimination, but only that which is inflicted because of the objective presence of protected grounds',⁷⁷ thereby ruling out discrimination by perception. There has been no response to this decision in terms of demands for legislative reform (no reform of the legislation as such being needed). It is not known whether an application was subsequently filed with the ECtHR.

b) Discrimination by association

In Bulgaria, discrimination based on association with people with particular characteristics is prohibited in national law. The PADA defines 'on grounds of' as 'on grounds of the actual, past or present or presumed fact of one or more of these characteristics in the person discriminated against, or in another person who is, actually or presumed to be, associated with the person discriminated against, where this association is a cause of the discrimination'.⁷⁸ Therefore, discrimination by association, including presumed association, is explicitly banned. In 2019, the SAC explicitly held, invoking *Coleman*, that non-discrimination protection included a ban on unequal treatment of persons associated with a person who is a bearer of a protected ground (but to claim protection, they had to have suffered discrimination personally). In 2019, the SAC recognised that the parents of a child with a disability had standing to seek protection against discrimination as persons associated with their child.⁷⁹ Past case law by the PADC and the SAC has also expressly recognised such an association (see below). The law is in line with the judgment in Case C-303/06.

In 2014, the PADC ruled that a parent of a child with a disability was discriminated against on grounds of disability by association, as well as on grounds of being a convicted offender, by being rendered ineligible under legislation as a 'personal assistant' (a paid position) to her child.⁸⁰ The first-instance administrative court and the SAC confirmed that PADC ruling. The SAC expressly rejected an argument by the respondent, the Minister of Labour and Social Policy, to the effect that the complainant could not be discriminated against on grounds of disability as she had no disability herself. The SAC held that the parent was directly discriminated against on grounds of disability due to her association with her

⁷³ SCC, Ruling No. 41 of 25 January 2019 in Case No. 4570/2018 (an alleged employment discrimination case in which the claimant failed to state any protected ground).

⁷⁴ SAC, Decision No. 636 of 15 January 2019 in Case No. 7229/2018, Decision No. 14026 of 21 October 2019 in Case No. 12163/2018 (an anti-Roma hate speech case in which the claimant was not personally targeted).

⁷⁵ SAC, Decision No. 2922 of 27 February 2019 in Case No. 10318/2016 (a police officer dismissal case in which the complainant alleged that he was discriminated against on grounds of 'personal status' – having been convicted of a crime).

⁷⁶ SAC, Decision No. 6151 of 11 May 2018 in Case No. 7203/2016.

⁷⁷ SAC, Decision No. 7174 of 8 June 2017 in Case No. 3469/2016.

⁷⁸ PADA, Additional Provisions, § 1(8).

⁷⁹ SAC, Decision No. 12023 of 26 August 2019 in Case No. 4599/2018.

⁸⁰ Protection Against Discrimination Commission (PADC), Decision No. 126 of 1 April 2014.

child.⁸¹ There is not sufficient case law on discrimination by association on grounds other than disability to conclude whether discrimination by association is similarly established in such cases.

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

a) Prohibition and definition of direct discrimination

In Bulgaria, direct discrimination is prohibited in national law (PADA, Article 4 (1)). It is defined in the PADA, Article 4 (2) as, 'treating a person on the grounds referred to in Subsection 1 less favourably than another person is treated, has been treated or would be treated in comparable similar circumstances'.

Under the PADA, 'unfavourable treatment' is also defined: 'Unfavourable treatment shall be any act, action or omission that results in less favourable treatment of a person compared to another on [protected] grounds, or that may place a person or persons who have a [protected] characteristic at a particular disadvantage compared to other persons'. This definition, which replaced a previous definition of unfavourable treatment, was adopted following the ruling of the CJEU in case C-83/14 (the *Chez* case).⁸² The intention was to clarify that less favourable treatment is not restricted to rights provided for under law. The effect, however, is dubious, the wording being unclear (unfavourable treatment shall result in less favourable treatment).

In 2019, the SAC problematically held that hypothetical unequal treatment was excluded, denying protection to a person who claimed that he would be refused (on age grounds) a banking service on equal terms based on a bank employee statement to that effect.⁸³

In respect of a hypothetical comparator, the SAC has problematically held that it had to be established that a specific person has been treated more favourably,⁸⁴ and that discrimination was not proven as no such persons for comparison were established.⁸⁵

In respect of identifying a proper comparator, the SAC explicitly reiterated its problematic case law (see below for 2018 rulings to that effect) that, in cases of dismissals based on employees' having acquired pension rights, dismissed employees should be compared to other employees in the same group, i.e. those who have acquired pension rights (as opposed to different age/seniority groups).⁸⁶ At the same time, the court held that 'the criterion is having acquired pension rights'.⁸⁷ In line with its established flawed case law on this issue, the SAC starkly differentiated the said criterion from age as a protected ground, and held that having acquired pension rights was not a protected ground under the PADA (even though the list of protected grounds under the PADA is open-ended and explicitly includes 'personal status' and 'public status', as well as age).⁸⁸

In respect of causality – mixed reasons, the SAC has repeatedly held that the reason for alleged unequal treatment must 'in all cases be a protected ground', arguably excluding cases where a protected ground was at play among other reasons.⁸⁹ The Sofia City

⁸¹ The PADC and the courts, however, failed to take into account the fact that the grounds for the parent's less favourable treatment – her exclusion from eligibility as a personal assistant to a person with a disability – was not her child's disability but her own conviction.

⁸² Judgment of 16 July 2015, *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia*, C-83/14, EU:C:2015:480.

⁸³ SAC, Decision No. 12865 of 1 October 2019 in Case No. 5114/2018.

⁸⁴ SAC, Decision No. 2922 of 27 February 2019 in Case No. 10318/2016.

⁸⁵ SAC, Decision No. 15498 of 14 November 2019 in Case No. 3959/2018.

⁸⁶ SAC, Ruling No. 2711 of 25 February 2019 in Case No. 5704/2017.

⁸⁷ SAC, Ruling No. 2711 of 25 February 2019 in Case No. 5704/2017.

⁸⁸ SAC, Ruling No. 2711 of 25 February 2019 in Case No. 5704/2017.

⁸⁹ SAC, Decision No. 6577 of 7 May 2019 in Case No. 10380/2017, Decision No. 6946 of 9 May 2019 in Case No. 8352/2017, Decision No. 14026 of 21 October 2019 in Case No. 12163/2018.

Administrative Court has copied that approach.⁹⁰ In one case, the SAC explicitly held that age was 'only one of a series of criteria', denying on this and other (equally problematic) bases that any discrimination was at hand.⁹¹

However, in one case, the SAC correctly stated that 'it is enough to establish that [a protected] ground constitutes a basic, meaningful reason for less favourable treatment'.⁹²

In respect of recognising that no intent is required, the SAC has not been able to comply with the directives. It found no discrimination as, *inter alia*, the treatment was not proven to be 'conscious'.⁹³

Importantly, in a case in which the lower court had found no discrimination as the treatment was not intentional, and the complainant had applied for cassation review, asking the Supreme Court of Cassation (SCC) to address specifically the question of the relevance or otherwise of intent, the SCC declined without giving reasons.⁹⁴

In 2018, there were similar case law issues. The SAC held that age discrimination would require less favourable treatment on grounds of age alone, excluding 'mixed reasons' cases.⁹⁵ The SCAC held that the reason for the treatment had at any rate to constitute a protected ground.⁹⁶ Furthermore, the SAC improperly identified the comparator, finding no discrimination where a complainant was not considered for a job based on maximum age admission rules, as he was not treated less favourably than others of the same age.⁹⁷

Similarly, where a complainant by law was entitled by law to a lower amount of pension compared with people born before a specific date (in 1959), the Supreme Court of Cassation found that he was not discriminated against on the grounds of his age as he was not treated less favourably than people of the same age born before the relevant date (indirect discrimination was not raised or considered *ex officio*).⁹⁸

This unfortunate ruling does not amount to an obstacle to age discrimination claims in general. First, it only concerns a specific issue and not all (potential) age-related issues. Secondly, Bulgaria's legal system is not based on judicial precedent and court rulings rendered in individual cases, even supreme court rulings, do not bind other judges, even trial court judges. Higher court rulings in individual cases may be relevant but they are not binding. Therefore, there is no general obstacle to age discrimination claims, which are numerous and, sometimes, successful.

In respect of allowing for a hypothetical comparator, in 2018, the SAC found no discrimination in a lease termination case as there was no proof that another was treated better than the complainant, not taking into account that there was no other party to the lease agreement to compare to the complainant and that, therefore, a hypothetical comparator only applied.⁹⁹

In respect of intent, in 2018, the SAC held that less favourable treatment had to be 'knowingly perpetrated'.¹⁰⁰ The SCAC used the same language, adding, to clarify

⁹⁰ SCAC, Decision No. 8325 of 20 December 2019 in Case No. 11063/2019, Decision No. 4590 of 3 July 2019 in Case No. 4299/2019.

⁹¹ SAC, Decision No. 12865 of 1 October 2019 in Case No. 5114/2018.

⁹² SAC, Decision No. 8758 of 11 June 2019 in Case No. 1014/2019.

⁹³ SAC, Decision No. 2922 of 27 February 2019 in Case No. 10318/2016, Decision No. 6577 of 7 May 2019 in Case No. 10380/2017, Decision No. 6946 of 9 May 2019 in Case No. 8352/2017.

⁹⁴ SCC, Ruling No. 596 of 22 July 2019 in Case No. 680/2019.

⁹⁵ SAC, Decision No. 2988 of 9 March 2018 in Case No. 13638/2017, Decision No. 4727 of 12 April 2018 in Case No. 2769/2018.

⁹⁶ SCAC, Decision No. 7471 of 10 December 2018 in Case No. 9628/2018.

⁹⁷ SAC, Decision No. 4159 of 30 March 2018 in Case No. 4591/2016.

⁹⁸ SCC, Ruling No. 306 of 29 March 2018 in Case No. 60/2018.

⁹⁹ SAC, Decision No. 6151 of 11 May 2018 in Case No. 7203/2016.

¹⁰⁰ SAC, Decision No. 4159 of 30 March 2018 in Case No. 4591/2016.

'knowingly', that the treatment had to be 'aimed at'.¹⁰¹ The PADC, however, ruled correctly on the same issue, in an anti-Roma harassment (hate speech) case, reasoning that it was irrelevant whether the respondents intended to impinge upon the dignity of their targets.¹⁰² (Nevertheless, in the same case, the PADC invoked arbitrary definitions of discrimination that have no legal basis, such as 'inequality set under law' and 'determining fewer rights for representatives of a state, organisation, individual, etc. as compared to other participants in a common undertaking').¹⁰³

In respect of recourse against the PADC or a court making a discrimination finding based on the wrong protected ground, in 2018, the SAC problematically held that a complainant had no standing to appeal against a decision finding discrimination on a ground other than the one alleged.¹⁰⁴ In such a case, the complainant had no legal interest to appeal against the decision as it was not unfavourable to them, discrimination having been found regardless of the ground.

In 2018, the courts continued to conflate the concepts of direct and indirect discrimination. The SAC confirmed a ruling by SCAC that the less favourable treatment of a certain category of patients who were excluded from access to public funding for the treatment of their disease as opposed to other categories of patients who were entitled to funded treatment constituted indirect discrimination, while terming it 'different treatment'.¹⁰⁵ Similarly, in some cases the PADC has misapplied the concept of indirect discrimination to cases of less favourable treatment. In 2018, the PADC held that, in order for an action to be found to be discriminatory, that action 'must result in an infringement of the principle of equality and be caused by a protected ground [...]'. In both direct and indirect discrimination cases [...] the legislator has determined that there must be "unfavourable treatment".¹⁰⁶ This appears to contradict the definition of indirect discrimination in the directives.

b) Justification for direct discrimination

The PADA does not permit a general justification for direct discrimination with respect to any ground.¹⁰⁷ It only provides for an exhaustive list of specific exceptions for various protected grounds, including the six EU grounds.¹⁰⁸

The case law has in some cases conflated various forms of discrimination, including direct and indirect discrimination, applying in some of those cases justifications that are only relevant to indirect discrimination to cases of direct discrimination or harassment. For instance, in a harassment (hate speech/incitement) case where TV broadcasters targeted a religious minority, the SAC invoked the justification test relevant to indirect discrimination to discuss whether the less favourable treatment of the religious group established by the court (their negative stereotyping, with violence against them encouraged) was necessary to achieve a legitimate aim.¹⁰⁹ Ultimately, the SAC found the treatment was unjustified but in its reasons, the court perpetuated the confusion to the extent of discussing a 'proportionate and justified aim'. The SAC qualified the treatment as both indirect discrimination and harassment.

¹⁰¹ SCAC, Decision No. 450 of 20 November 2018 in Case No. 180/2017.

¹⁰² PADC, Decision No. 7471 of 10 December 2018 in Case No. 9628/2018.

¹⁰³ PADC, Decision No. 7471 of 10 December 2018 in Case No. 9628/2018.

¹⁰⁴ SAC, Decision No. 7863 of 12 June 2018 in Case No. 697/2017.

¹⁰⁵ SAC, Decision No. 2138 of 16 February 2018 in Case No. 13552/2016.

¹⁰⁶ PADC, Decision No. 183 of 3 May 2018 in Case No. 287/2016.

¹⁰⁷ In Bulgaria, national law provides for specific (not general) exceptions for direct discrimination on the ground of age. Under the PADA, there are six exceptions for age altogether, three of which refer to other laws providing for age differentiation.

¹⁰⁸ PADA, Article 7.

¹⁰⁹ SAC, Decision No. 4238 of 2 April 2018 in Case No. 70/2017.

The SAC has applied the justification test which is only relevant for indirect discrimination to cases of less favourable treatment, i.e. direct discrimination, in previous years too. In 2017, in a case where a pupil with a disability was not allowed to take part in a school trip because of their disability, the SAC agreed with the lower court that the treatment was causally linked to a protected ground and not objectively justified by a legitimate aim.¹¹⁰ In another case decided in 2017, the SAC directly invoked the PADA provision on direct discrimination, reasoning that a difference of treatment would be justified by proportionality.¹¹¹

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

a) Prohibition and definition of indirect discrimination

In Bulgaria, indirect discrimination is prohibited in national law (PADA, Article 4(1). It is defined. The PADA, Article 4(3), defines indirect discrimination as, 'placing a person or persons who have a [protected] characteristic or a person or persons without such a characteristic together with the former suffer less favourable treatment or are placed at a particular disadvantage deriving from an apparently neutral provision, criterion or practice, unless the provision, criterion or practice are objectively justified with a view to a legitimate aim and the means to achieving that aim are appropriate and necessary'.

This definition, which amended the previous one, was adopted in 2016 following the CJEU's ruling in *Chez* (Case C-83/14). Under the former definition, indirect discrimination was 'placing a person on [protected] grounds in a less favourable situation compared to other persons through an apparently neutral provision, criterion, or practice, unless that provision, criterion, or practice is objectively justified with a view to a legitimate aim and the means to achieving that aim are appropriate and necessary'. The current definition sought to clarify that indirect discrimination by association was banned. The clarity of its wording, however, is questionable, arguably compromising its usefulness.

As discussed above in Section 2.2, the case law has in some cases misapplied the concept of indirect discrimination to cases of less favourable treatment. The SCC failed to correct a ruling by the lower court to the effect that indirect discrimination required protected grounds to be the reason for the disadvantage.¹¹²

The SAC, however, ruled correctly that indirect discrimination implied application of the same rule resulting in different situations based on protected grounds.¹¹³

In addition, the SAC correctly held that a person with a disability was discriminated against as residence requirements were applied to him without taking into account the disability-related difficulties that he faced in complying, in comparison with non-specified others who were able to comply because they had no such difficulties/disability (hypothetical comparator).¹¹⁴

However, in another case, the SAC erroneously held that less favourable treatment provided for under secondary legislation amounted to indirect discrimination because it was envisaged by norms, and not perpetrated by any specific actor.¹¹⁵

The SAC also erred in another case in respect of identifying the proper comparator group, when it held that a person with a disability was not discriminated against in relation to the inaccessibility of an element of railway station infrastructure as he was not put at a

¹¹⁰ SAC, Decision No. 580 of 17 January 2017, Case No. 10383/2015.

¹¹¹ SAC, Decision No. 1572 of 7 February 2017, Case No. 12173/2015.

¹¹² SCC, Ruling No. 595 of 22 July 2019 in Case No. 109/2019.

¹¹³ SAC, Decision No. 2711 of 25 February 2019 in Case No. 5704/2017.

¹¹⁴ SAC, Decision No. 3547 of 12 March 2019 in Case No. 10671/2017.

¹¹⁵ SAC, Decision No. 15498 of 14 November 2019 in Case No. 3959/2018.

disadvantage in comparison with others with mobility issues (instead of comparing his position with that of people with no mobility issues).¹¹⁶

Nonetheless, although the case law is contradictory, in at least one case the SAC has properly defined indirect discrimination thus: '[I]ndirect discrimination is not treatment based on protected grounds. Conversely, [it] is treatment, which universally applies to all regardless of their characteristics but which, implemented in practice, impacts some worse than others, and disproportionately affected are groups characterised by protected grounds. Indirect discrimination is a result of the same treatment of persons in different situations. Such discrimination is indirect because it is not treatment that is different but the consequences of it. The consequences of such treatment feel differently to persons with different characteristics.'¹¹⁷

Similarly, the Varna Regional Court (VRC) has correctly interpreted indirect discrimination in terms of its difference from direct discrimination.¹¹⁸

b) Justification test for indirect discrimination

The test for justification is necessity. Neither the law (PADA, Article 4(3)), nor the case law has specified whether this is to be understood as strict proportionality or mere proportionality. There is no legislative or judicial guidance on what constitutes a 'legitimate aim'. There is a dearth of indirect discrimination cases and the case law has not evolved a standard for either 'a legitimate aim' or 'an appropriate and necessary measure'. As a rule, the PADC and judges have failed to undertake a proper analysis of necessity, including by looking into alternatives to impugned measures. In some cases, they have accepted declarations of necessity by respondents without questioning the linkage between the asserted aim and the specific measures. In this way, they have failed to properly apply the rule on shifting the burden of proof, *de facto* excusing respondents of their burden of proof in terms of establishing a justification for disparate impact.

Still, in one case at least, the VRC has correctly defined the necessity test as follows: '[D]isproportionate adverse effect on the claimant [who is blind] may only be justified when the [legitimate] aim cannot be achieved by other means. [T]he adverse effect of the rule [...] results from its insensitivity to an objectively existing situation, which excludes a possibility to treat all [persons] the same as they are objectively not in the same position. Therefore, the court finds that there is no proportionality between the aim pursued [personal data protection] and the means used [a requirement to submit an application in person]. It is not established that only by means of such a requirement the legitimate aim can be realised and there is no means less interfering with people's rights to pursue that aim'.¹¹⁹

2.3.1 Statistical evidence

a) Legal framework

In Bulgaria, there is legislation regulating the collection of personal data. The relevant rules are not included in the PADA and make no provision on using data for purposes of equality litigation or positive measures. Such use is implicitly permissible, on the same grounds as

¹¹⁶ SAC, Decision No. 8325 of 4 June 2019 in Case No. 45/2019.

¹¹⁷ SAC, Decision No. 17362 of 18 December 2019 in Case No. 3542/2019. This language, while not crediting the source, is copied from a book by the author of this report, an explanatory work addressed to the judiciary, analysing the concepts under the PADA.

¹¹⁸ VRC, Decision No. 1486 of 11 December 2019 in Case No. 1872/2019. This language, while not crediting the source, is copied from a book by the author of this report, an explanatory work addressed to the judiciary, analysing the concepts under the PADA.

¹¹⁹ VRC, Decision No. 1486 of 11 December 2019 in Case No. 1872/2019. This language, while not crediting the source, is copied mutatis mutandis from a book by the author of this report, an explanatory work addressed to the judiciary, analysing the concepts under the PADA.

testing, because under general evidentiary rules any evidence the court finds relevant is admissible.

Data collection is provided for in the Statistics Act,¹²⁰ the Protection of Personal Data Act,¹²¹ the Census 2011 Act,¹²² the People with Disabilities Act,¹²³ the Ministry of the Interior Act,¹²⁴ the Bulgarian Personal Documents Act,¹²⁵ the Ordinance on the Terms and Procedure to Conclude, Implement and Terminate the Agreement for Integration of Foreigners Granted Asylum (Refugees) or Subsidiary Protection,¹²⁶ and the Ordinance on Integrative Education.¹²⁷ Data collection is provided for regarding: racial or ethnic origin; national origin; mother tongue; political, religious or philosophical convictions; membership of political parties or organisations with political, religious, philosophical or trade union aims; health status or disability; sexual life (there has been no movement to include sexual orientation);¹²⁸ personal life; human genome; unlawful acts committed; nationality; sex; age; education; language.¹²⁹

This is considered sensitive data. Such data may only be collected if the person concerned consents or in accordance with specific exceptions accompanied with procedural guarantees. The exceptions include where:

- 1) this is necessary to carry out specific duties under labour law;¹³⁰
- 2) it is necessary to protect human life or health and the person concerned is unable to give their consent;¹³¹
- 3) the data are collected by a non-profit organisation, including with a political, philosophical, religious or trade union aim, in the course of its lawful activities, provided that this only involves the organisation's members or regular associates, and the data are not published without the consent of the person concerned;¹³²
- 4) the data have been published by the person concerned or their collection is necessary for rights enforcement in court;¹³³
- 5) this is necessary for medical prevention or diagnostics or provision of health services, provided that the data are processed by a medical professional or another person legally under a duty to keep a professional secret;¹³⁴

¹²⁰ Statistics Act (*Закон за статистиката*), adopted June 1999, last amended 19 January 2018, Article 21.

¹²¹ Protection of Personal Data Act (*Закон за защита на личните данни*), adopted January 2002, last amended 19 January 2018, Article 1(3-5).

¹²² Census 2011 Act (*Закон за преброяване на населението и жилищния фонд в България през 2011 г.*), adopted May 2009, last amended 28 January 2011, Article 2.

¹²³ PDA, Article 82.

¹²⁴ Ministry of the Interior Act (*Закон за Министерството на вътрешните работи*), adopted June 2014, last amended 18 September 2018, Article 10(2), Articles 25–26.

¹²⁵ Bulgarian Personal Documents Act (*Закон за българските лични документи*), adopted August 1998, last amended 23 May 2018, Articles 18 and 65.

¹²⁶ See Council of Ministers, Decree No. 144 of 19 July 2017, Articles 12(1) and (3) and Article 15(1), available at: <http://dv.parliament.bg/DVWeb/showMaterialDV.jsp?idMat=116399>.

¹²⁷ Ordinance on Integrative Education, Article 145(2) – concerning pupils with special educational needs.

¹²⁸ There is no definition of 'sexual life'. The ordinary meaning would apply. It is not meant to work as a synonym for 'sexual orientation'; it is broader, all-encompassing. Everyone would be covered regardless of their sexual orientation or the nature of their sex life (for example, who their partners are would be covered). Sexual orientation would potentially be included in sexual life. Judicial interpretation would be necessary to confirm this (no case law dealing with this exists). The same goes for 'personal life' – it is broader than 'sexual orientation', potentially covering it.

¹²⁹ Respectively, Statistics Act, Article 21(2); Protection of Personal Data Act, Article 5; Census 2011 Act, Article 6(3); Ordinance on the Terms and Procedure to Conclude, Implement and Terminate the Agreement for Integration of Foreigners Granted Asylum (Refugees) or Subsidiary Protection, Article 12(1) and (3) and 15(1); Ordinance on Integrative Education, Article 145(2). The Ministry of the Interior Act does not define personal or sensitive data. The Bulgarian Personal Documents Act defines personal data as 'any information regarding a particular natural person' (Paragraph 1.13 of the Additional Provisions).

¹³⁰ Protection of Personal Data Act, Article 5(2.1).

¹³¹ Protection of Personal Data Act, Article 5(2.3).

¹³² Protection of Personal Data Act, Article 5 (2.4).

¹³³ Protection of Personal Data Act, Article 5 (2.5).

¹³⁴ Protection of Personal Data Act, Article 5(2.6).

- 6) this is only for journalistic or artistic purposes, provided that the right to privacy of the person concerned is not infringed;¹³⁵
- 7) or a special law provides for it.¹³⁶

No law provides for the collection of ground-disaggregated data explicitly for purposes of equality litigation or policies.¹³⁷ Public bodies taking positive measures do use statistics to design such measures.¹³⁸ Statistics are collected either by the National Statistical Institute, a public institution governed under the Statistics Act, or by public services themselves or by private research agencies on commission.¹³⁹

In Bulgaria, statistical evidence may be admitted by national law in order to establish indirect discrimination. National law implicitly permits any type of evidence in civil cases, including statistical evidence.¹⁴⁰ There are no particular conditions for admission of statistics. The admission and evaluation of all evidence, implicitly including statistics, is left to the discretion of judges.¹⁴¹

b) Practice

In Bulgaria, statistical evidence is used in practice in order to establish indirect (and other forms of) discrimination. It is not widespread, but there has been no reluctance on the part of judges or the PADC to consider statistics.

In the past, Sofia trial court judges have rendered several decisions in cases concerning sex quotas for admission to university. The courts have accepted as a statistically established fact that women with higher academic scores were denied admission for the benefit of men with lower results. In other cases, courts have accepted the predominance of Roma in the ethnic composition of certain residential areas as a fact based on statistics.¹⁴²

In 2018, the SAC found that there was discrimination against a category of patients who were denied publicly funded treatment, in contrast with another category of patients, by relying on statistical data presented by an expert who compared two categories of patients in terms of, *inter alia*, the prevalence, consequences and other relevant characteristics of their respective diseases.¹⁴³

¹³⁵ Protection of Personal Data Act, Article 5 (2.7).

¹³⁶ Protection of Personal Data Act, Article 5(2.2).

¹³⁷ While 'data collection [...] necessary for rights enforcement in court' (point (4)), could theoretically be construed as also being applicable to equality rights, this is not expressly stated and there was no such intention behind this provision. The legislative intent was more likely to authorise the police to provide individuals with data concerning the identity of parties they might wish to sue in court. This would differ from data collection for policy or law-making ends. Furthermore, personal data are not statistical data. In addition, disaggregation by ground is not provided for. While it may be possible to gather data regarding the race of someone in particular (based on police perceptions), this is not equivalent to gathering race-disaggregated statistics. More importantly, this provision only authorises data collection in exceptional cases (to be narrowly construed as a matter of course) and does not mandate it.

¹³⁸ In documents providing for positive measures, Government institutions have used statistical data to analyse the status quo. For example, see the National Strategy of the Republic of Bulgaria for Integration of the Roma 2012-2020, in its section on 'Current status of the Roma community', available at: <http://www.nccedi.government.bg/bg/node/85> (in BG and EN).

¹³⁹ The National Statistical Institute gathers statistics based on self-determination. Other public services gather statistics based on self-determination in some cases and, in others, on perception. Private sociological research agencies gather statistics of both types.

¹⁴⁰ Civil Procedural Code, Article 12.

¹⁴¹ Civil Procedural Code, Article 12 in conjunction with Article 10.

¹⁴² See, *inter alia*, Plovdiv District Court, Decision No. 185 in civil case No. 1330/2005, 1 February 2006; Plovdiv Regional (appeals) Court, Decision No. 1934 of 24 October 2006 in civil case No. 862/2006; and Supreme Court of Cassation, Decision No. 1302 in civil case No. 1602/2006, 28 November 2007; PADC, Decision No. 58 in Case No. 10/2006. These statistics were presented by complainants in some cases, by respondents in others, or established in proceedings by witness testimony or by expert opinion on the basis of official census statistics.

¹⁴³ SAC, Decision No. 2138 of 16 February 2018 in Case No. 13552/2016.

There has been no relevant case law in 2019.

2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

In Bulgaria, harassment is prohibited in national law. It is defined in the PADA, Additional Provisions, § 1(1), as 'any unwanted conduct related to [protected] grounds [...] and manifested physically, verbally or in any other manner, having the purpose or effect of violating the dignity of a person and of creating a hostile, degrading, humiliating, offensive or intimidating environment'. The personal scope of the PADA is universal: anyone (including a legal person) may be a victim and everyone (including legal persons) is bound by the prohibition. The material scope of the PADA is universal as well: the bans apply to all rights and legitimate interests. In 2019, the term 'a person' in the definition has been interpreted as limiting the scope of protection to an individual, rather than a group. This new interpretation is in stark contrast to extensive case law in previous years when, in numerous cases of hate speech targeting communities, the PADC and the courts have found harassment to have occurred.¹⁴⁴

While the directives do not ban 'hate speech' or 'negative stereotyping' as such in general terms, the ban on harassment under the directives applies, as a matter of course, to any expression that corresponds to the definition of harassment, i.e. any unwanted conduct related to any of the protected grounds that 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. Accordingly, litigators at the national level have, on many occasions over the years, successfully brought a large number of hate speech cases to the attention of the courts, invoking the ban on harassment under the PADA (the domestic legislation transposing the directives), whose applicability, as mentioned above, is not limited to the material scope of the directives but goes beyond.

Although the directives do not ban harassment in general terms outside their respective material scopes, under the PADA harassment is banned in any field. Accordingly, strategic litigators at the national level have successfully triggered a significant body of case law on hate speech construed by the domestic equality body and the domestic courts as harassment within the meaning of the directives, which spans a range of fields both within and outside the scope of the directives as narrowly interpreted. At the national level, under the legislation transposing the directives and going beyond their scope, it has for many years been accepted that anti-minority negative stereotyping in general terms in publicly disseminated expression has an impact on minority rights to equality within the scope of the PADA, i.e. in every field, whether or not the directives can be interpreted in that way. The following paragraphs describe domestic case law dealing with the concept of harassment as applicable to anti-minority public expression as per domestic judicial construction. In general, national case law has construed hate speech as harassment, using the latter concept under the law transposing the directives to protect (or otherwise) people from negative stereotyping.

In 2019, the SAC and the SCC ruled in cases of alleged anti-Roma harassment by means of hate speech that, for harassment to be at hand against a particular claimant, that person needs to have been specifically targeted and affected by the impugned statements.¹⁴⁵ In addition, a concrete, specifically defined hostile environment needs to have been created for them (their workplace, place of study, a place where services are provided, a place of

¹⁴⁴ For instance, PADC, Decision No. 450 of 20 November 2018 in Case No. 180/2017; Burgas Administrative Court, Decision No. 564 of 23 March 2018 in Case No. 17862017; Supreme Administrative Court, Decision No. 4238 of 2 April 2018 in Case No. 70/2017.

¹⁴⁵ SCC, Decision No. 2 of 19 June 2019 in Case No. 3203/2018, Decision No. 819 of 29 November 2019 in Case No. 2596/2019; SAC, Decision No. 636 of 15 January 2019 in Case No. 7229/2018, SAC, Decision No. 14026 of 21 October 2019 in Case No. 12163/2018.

worship, a place of residence, an authority's premises, etc.). The onus is on the claimant to prove such a specific impact. No assumptions can be made based on the content of the impugned verbal conduct or the fact that it has been covered by the media, even if it is found to be offensive. Similarly, no intent to harass on the part of the respondent can be established based on the content of statements. 'Abstract' statements, targeting an unidentified circle of persons, including a racial, ethnic or religious community, are not banned under the concept of harassment (or other forms of discrimination, including less favourable treatment, victimisation and racial segregation). In essence, according to these recent rulings, which diverge from previous SAC case law, hate speech is not covered by harassment.

This would not be tantamount to saying that hate speech is not outlawed at all, but only that it could not be legally qualified as harassment within the meaning of the PADA in particular. It could still be construed as incitement to discrimination under the PADA or as incitement to hatred or discrimination under the Criminal Code, for example. Therefore, these rulings are not as such in breach of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) or the Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law. At any rate, the PADA, which these rulings apply, is not criminal legislation but part of civil and administrative law.

With these decisions concerning Roma and not involving other grounds, influenced by institutionalised anti-Roma racism, and arguably in contravention of the *Firma Feryn* principle that wholesale discriminatory statements are outlawed regardless of whether an individual victim is identified, the courts have introduced a curb on protections against wholesale anti-community harassment under the PADA, in particular on the part of figures of authority. While these decisions do not concern cases that are limited to employment or other specific fields within the scope of the directives, the anti-minority expression they analyse, being generally applicable, concerns equally all the fields covered under the PADA. The PADA, which in many respects goes beyond the directives, including in its comprehensive material scope, was meant by its drafters – and has, for more than 15 years, been interpreted by domestic courts and the PADC as such – to ban harassment, including generalised harassment targeting minorities as such in all fields.

These pernicious rulings could be seen to reflect, knowingly or unknowingly, the adverse stance adopted by the ECtHR in its inadmissibility decision in the *Donka Kamenova Panayotova and Others v. Bulgaria* case (Application No. 12509/13) (a case brought by the author of this report, subsequently represented by a substitute) where the Court ruled that no criminal law remedies were required against anti-Roma hate speech where 'the applicants do not suggest that they have been directly confronted with verbal abuse, or that the [impugned speech] produced an atmosphere of intolerance or racial strife which specifically affected them in some way' and '[they] did not base their complaint on its pernicious effects on them specifically, but on its broader social impact' (at paragraph 60). According to the Court, 'the situation in this case is different [than in cases of] direct verbal assaults and physical threats motivated by discriminatory attitudes' where criminal law remedies were due (at paragraphs 59-60). The Court accordingly held that the PADA proceedings would have been a sufficient remedy in this case concerning a publication by a political party, which 'was premeditated and revealed virulent anti-Roma sentiment and a wish to stigmatise Roma in Bulgaria as a group' by the Court's own admission (at paragraph 48). Again, this ruling is of relevance to the directives insofar as, under the PADA – the legislation transposing the directives, which goes beyond them – such verbal conduct legally qualifies as harassment as defined by the Race Directive. As clarified above, national case law has consistently interpreted the concept of harassment under the PADA (defined in accordance with the directives) as encompassing speech whereby public influencers legitimise comprehensive anti-minority stances. Domestic adjudicators have seen such unwanted conduct as having an adverse impact on minorities' rights to equality

in all fields protected under the PADA, including employment, education, healthcare, social security, as well as other fields.

It is noteworthy that the domestic Criminal Code does provide a remedy against incitement to discrimination and hatred, which the prosecutor's office refused to enforce in this case, using reasons indicative of institutionalised racist bias. The ECtHR, in its regrettable decision, failed to address this. It failed altogether to discuss the prosecutorial decrees, which had held that the impugned content considered by the ECtHR to 'reveal virulent anti-Roma sentiment and a wish to stigmatise Roma in Bulgaria as a group' was merely (statements of) facts or legitimate opinion.

In the manner of a vicious circle, the PADA remedy, as construed by the SAC in its decisions outlined above, in turn, does not provide protection against hate speech where the Roma complainants were not targeted personally as the public speech in question targeted their community as such (as a whole). This stance on the part of both the ECtHR and the SAC is tantamount to sabotaging redress against hate speech, as hate speech is by its very nature about stereotyping – i.e. generalising – and as a rule targets communities as opposed to specific persons. It is precisely that which makes it destructive: it vilifies people by treating them not as individuals but as stereotypes.

Hypothetically, this SAC trend could infect the case law under the PADA with regard to other unpopular minorities as well – provided that future case law affirms the trend, which is not necessarily a given as the SAC's case law in previous years has recognised that general (anti-Roma) non-individualised hate speech violates the PADA.

In line with this new restrictive trend, the SCAC, a lower instance court below the SAC, denied that there was harassment as found by the PADC in the case of an anti-Roma publication as the complainant had failed to prove that she had been personally affected. It had not been proven that the editor had manifested a negative attitude towards a specific person based on ethnicity. The lack of a specific victim meant the lack of a violation under the PADA. In addition, the impugned statements needed to be 'objectively' and not 'subjectively' offensive.¹⁴⁶ As explained above, such general anti-Roma expression is covered by the directive insofar as it meets the latter's definition of harassment and, in terms of material scope, due to the fact that expression targeting the Roma as such by necessity also targets Roma in the specific fields covered under the directive, including employment, education, etc.

However, the case law in 2019 has been contradictory. The SAC confirmed a decision against a media company that had failed to moderate anti-Roma hate comments posted on its news site.¹⁴⁷ The PADC had found that the comments, which were general in nature and therefore applicable to any and all contexts, including the specific fields covered under the directive, constituted ethnic harassment, and the company was given an instruction to introduce active continuous comment moderation. The SAC agreed that the comments impinged upon human dignity, instilled ethnic hatred and contained calls to violence, regardless of the intent behind them or of the lack of any consequences (in terms of actual violence committed). The site owner had failed to take measures to control the content, thereby allowing users to infringe the absolute ban on harassment. The court did not discuss the fact that the impugned hate comments targeted the Roma community as such, i.e. Roma in general, and not the individual complainant before the PADC. While the directive does not apply to hate crime or to 'hate speech' as such, this case is relevant as it concerns verbal conduct that corresponds to the definition of harassment under the directive: the domestic instances applied the concept of harassment within the meaning of the directive to that impugned conduct.

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

¹⁴⁶ SCAC, Decision No. 4590 of 3 July 2019 in Case No. 4299/2019.

¹⁴⁷ SAC, Decision No. 7269 of 15 May 2019 in Case No. 11803/2017.

In 2018, the PADC expressly held that intent was irrelevant to finding harassment.¹⁴⁸ In 2018, an administrative court correctly held that a comparison was irrelevant for the purposes of establishing harassment (as opposed to direct or indirect discrimination).¹⁴⁹ In some cases, the courts have erroneously applied justification reasoning (relevant to indirect discrimination) to harassment (hate speech) cases.¹⁵⁰

In 2018, the SAC confirmed a lower court decision that maintaining an inaccessible urban environment constituted harassment of a person with disabilities.¹⁵¹ The SAC termed harassment 'the highest' and 'most severe' form of discrimination. The SAC further confirmed a decision that denying, by secondary legislation, a certain category of patients free treatment of their disease amounted to harassment.¹⁵² In addition, the SAC confirmed a decision qualifying as harassment the treatment of an employee (a trade union representative who was made to perform a series of tasks below her post for almost two years, as a means of pressure by management).¹⁵³ In this case, using the concept of harassment in a novel way, the court correctly reflected the nature of the impugned treatment – management systematically humiliated the complainant, using the organisational hierarchy to her detriment, in order to punish her for her trade unionism. The PADC had found that there was discrimination based on age (and based on trade union affiliation, which is also a protected ground under the PADA). The SAC held that the employee was deliberately humiliated.

b) Scope of liability for harassment

Where harassment is perpetrated by an employee, in Bulgaria, the employer and the employee are liable. Any individual who performs an act of discrimination, including harassment, is liable. In addition, employers are liable for compensation for damages ensuing from the actions of their employees or others carrying out work for them. This is a matter of general tort law, applicable to any legal person.¹⁵⁴ Furthermore, persons, including employers, can be held liable and sanctioned by a fine if they knowingly aided an act of discrimination, including harassment, by a third party.¹⁵⁵ If an employee suffers harassment in the workplace by a third party and complains about it to the employer, the latter has a duty to take action to stop the harassment.¹⁵⁶ If an employer fails to take such action, the affected employee could take legal action against them.

2.5 Instructions to discriminate (Article 2(4))

a) Prohibition of instructions to discriminate

In Bulgaria, instructions to discriminate are prohibited in national law. Instructions are not defined. The PADA bans incitement to discrimination, going beyond the directives, and defines that to expressly include instructions to discriminate.¹⁵⁷ However, this definition may not be compatible with the directives because it requires direct intent. In many cases, both the PADC and the courts have qualified public hate speech as incitement to discrimination.¹⁵⁸

¹⁴⁸ PADC, Decision No. 450 of 20 November 2018 in Case No. 180/2017.

¹⁴⁹ Burgas Administrative Court, Decision No. 564 of 23 March 2018 in Case No. 1786/2017.

¹⁵⁰ For instance, Burgas Administrative Court, Decision No. 564 of 23 March 2018 in Case No. 1786/2017; SAC, Decision No. 4238 of 2 April 2018 in Case No. 70/2017.

¹⁵¹ SAC, Decision No. 356 of 10 January 2018 in Case No. 8993/2016.

¹⁵² SAC, Decision No. 2138 of 16 February 2018 in Case No. 13552/2016.

¹⁵³ SAC, Decision No. 4228 of 2 April 2018 in Case No. 7771/2016.

¹⁵⁴ Obligations and Contracts Act (*Закон за задълженията и договорите*), Article 49.

¹⁵⁵ PADA, Article 8.

¹⁵⁶ PADA, Article 17.

¹⁵⁷ PADA, Article 5 in conjunction with Additional Provisions, § 1(5).

¹⁵⁸ For instance, PADC, Decision No. 450 of 20 November 2018 in Case No. 180/2017.

In 2018, the SAC held that there was no legal definition of 'incitement to discrimination' (under the PADA, there is) and proceeded to define the concept, based on doctrine, as 'creating favourable conditions for third parties to commit an act of discrimination by using expression to influence beliefs, values, attitudes regarding groups defined by a protected ground'.¹⁵⁹ According to this ruling by the SAC, in the case of incitement, 'ideas, beliefs, desires, information are manifested in statements aimed at, and capable of, persuading an addressee to treat unfavourably third parties based on grounds of difference. [...] convictions are expressed that, in terms of their content and manner of expressing, are not protected by the right to free expression [...] as they do not contribute to forming democratic opinions or democratic will'. Based on this, the SAC went on to justify what the author of this report would term extreme hate propaganda against Syrian refugees by an MP/journalist member of the xenophobic Ataka party. The court did not find incitement to discrimination, including an instruction to discriminate.

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

b) Scope of liability for instructions to discriminate

In Bulgaria, the instructor and the discriminator are liable.¹⁶⁰ The instructor is liable for the instruction and not for the discrimination that ensued. There is no information on case law concerning instructions as such. The case law on incitement concerns hate speech.

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

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

In Bulgaria, the duty on employers to provide reasonable accommodation for people with disabilities is included in the law, but is not defined. The PADA, Article 16, provides for accommodation for people with disabilities in employment.¹⁶¹ The limit of the duty is when 'costs are unfoundedly large and would seriously hinder' the employer.¹⁶²

Under the PDA, 'reasonable facilitations' (*разумни улеснения*) are listed among the means to support people with disabilities for purposes of their social inclusion.¹⁶³ People with disabilities are entitled to rehabilitation, which includes, *inter alia*, professional rehabilitation and labour rehabilitation.¹⁶⁴ Professional rehabilitation includes 'support to overcome barriers of functional limitations to practice an acquired profession, an accommodated (adapted) workplace and work conditions fitting the needs of the person with a disability and others'.¹⁶⁵ Labour rehabilitation includes 'adapting the labour environment to ensure employment for people with disabilities'.¹⁶⁶ Under the PDA, there is no 'reasonable' or 'disproportionate burden' limit to these entitlements. (The PDA was adopted to transpose the CRPD rather than EU law.)

Under the PDA, an employer is under a duty to adapt the workplace to the needs of a person with a disability upon their hiring, if necessary, depending on the type and degree

¹⁵⁹ SAC, Decision No. 7863 of 12 June 2018 in Case No. 697/2017.

¹⁶⁰ PADA, Articles 71 and 78.

¹⁶¹ The provision reads: 'The employer is under a duty to adjust the workplace to the needs of a person with a disability upon the latter's hiring or when the person's disability occurs following their hiring, unless the costs of this are unfoundedly large and would seriously hinder the employer'.

¹⁶² PADA, Article 16.

¹⁶³ PDA, Article 5(2.4).

¹⁶⁴ PDA, Article 29(1).

¹⁶⁵ PDA, Article 29(6.5).

¹⁶⁶ PDA, Article 29(9.6).

of the disability.¹⁶⁷ An employer may be funded by the Agency for People with Disabilities for the purpose of securing access to a workplace for a person with a long-term disability; for adapting a workplace for a person with a long-term disability; or for equipping a workplace for a person with a long-term disability.¹⁶⁸

Under the PADA and the PDA, the entitlements apply to all professional contexts and employment relationships. Under the PADA, the entitlement covers successful job applicants – again, only successful applicants ('...upon the latter's hiring...') and not all applicants, as clearly not all will be hired – as well as employees. It appears that the PDA entitlement covers only successful job applicants, but not employees. As the duties under both laws refer to 'employers', 'the workplace' and 'the labour environment', they arguably do not cover people undergoing vocational training. In the case of training provided by an employer, this apparent meaning of the provisions, if not expanded by judicial construction, would be in breach of the directive. There are no criteria in the laws for assessing the extent of the duties.

According to the Labour Code, employers are under a duty to provide accommodation for workers who are unable to perform their job because of illness or accident.¹⁶⁹ This duty pre-dates both the PADA and the IPDA, as well as the directive.¹⁷⁰ It has no disproportionate burden limit. It is based on an instruction by the health authorities. An employer who fails to comply with such an instruction owes the employee concerned compensation.¹⁷¹

Under the Civil Servant Act, there is an absolute duty for employers to 'adapt the workplace of the civil servant with a permanent disability in a way that makes it possible for their civil service to be carried out'.¹⁷²

According to the Healthy and Safe Working Conditions Act, employers are under a duty to provide the appropriate facilities for employees with reduced working capacity, e.g. people with disabilities, in their workplaces.¹⁷³ Employers are to be assisted and consulted by special occupational health authorities in adapting jobs to employees' capabilities, considering their physical and mental health, by special labour medicine authorities.¹⁷⁴

The lack of definition is not on record as having caused difficulties in implementation because there have as yet been very few reasonable accommodation cases, as far as information is available.

b) Practice and case law

In 2019, no relevant case law has been identified.

In 2018, the SAC qualified as a denial of reasonable accommodation (using the phrase 'reasonable facilitations' (*разумни улеснения*) a violation, which is outside the scope of Directive 2000/78/EC, while arguably within the scope of the pending Equal Treatment Directive. The case in question was the only one to be decided in 2018 invoking the concept of reasonable accommodation. It concerned a denial of access to public funding for medical equipment/treatment brought by a person with a disability. The SAC confirmed that a

¹⁶⁷ PDA, Article 40.

¹⁶⁸ PDA, Article 44(1.1-3).

¹⁶⁹ Labour Code (*Кодекс на труда*), Article 314. Such accommodation can include both adjustments to working conditions for the same job or reassignment to another job.

¹⁷⁰ The Labour Code, including this particular provision, has been in force since 1987.

¹⁷¹ Labour Code, Article 317(4).

¹⁷² Civil Servants Act (*Закон за държавния служител*), entered into force 28 August 1999, Article 30.

¹⁷³ Healthy and Safe Working Conditions Act (HSWCA) (*Закон за здравословните и безопасни условия на труд*), last amended 5 December 2017, Article 16(1.4).

¹⁷⁴ HSWCA, Article 25(2.3). Those authorities are charged, *inter alia*, with monitoring and analysing employees' health status (HSWCA, Articles 25a(1.2) and (1.4)).

governmental failure to provide, under secondary legislation, full funding for a special piece of medical equipment needed for the purposes of a particular disability constituted a denial of 'reasonable facilitations' (reasonable accommodation) and an act of discrimination under the CRPD and ICCPR (as well as a violation of general mainstreaming/positive duties for authorities under the PADA).¹⁷⁵ The Court held that, for purposes of establishing such a violation, no comparison was needed. The SAC invoked the CRPD (Article 2) definition of 'reasonable facilitations' (reasonable accommodation). The Court used the term without clarifying in what specific way the payment in question constituted reasonable accommodation within the meaning of the directive or the CRPD. It implicitly accepted that access to the treatment in question was an imperative need for the person concerned as the treatment was repeatedly termed 'life-saving' in the decision. Again, the court did not compare the person concerned to other persons, as it expressly held that, in such a case, no comparison was needed. The treatment, accepted as life enabling, was implicitly considered as accommodation for the purposes of continuing the person's life (with public support).

The case law does not give guidance on how to interpret 'reasonable accommodation' and/or 'disproportionate burden'. There is no case law to suggest that a failure to comply with general accessibility or building regulations would be relevant, i.e. an employer would be barred from arguing that a disproportionate burden exists if they have not met relevant regulations. Case law on failure to secure accessibility is abundant, but it does not qualify this as denial of reasonable accommodation.

There is no provision or case law on taking into account the availability of financial assistance from the State.

c) Definition of disability and non-discrimination protection

The definition of a disability for the purposes of claiming reasonable accommodation is no different from the definition for claiming protection from discrimination in general. The definitions of 'people with disabilities' and 'people with long-term disabilities' in the PADA apply for all purposes under the law, including non-discrimination and reasonable accommodation. In addition, the courts increasingly and relatively consistently rely on the CRPD concerning the concept of disability. They do not 'require', strictly speaking, medical proof of disability, as claimants/complainants are at liberty to choose their own evidence to present, in accordance with general procedural rules. It is implicitly accepted that medical proof (official assessment by the competent expert administrative bodies) is expected, in a legal context, to prove disability. There have not been any cases in which complainants have tried to establish disability with regard to a specific individual without the use of official medical certificates. In practice, this would not be an issue, as people with disabilities do possess such certificates, having obtained them as a matter of course in order to access the various entitlements, financial and otherwise, of people with disabilities under the legislation, regardless of any anti-discrimination protection.

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

In Bulgaria, failure to meet the duty of reasonable accommodation does not count as discrimination under the PADA or PDA. Under the PADA, unlike other forms of conduct, such as building or maintaining an inaccessible public architectural environment, a denial of reasonable accommodation is not defined as a form of discrimination. There is no provision on the relation of such a denial to direct or indirect discrimination. The same applies for a failure to meet accommodation duties under the PDA, the Labour Code and the Healthy and Safe Working Conditions Act.

¹⁷⁵ SAC, Decision No. 5302 of 24 April 2018 in Case No. 11143/2016.

In a 2018 case (there are no 2019 cases), the SAC confirmed that a governmental failure to provide, under secondary legislation, what the SAC termed 'reasonable facilitations' (reasonable accommodation), constituted discrimination under the CRPD and the ICCPR, as well as a violation of general mainstreaming/positive duties for authorities under the PADA.¹⁷⁶ While this case obviously did not concern an individualised measure, the court qualified the denial as a denial of 'reasonable facilitations' (reasonable accommodation) (as well as an act of discrimination within the meaning of the CRPD and ICCPR, *and* a breach of the authorities' duties to take special, equalising measures. This ruling is an instance of a remarkable, growing trend on the part of the Bulgarian judiciary to utilise discrimination law concepts, including that of reasonable accommodation, in order to enforce effective socio-economic rights for entire categories of people with disabilities. This is a fascinating, exceptional phenomenon, which well deserves studying.

Under the PADA, there is a disproportionate burden defence for employers and educators – namely, where the costs are 'unreasonably high' or would 'seriously hinder' the organisation. Under the PDA, employers and professional institutions have no such defence, but absolute duties instead.

According to general PADA violation provisions, a failure to provide reasonable accommodation is subject to a fine of between EUR 125 (BGN 250) and EUR 1 000 (BGN 2 000) for a natural person and between EUR 125 (BGN 250) and EUR 1 250 (BGN 2 500) for a legal person. Under the PADA, the shifting burden of proof would apply if the court or the PADC agrees that a case against a failure to provide reasonable accommodation constitutes 'proceedings for protection against discrimination' within the meaning of the PADA, Article 9.

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

In Bulgaria, there is a legal duty to provide reasonable accommodation for people with disabilities outside the area of employment. Article 32 of the PADA provides for reasonable accommodation in education. The limit of the duty is, as in employment, the 'costs are unreasonably high and would seriously hinder' the educator.¹⁷⁷ The PDA provides for a duty on universities to ensure a supportive environment and 'special accommodations'.¹⁷⁸ Children and school students are entitled to 'additional support' to facilitate their equal access to quality education and inclusion.¹⁷⁹ Regional inclusive education support centres have a duty to provide such additional support to children and students with disabilities, as well as 'resource support' to children and students with 'special educational needs'.¹⁸⁰ The PDA duties are absolute (there is no disproportionate burden defence).

In addition, under the PDA, people with long-term disabilities are entitled to financial aid for the accommodation of housing.¹⁸¹ A person with a disability who experiences serious difficulties in undertaking legal actions is entitled to support measures (assisted decision-making) for access to justice.¹⁸²

The Ordinance on Inclusive Education¹⁸³ (the Ordinance) governing education for pupils with disabilities in mainstream and special schools defines 'reasonable facilitations' (*разумни улеснения*) as 'all kinds of necessary and appropriate modifications and adjustments that do not result in disproportionate or unjustified burdening of others, when

¹⁷⁶ SAC, Decision No. 5302 of 24 April 2018 in Case No. 11143/2016.

¹⁷⁷ PADA, Article 32.

¹⁷⁸ PDA, Article 33.

¹⁷⁹ PDA, Article 31(2).

¹⁸⁰ PDA, Article 32(1).

¹⁸¹ PDA, Article 24(2.2), Article 75(1).

¹⁸² PDA, Articles 65 - 67.

¹⁸³ Ordinance on Inclusive Education (OIE) (*Наредба за приобщаващото образование*), entry into force 27 October 2017, last amended 18 December 2018, Additional Provisions, § 1(2).

those are necessary in every individual case to ensure a person with a disability the recognition or exercise of all rights and basic freedoms on an equal footing with all others within the meaning of the Convention on the Rights of Persons with Disabilities'.¹⁸⁴

The term 'reasonable facilitations' used above by the author of this report to translate the Ordinance's language of '*разумни улеснения*' may not correspond to the original English-language legal term from whence, in all probability, the phrase '*разумни улеснения*' was adopted by the domestic legislator. The domestic legislator is likely to have adopted the phrase from Article 24 of the CRPD, which uses 'reasonable accommodation', as well as 'facilitating'. It is unclear whether the drafters intended '*разумни улеснения*' ('reasonable facilitations') to be construed as 'reasonable accommodation' and to be applied by domestic bodies in line with 'reasonable accommodation' under the PADA, which derives the concept from EU law.

The Ordinance provides for equal access to education through reasonable facilitations and various forms of accessibility and other resources.¹⁸⁵ It defines reasonable facilitations as a means to make textbooks and other learning materials accessible.¹⁸⁶ It specifically provides for reasonable facilitations for taking school leaving exams.¹⁸⁷

According to the Physical Education and Sports Act, schools have a duty to create conditions for adapted physical exercise and sports for students with special educational needs.¹⁸⁸ Under that law, people with disabilities, in general, are entitled to the necessary conditions for various sports, although the law does not mention whose duty this is.¹⁸⁹

In a case of denial of access to public funding for medical equipment/treatment brought by a person with a disability, the SAC confirmed that a governmental failure to provide, under secondary legislation, full funding for a special piece of medical equipment constituted a denial of 'reasonable facilitations' (reasonable accommodation) – discrimination under the CRPD and ICCPR (as well as a violation of general mainstreaming/positive duties for authorities under the PADA).¹⁹⁰ The court held that, for the purposes of establishing such a violation, no comparison was needed. The SAC invoked the CRPD definition of 'reasonable facilitations' (reasonable accommodation).

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

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

Religion/belief

Under Article 13(2) of the PADA, employers have a duty to provide reasonable accommodation for religion/belief in terms of working hours and rest days, where 'this would not lead to excessive difficulties [...] and where [it is possible] [...] to compensate for the potential adverse consequences on the [business]'.¹⁹¹ There has been no litigation on record as yet based on this provision. It is unknown whether it is applied in practice or not.

¹⁸⁴ OIE, Additional Provisions, § 1(8).

¹⁸⁵ OIE, Article 102.

¹⁸⁶ OIE, Article 105.

¹⁸⁷ OIE, Article 107.

¹⁸⁸ Physical Education and Sports Act (*Закон за физическото възпитание и спорта*), repealed 18 October 2018, in force as of 18 January 2019, Article 21(4).

¹⁸⁹ Physical Education and Sports Act, Article 33(1).

¹⁹⁰ SAC, Decision No. 5302 of 24 April 2018 in Case No. 11143/2016.

¹⁹¹ Under discrimination law, there is no definition of religion or belief in this or any other context.

3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

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

In Bulgaria, there are no residence or citizenship/nationality requirements for protection contained in the relevant national laws transposing the directives. Non-nationals, as well as nationals are entitled to protection from discrimination on any ground other than nationality.¹⁹² Legal residence is irrelevant to entitlement to anti-discrimination protection; only factual being within the territory is a condition. However, non-nationals are protected from discrimination based on nationality only insofar as such discrimination has no basis in primary legislation.¹⁹³ Parliament may make law that discriminates against non-nationals, but executive bodies and private parties have no discretion to make such decisions (including secondary legislation). Parliament is free to adopt discriminatory laws based on nationality, with no constitutional limit to its discretion.¹⁹⁴

Those with irregular status are entitled to the protection of the directives, as factual being within the territory is the only condition.

3.1.2 Natural and legal persons (Recital 16, Directive 2000/43)

a) Protection against discrimination

In Bulgaria, the personal scope of anti-discrimination law covers natural and legal persons for the purpose of protection against discrimination (PADA, Article 3(1)). Legal entities and non-incorporated associations are protected, as well as individuals, where the former suffer discrimination on grounds of characteristics of their employees or members.¹⁹⁵ The courts and the PADC have generally recognised the standing of legal persons as victims.¹⁹⁶ In 2018, the Supreme Administrative Court (SAC), in a hate speech case brought by a minority denomination, expressly held, relying on the relevant PADA provision, that a denomination, understood as a legal entity representing a religious community, had standing to litigate in defence of all its members (believers) targeted by the alleged harassment.¹⁹⁷ National law is in compliance with EU law.

b) Liability for discrimination

In Bulgaria, the personal scope of anti-discrimination law covers natural and legal persons for the purpose of liability for discrimination. The PADA makes no distinction between individuals and legal entities in terms of the ban on discrimination. The ban is expressly applicable *erga omnes*, including all legal persons.¹⁹⁸ Case law has recognised this.

3.1.3 Private and public sector including public bodies (Article 3(1))

a) Protection against discrimination

¹⁹² PADA, Article 3(1).

¹⁹³ PADA, Article 7(1.1).

¹⁹⁴ Constitution, Article 26(2).

¹⁹⁵ PADA, Article 3(2).

¹⁹⁶ For instance, SAC Decision No. 5539 of 11 May 2016 in Case No. 3732/2016, in which the SAC expressly refuted the lower court's reasoning that an NGO could not be a victim of discrimination, recognising a legal person's victim status derived directly from the PADA.

¹⁹⁷ SAC, Decision No.4238 of 2 April 2018 in Case No. 70/2017.

¹⁹⁸ PADA, Article 6(1).

In Bulgaria, the personal scope of national law covers the private and public sectors, including public bodies, for the purpose of protection against discrimination.¹⁹⁹ The national provisions comply with the directives.

b) Liability for discrimination

In Bulgaria, the personal scope of anti-discrimination law covers the private and public sectors, including public bodies, for the purpose of liability for discrimination.²⁰⁰ The prohibition is expressly *erga omnes*. The case law has recognised this, with numerous cases against public bodies heard and decided on the merits (regardless of some unstable contradictions in previous years regarding the liability of public bodies).

However, in 2019, the SAC ruled that the PADC has no authority to issue injunctions to public bodies, only the authority to do so for private natural and legal persons.²⁰¹ Vis-à-vis public bodies that are found to have discriminated, the PADC has the authority only to make recommendations. This ruling, in an age-related case in which the PADC had ordered the Council of Ministers (the Government) to amend a piece of secondary legislation, invoked 'the rule that administrative bodies have specified competences and may not usurp the competencies assigned by law to other bodies'. The SAC considers the PADC to be an 'administrative body' (as per established case law). The Court referred to an understanding that the PADC may not decide policy questions, which the Government is competent to decide by making secondary legislation. This raises no issues of compliance with the directives as the latter do not require that the equality body should have the power to make orders for structural relief. This SAC ruling does not affect the PADC's power to make binding declarations of discrimination and to impose binding sanctions.

3.2 Material scope

3.2.1 Employment, self-employment and occupation

In Bulgaria, national legislation applies to all sectors of private and public employment, self-employment and occupation, including contract work, self-employment, military service and holding statutory office, for the five grounds.²⁰² The relevant provisions consist of the general ban on discrimination, which has universal scope,²⁰³ and certain specific employment discrimination bans. The latter provide examples of the conduct prohibited under the general discrimination ban (e.g. no discriminatory job requirements; no demands for information about protected grounds from job applicants; no refusals to hire and no hiring under worse conditions; equal pay; equal opportunities for vocational training and career advancement; right to equal conditions for access to a profession or activity and to equal opportunities for exercising a profession or activity and for developing in them). These specific provisions constitute Title I of the PADA: 'Protection in the exercise of the right to labour'. In 2019, the courts decided a number of cases brought by (former) employees and civil servants.²⁰⁴

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))

¹⁹⁹ PADA, Article 3(1).

²⁰⁰ PADA, Article 6(1).

²⁰¹ SAC, Decision No. 15498 of 14 November 2019 in Case No. 3959/2018.

²⁰² PADA, Article 6(1) and Articles 12-28.

²⁰³ The Supreme Administrative Court has recognised in its case law that the ban is, in that sense, 'absolute'. See, among other authorities, its Decision No. 7597 of 15 June 2017 in Case No. 569/2016.

²⁰⁴ For instance, SAC, Decision No. 2711 of 25 February 2019 in Case No. 5704/2017, Decision No. 3922 of 18 March 2019 in Case No. 6516/2017. SCC, Ruling No. 497 of 19 June 2019 in Case No. 881/2019.

In Bulgaria, national legislation prohibits discrimination in relation to conditions for access to employment, self-employment or 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 and in both private and public sectors as described in the directives.²⁰⁵

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

In Bulgaria, national legislation prohibits discrimination in working conditions, including pay and dismissals, for all five grounds and for both private and public employment.²⁰⁶

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

In Bulgaria, national legislation prohibits discrimination in vocational training outside the employment relationship, such as adult lifelong learning courses or vocational training provided by technical schools or universities.²⁰⁷

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

In Bulgaria, national legislation prohibits discrimination in relation to 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.²⁰⁸

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

In Bulgaria, national legislation prohibits discrimination in social protection, including social security and healthcare as formulated in the Racial Equality Directive.²⁰⁹ All five grounds are covered.

Racial/ethnic discrimination in social housing is covered regardless of whether it is defined as social protection or as housing (or in any other manner), as the PADA bans discrimination in all areas, applicable to all rights and freedoms.

a) Article 3(3) exception (Directive 2000/78)

The PADA transposes the exception in Article 3(3) of Directive 2000/78/EC with respect to age, and no other ground, as concerns eligibility for pension ages only.²¹⁰

²⁰⁵ PADA, Article 6(1), Articles 12-28 and Article 37(2).

²⁰⁶ PADA, Article 6(1). Article 6(1) does not list any specific fields of application. It does not mention dismissals or pay. It is a general norm providing for a universal scope, implicitly covering any specific field. It reads: 'The ban on discrimination applies to all persons in the exercise and the defence of the rights and freedoms provided for under the Constitution and the laws of the Republic of Bulgaria.'

²⁰⁷ PADA, Article 6(1) and Articles 29-35. Article 6(1) is a general provision, implicitly covering these fields. Articles 29-35 do not list specific fields of application but provide for specific bans (bans on particular conduct) in the fields of education and training.

²⁰⁸ PADA, Article 6(1) and Article 36.

²⁰⁹ PADA, Article 6(1).

²¹⁰ PADA, Article 7(1.8).

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

In Bulgaria, national legislation implicitly prohibits discrimination in social advantages, as formulated in the Racial Equality Directive.²¹¹ All five grounds are covered.

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

In Bulgaria, national legislation prohibits discrimination in education as formulated in the Racial Equality Directive.²¹² All five grounds are covered. The scope of protection under the PADA is universal: discrimination is banned with regard to the exercise of all rights and freedoms (Article 6(1)). Therefore, any discriminatory treatment in school would be covered, including educational content.

In addition, according to the Pre-School and School Education Act, everyone shall have a right to education and inclusive education is an integral part of the right to education.²¹³ Equal access to quality education and the inclusion of every child, as well as equal treatment and non-discrimination, are among the principles of education.²¹⁴ Compulsory pre-school and school education is free.²¹⁵

a) Pupils with disabilities

In Bulgaria, the general approach to education for pupils with disabilities gives rise to problems. While under the legislation integrative (inclusive) education is the rule,²¹⁶ and declared an integral part of the right to education,²¹⁷ in practice, inclusion of all pupils with disabilities is yet to be achieved. NGOs monitoring the process of educational integration have observed that: funding and methodological support for inclusion are inadequate and measurable indicators for progress are lacking, with few schools and few children included in integrative change in practice;²¹⁸ 17 % of children living in residential care in community centres are not included in any form of schooling, while 32 % of children living in residential care in community centres are schooled in classes within those centres (outside of schools) and most of the children living in residential care in community centres who actually attend a school are enrolled in a form of special (not mainstream) school;²¹⁹ not all kindergartens and schools are physically accessible.²²⁰

²¹¹ PADA, Article 6(1). Article 6(1) is a general norm providing for a universal scope, implicitly covering any specific field, including social advantages. It reads: 'The ban on discrimination applies to all persons in the exercise and the defence of the rights and freedoms provided for under the Constitution and the laws of the Republic of Bulgaria.' There is no case law on social advantages. There has never been a decision, by the courts or the equality body, as far as the author is aware, to deny the universal, all-encompassing scope of the PADA.

²¹² PADA, Article 6(1) and Articles 29-35. Article 6(1) is a general provision, implicitly covering these fields. Articles 29-35 do not list specific fields of application but provide for specific bans (bans on particular conduct) in the fields of education and training.

²¹³ Pre-School and School Education Act (PSEA) (*Закон за предучилищното и училищното образование*), adopted 13 October 2015, entered into force on 1 August 2016, last amendments 29 December 2018, Article 7(1-2).

²¹⁴ PSEA, Article 3(2.3-4).

²¹⁵ PSEA, Article 9(1-3).

²¹⁶ PSEA, and secondary legislation – the Ordinance on Integrative Education (*Наредба за приобщаващото образование*), entry into force 27 October 2017, last amended 18 December 2018.

²¹⁷ PSEA, Article 7(2).

²¹⁸ National Network for Children, 'Notebook' 2017, available (in BG) at: https://nmd.bg/wp-content/uploads/2017/05/A4_bejejnjk2017_web.pdf, pp. 83-84.

²¹⁹ Lumos Foundation (2016), *Ending institutionalisation: An assessment of the outcomes for children and young people in Bulgaria who moved from institutions to the community*, p. 32, available at: https://lumos.contentfiles.net/media/documents/document/2017/02/Bulgarian_Outcomes_Report_ENG.pdf.

²²⁰ Bulgarian Helsinki Committee (2017) *Alternative report about the rights of persons with disabilities in Bulgaria under the UN Convention on the Rights of Persons with Disabilities*, citing official data for 2013 (91 accessible schools), p. 66, available at: http://bghelsinki.org/media/uploads/special/2017-int_crpd_ico_bgr_27646_e.pdf.

Furthermore, under the legislation itself, children with sensory (hearing or sight) impairments are channelled into special schools for their category.²²¹ As for children with other disabilities, while, according to the law, kindergartens and schools are under a duty to accept them,²²² and they may not be segregated into separate classes or groups,²²³ they may still be referred, on parental application, to separate special schools (centres for special educational support) or to special groups based on an assessment of their special needs.²²⁴ While the law stipulates that this is to be done 'as an exception, when educational objectives cannot be achieved through another form of support',²²⁵ this wording is broad and there is no legal definition of what it means for educational objectives not to be achievable through other support. It is unclear whether mainstream education environmental deficiencies (inaccessibility or insufficient human and technical resources) could be construed as a legitimate reason for why educational objectives could not be realised other than in a special school. Furthermore, under the law, there are no procedural guarantees for informed parental choice in terms of making an application for referring a child to a special school. It seems to the author of this report that it would be possible for marginalised, indigent parents to be put under pressure by educators, intellectual health specialists or officials to apply for special school referral on grounds that 'there is no other way'.

No public data are available on the numbers of children segregated in special schools, excluded from any schooling or integrated into schools and kindergartens. According to NGO estimates, between 2 032 and 2 722 children with disabilities are schooled at special centres, while between 10 000 and 14 000 are integrated into mainstream schooling, using the so-called 'resource support'.²²⁶ A large proportion of children are said to be excluded from any schooling – some 8 500 children with disabilities, including those younger than pre-school age (0-5 years), are not reported as being schooled either in special or in mainstream schools.²²⁷

In 2018 (there being no 2019 cases), the Supreme Administrative Court (SAC) confirmed a decision by the Sofia City Administrative Court awarding damages to the mother of a child with disabilities who was not admitted for full-time care to a public kindergarten on grounds of his disability (he was only taken for an hour and a half daily).²²⁸ His mother obtained a decision by the PADC finding direct discrimination and brought court proceedings, winning pecuniary damages resulting from enrolling her child in an alternative, privately owned kindergarten (BGN 5 382 (EUR 2 691)).

b) Trends and patterns regarding Roma pupils

In Bulgaria, there are specific societal patterns in education regarding Roma pupils, such as segregation. Roma predominantly live in segregated areas in severely substandard (inhuman) conditions and Roma children predominantly study in schools located in such areas. These schools are predominantly Roma, i.e. segregated, and are seriously substandard. According to the 2014 annual report of the European Union Agency for Fundamental Rights (FRA), more than 25 % of Roma pupils attend de facto segregated school classes.

Other patterns of educational exclusion/segregation of Roma include:

²²¹ PSEA, Article 441.1).

²²² PSEA, Article 1921).

²²³ PSEA, Article 995).

²²⁴ PSEA, Article 1455) and Article 1941).

²²⁵ PSEA, Article 194(1).

²²⁶ Bulgarian Helsinki Committee (2017) *Alternative report about the rights of persons with disabilities in Bulgaria under the UN Convention on the Rights of Persons with Disabilities*, pp. 63, 65, available at: http://bghelsinki.org/media/uploads/special/2017-int_crpdc_ico_bgr_27646_e.pdf.

²²⁷ Bulgarian Helsinki Committee (2017) *Alternative report about the rights of persons with disabilities in Bulgaria under the UN Convention on the Rights of Persons with Disabilities*, p. 66, available at: http://bghelsinki.org/media/uploads/special/2017-int_crpdc_ico_bgr_27646_e.pdf.

²²⁸ SAC, Decision No. 5516 of 26 April 2018 in Case No. 187/2017.

1. Children at home or in the street with no access to school at all, as 'Roma children are less likely to attend kindergarten and much more likely to drop out of school'.²²⁹ According to the FRA, Roma face three major interrelated education problems: low preschool attendance; a high risk of segregated schooling, compounded by prejudice and discrimination; and high drop-out rates before completing secondary education.²³⁰

One report on *Strategies and Tactics to Combat Segregation of Roma Children in Schools* states: 'Roma children experience lower enrolment, attendance, and completion levels than average at all levels of education. Access to non-compulsory preschool education (before age 5) is limited due to the attendance fees that registration requires and preferential registration for children with employed parents. Additionally, many Roma children are excluded from compulsory preschool education due to space limitations.'²³¹

The report goes on to say: 'According to 2011 census data, 23.2 percent of Roma children of compulsory school age do not attend school, compared to 5.6 percent of Bulgarian children on the whole. Around 10 percent of Roma children between the ages 7 and 15 attend school irregularly (i.e., missing at least four school days a month). During the 2010/2011 school year, only 42 percent of Roma children attended preschool or kindergarten, a "striking phenomenon" according to a 2013 FRA report. In addition, dropout rates for Roma children are generally extremely high, particularly between the first and fourth grades. It has also been shown there is a lack of interest on the part of teachers and school officials in ensuring the attendance and literacy of Roma children. Teachers do not adapt their methods to the needs of different students, even though most Roma children speak another language. Furthermore, there is a dearth of programs and activities to prevent early school leaving at upper educational levels.'²³²

Another report states that, 'In Bulgaria, early schools leaving is particularly high among Roma (67%) while the national average is 12.7% - which is still above the national European 2020 target and EU average.'²³³

2. Children in special schools for students with 'special educational needs'²³⁴ (under the law, 'centres for special educational support', or 'special groups', or 'field' (изнесени) classes/groups in social services in the community) (over-representation).²³⁵

²²⁹ European Commission (2019), *Education and Training Monitor 2019: Bulgaria*, p. 9, available at: https://ec.europa.eu/education/sites/education/files/document-library-docs/et-monitor-report-2019-bulgaria_en.pdf.

²³⁰ Fundamental Rights Agency (2014), *Roma survey – Data in focus: Education: the situation of Roma in 11 EU Member States*, available at: http://fra.europa.eu/sites/default/files/fra-2014_roma-survey_education_tk0113748enc.pdf.

²³¹ The FXB Centre for Health and Human Rights at Harvard University (2015), *Strategies and Tactics to Combat Segregation of Roma Children in Schools: Case studies from Romania, Croatia, Hungary, Czech Republic, Bulgaria, and Greece*, p. 93, available at: <http://www.dare-net.eu/cms/upload/file/strategies-and-tactics-to-combat-segregation-case-studies-english.pdf>.

²³² The FXB Centre for Health and Human Rights at Harvard University (2015), *Strategies and Tactics to Combat Segregation of Roma Children in Schools: Case studies from Romania, Croatia, Hungary, Czech Republic, Bulgaria, and Greece*, p. 93, available at: <http://www.dare-net.eu/cms/upload/file/strategies-and-tactics-to-combat-segregation-case-studies-english.pdf>.

²³³ Open Society Foundations (2019), *Post-2020 EU Roma Strategy: The Way Forward*, p. 17, available at: <https://www.opensocietyfoundations.org/uploads/7004b0da-956d-4df9-a1f7-d889a00ae9d5/post-2020-eu-roma-strategy-the-way-forward-20190627.pdf>.

²³⁴ Under the law, 'special educational needs' are defined as a child's or a student's educational needs 'that might arise in cases of sensory disabilities, physical disabilities, multiple disabilities, intellectual impediments, language and speech impairments, specific learning ability impairments, autistic spectrum disorders, emotional and behavioural disorders' (PSEA, Additional Provisions, § 1(27)).

²³⁵ Among numerous authorities, see Fundamental Rights Agency (2014), *Roma survey – Data in focus: Education: the situation of Roma in 11 EU Member States*, available at: http://fra.europa.eu/sites/default/files/fra-2014_roma-survey_education_tk0113748enc.pdf.

²³⁵ The FXB Centre for Health and Human Rights at Harvard University (2015), *Strategies and Tactics to Combat Segregation of Roma Children in Schools: Case studies from Romania, Croatia, Hungary, Czech Republic, Bulgaria, and Greece*, p. 191, available at: <http://www.dare-net.eu/cms/upload/file/strategies-and-tactics-to-combat-segregation-case-studies-english.pdf>.

The *Strategies and Tactics* report states: 'Most children in Bulgaria's special schools and residential care institutions for orphans are Roma (60 percent). In some cases, Roma children represent more than half the student population in special schools. The rate of Roma students attending special schools is decreasing, but observers note that this remains a concern. Although the Ministry of Education and Science's new policy supports the downsizing of special schools, the process is slow. Many Roma children in these classes in fact do not demonstrate learning impairments [...].'²³⁶

A report by the Open Society Foundations states: '[...] 26% of Roma children are educated in segregated settings, and around 50% of students in remedial special schools are Roma.'²³⁷

3. Children in schools for juvenile delinquents (disproportionate representation). One report notes that 'Children and students belonging to the Roma minority are overrepresented in two types of special schools: the schools for children with developmental deficiencies and the schools for juvenile delinquents.'²³⁸

The PADA bans racial segregation as a form of discrimination (Article 5). However, it defines it in a way that is not compatible with European law because the definition explicitly requires the state of separation to be 'compelled'.²³⁹ It thus implies that segregation may be chosen, i.e. that segregated people may waive their right not to be discriminated against, including not to be segregated on racial grounds. Yet, the European Court of Human Rights has consistently held in Roma segregation cases that no waiver of the right to non-discrimination in this context is possible.²⁴⁰

In 2019, the Pazardzhik Regional Court held that the element of 'compelled separation' in the legal definition was to be construed in line with the ECtHR's case law to the effect that separation is 'compelled' when it 'does not result from an individual's freely formed will, provided that all the prerequisites to form free will are there'. The Court held that 'the qualification "compelled separation" is not to be taken formally, as a mere absence of compulsion in the strict sense of the word, but instead as clarified by the ECtHR.'²⁴¹ The appeals court confirmed the first instance court's decision, which contained the same interpretation of racial segregation.²⁴²

According to the Pre-School and School Education Act, kindergartens and schools may not segregate children of 'a different' ethnicity in separate groups or classes (since 1 August 2016).²⁴³ However, there is no ban under that act on segregating children in separate kindergartens or schools.

²³⁶ The FXB Centre for Health and Human Rights at Harvard University (2015), *Strategies and Tactics to Combat Segregation of Roma Children in Schools: Case studies from Romania, Croatia, Hungary, Czech Republic, Bulgaria, and Greece*, p. 93, available at: <http://www.dare-net.eu/cms/upload/file/strategies-and-tactics-to-combat-segregation-case-studies-english.pdf>.

²³⁷ Open Society Foundations (2019), *Post-2020 EU Roma Strategy: The Way Forward*, p. 17, available at: <https://www.opensocietyfoundations.org/uploads/7004b0da-956d-4df9-a1f7-d889a00ae9d5/post-2020-eu-roma-strategy-the-way-forward-20190627.pdf>.

²³⁸ RAXEN_CC National Focal Point Bulgaria (2004), *Analytical Report PHARE RAXEN_CC Minority Education*, available at: https://fra.europa.eu/sites/default/files/fra_uploads/272-edu-bulgaria-final.pdf, p. 11.

²³⁹ PADA, Additional Provision, § 1(6).

²⁴⁰ For instance, *D.H. v. Czech Republic*, No. 57325/00, 13 November 2007; *Sampanis v. Greece*, No. 32526/05, 5 June 2008; *Oršuš v. Croatia* [GC], No. 15766/03, 16 March 2010.

²⁴¹ Pazardzhik Regional Court, Decision No. 233 of 25 June 2019 in Case No. 315/2019.

²⁴² This judicial interpretation derived from the *actio popularis* claim brought against the local general hospital by the author of this report (subsequently the case was represented by substitutes) concerning a practice of racial segregation in the hospital's maternity wards, consisting of separating Roma women in rooms where no Bulgarian majority women would be placed. Both the first instance and appeals courts found, on the evidence, that the respondent had succeeded in rebutting any presumption of discrimination raised by the claimants. In particular, the hospital had engaged, *inter alia*, witnesses who testified that they had given birth in the hospital on more than one occasion and had shared rooms with Roma women.

²⁴³ PSEA, Article 62(4) and Article 99(4) and (6).

In a few cases brought to court to challenge all-Roma schools,²⁴⁴ the 'compelled' element in the PADA definition of segregation has proved an obstacle to effective protection. In one case, the appeals court explicitly confirmed that there was separation on ethnic grounds but found that it was not 'compelled' because it was 'not a consequence of factors outside of the students' will and did not occur against their will – it did not result from legislation or an administrative decision'.²⁴⁵ However, the court found that the students suffered indirect discrimination because the school curricula and processes did not take account of their ethnic and linguistic differences. In two other cases, the 'compelled' hurdle prevented any protection.²⁴⁶ In a case concerning the disproportionate representation of Roma children in special schools, the equality body instructed the Minister of Education to take measures to stop the admission of 'healthy' children to special schools.²⁴⁷

The PADC did not specify the extent of the over-representation it found.²⁴⁸ According to studies relevant at the time, Roma represented between 42 % and 51 % of the special schools' student body. In a 2007 study, the Roma Education Fund found that 'still, the majority of children in special schools are Roma or of Roma origin'.²⁴⁹ This study further specified that '[t]here are no data on the exact number of Roma children in [special] schools, but it is generally said that they are around two thirds of [all pupils there]'.²⁵⁰ The Roma Education Fund findings also referred to a 2004 study by the State Child Protection Agency, according to which the share of ethnic Bulgarian children in special schools was 42.5 %, the rest being minority students, including Roma, Turkish and others.²⁵¹ The Roma Education Fund further claimed that, 'in certain special schools, the share of Roma reaches 90-100 %'.²⁵²

In addition, a 2006 study by the Sofia branch of Save the Children UK found that special schools included both children with disabilities and 'socially neglected' children and, while 'accurate statistics were lacking', a 'significant proportion' of 'socially neglected' children were Roma.²⁵³ Similarly, a 2008 study by the Sofia branch of the Open Society Institute found that Roma children are 'often' educated in special schools, a 'large proportion' of them being enrolled in such schools for 'purely social reasons', as a result of which Roma

²⁴⁴ In one case, segregation of *Turkish* children in separate classes was also successfully challenged before the equality authority (PADC, Decision No. 91 of 8 November 2007 in Case No. 28/2007).

²⁴⁵ Sofia City Court (SCtC), Decision of 27 February 2007, civil Case No. 3139 of 2005. The Supreme Court of Cassation, the final instance court, confirmed this decision in its Decision No 723 of 1 August 2008, civil case No. 6402 of 2007.

²⁴⁶ Blagoevgrad Regional Court, Decision No. 139 of 1 December 2005 in Case No. 1154/2004; Sofia Regional Court, Decision of 16 December 2005 in Case No. 871/2005 (both confirming negative trial court rulings on appeal). The first case was brought by Roma students studying in exclusively or predominantly Roma classes in school. The courts in effect found that the authorities had done nothing to create this situation and could do nothing about it because the right to choice of school (of non-Roma parents/students) was absolute and could not be interfered with. The second case was brought by the European Roma Rights Centre alleging that an all-Roma school was segregated (as well as substandard and ill-adapted to deal with the students' language differences). The courts found that the authorities did not 'force' any of the students to study in that particular school, therefore, there was no segregation or any other breach of equality law.

²⁴⁷ PADC, Decision No. 80 of 16 October 2007.

²⁴⁸ PADC, *Годишен отчет 2007 г. (Annual Report 2007)*, p. 79, available (in BG) at: http://www.kzd-nondiscrimination.com/layout/images/stories/pdf/annual_report_07.pdf.

²⁴⁹ Roma Education Fund (2007), *Подобряване на образованието на ромите в България (Improving Roma education in Bulgaria)*, p. 11, available (in BG) at: https://www.romaeducationfund.org/wp-content/uploads/2019/05/bulgaria_report_bulgarian.pdf.

²⁵⁰ Roma Education Fund (2007), *Подобряване на образованието на ромите в България (Improving Roma education in Bulgaria)*, p. 30, available (in BG) at: https://www.romaeducationfund.org/wp-content/uploads/2019/05/bulgaria_report_bulgarian.pdf.

²⁵¹ Roma Education Fund (2007), *Подобряване на образованието на ромите в България (Improving Roma education in Bulgaria)* p. 31, available (in BG) at: https://www.romaeducationfund.org/wp-content/uploads/2019/05/bulgaria_report_bulgarian.pdf.

²⁵² Roma Education Fund (2007), *Подобряване на образованието на ромите в България (Improving Roma education in Bulgaria)*, p. 31, available (in BG) at: https://www.romaeducationfund.org/wp-content/uploads/2019/05/bulgaria_report_bulgarian.pdf.

²⁵³ Save the Children (2006), *Интегрираното обучение – от концепцията към практиката (Integrated education – from concept to practice)*, pp. 35-36, available (in BG) at: http://www.ced.bg/uploads/project/SaveTheChildren_Final1.pdf.

children are 'over-represented' in special schools.²⁵⁴ The latter study referred to a 2002 study by the Bulgarian Helsinki Committee, according to which at least 51 % of the total number of special school students were Roma.

Current statistics are lacking. The most recent data are from 2014 and are incomplete. In a 2014 study, the FRA found that, in Bulgaria, the percentage of Roma children up to the age of 15 reported as having attended a special school or class 'mainly for Roma' was 14 %.²⁵⁵ This figure does not include students older than 15. In addition, it includes not only students channelled into special schools but also students sent to racially segregated classes or schools, leaving the number of Roma children sent to special schools unclear.

According to the authorities, the situation has improved. In the 2015-2020 Strategy for Educational Integration of Ethnic Minority Children and Students (adopted in 2015) (the Strategy), the authorities claim that there is a 'complete limiting of the practice of placing healthy [Roma] children in special schools for social reasons', which is a 'significant success in the work of the Ministry of Education and Science'.²⁵⁶ This statement refers to data included in Annex No. 4 to the Strategy but these data only show a reduction of the overall number of children (regardless of ethnicity) placed in special schools: from 7 842 in the 2005/2006 school year, to 3 179 in the 2014/2015 school year. This does not appear to be proof of 'complete limiting of the practice of placing healthy [Roma] children in special schools for social reasons'.

The 2010-2020 Framework Programme for the Integration of Roma in Bulgarian Society (the Programme) features, as a priority, 'not allowing schooling of healthy Roma children in special schools' and 'taking out of special schools healthy students enrolled in preceding years'.²⁵⁷ (No estimates of the numbers of affected children are offered.) No specific measures to implement the 'not allowing schooling of healthy Roma children in special schools' priority are included in the Programme.

Overall, there appears to be no evidence available to support the official claim that at present no Roma students are channelled into special schools for no good reason. While, as mentioned above, current data are lacking, making it unclear whether there is ongoing large-scale unwarranted channelling of Roma students into special schools, it seems risky to assume that there therefore aren't any. In the light of the 2014 FRA findings mentioned above, revealing a significant Roma over-representation in special schools, and in the light of the absence of any information on the remedial measures, if any, taken since by the authorities, there is no basis on which to judge the effectiveness of any such measures, or their potential to eradicate the issue. Accordingly, the probability is not high that the issue has been resolved in the six years since 2014, a relatively limited period considering the institutional and cultural changes necessary, including (re-)training of relevant staff, to correct deficient practices that had existed for many years before. However, as the figures dropped from approximately 50 % in 2002 to around 14 % in 2014, it seems safe to conclude non-negligible progress is underway.

The above-mentioned PADC instructions contained in its 2007 decision were, as a whole, not complied with. While the applicable legislation has been replaced since (not for purposes of implementing the PADC instructions, but as a matter of general educational

²⁵⁴ Open Society Institute Sofia (2008), *Ромите в България (Roma in Bulgaria)* p. 32, available (in BG) at: https://osis.bg/wp-content/uploads/2018/04/OSI_Publication_Roma_2.pdf.

²⁵⁵ Fundamental Rights Agency (2014), *Roma survey – Data in focus: Education: the situation of Roma in 11 EU Member States*, available at: http://fra.europa.eu/sites/default/files/fra-2014_roma-survey_education_tk0113748enc.pdf, p. 48.

²⁵⁶ 'Стратегия за образователна интеграция на децата и учениците от малцинствата (2015-2020)' ('Strategy for Educational Integration of Ethnic Minority Children and Students'), p. 8, available (in BG) at: <https://www.mon.bg/bg/143>.

²⁵⁷ 'Рамкова програма за интегриране на ромите в българското общество (2010-2020)' ('Framework Programme for Integration of Roma in Bulgarian Society'), p. 7, available (in BG) at: <http://www.strategy.bg/StrategicDocuments/View.aspx?lang=bq-BG&Id=609>.

reform), with the Pre-school and School Education Act of 2016 and the Ordinance on Integrative Education of 2017, the new legislation does not incorporate all the measures that the PADC indicated in 2007. The one exception is a duty, under the legislation, for educators to provide additional Bulgarian language instruction for children whose mother tongue is different in order to support their educational integration.²⁵⁸

There is no relevant recent case law on record.

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

In Bulgaria, national legislation prohibits discrimination in access to and the supply of goods and services, as formulated in the Racial Equality Directive.²⁵⁹ This is ensured by both the general, all-encompassing ban on discrimination and by the specific provision of Article 37 prohibiting any refusal to provide goods or services, as well as any provision of goods and services of lesser quality or under worse conditions. All five grounds are covered.

Under the legislation, a failure to adapt goods or a service to meet the needs of a person with a disability is not a separate form of discrimination. It could, however, fall under direct or indirect discrimination.

In 2019, in a case brought under the PADA, the Varna Regional Court ruled in favour of a blind person who had effectively been denied access to a health-related administrative service by the relevant public body, as he had been required to apply for the service in person (which was not possible due to his disability) and not via an authorised representative (his son) as he had requested.²⁶⁰

In 2018, the SAC confirmed a relevant decision by the Sofia City Administrative Court, confirming a decision by the PADC.²⁶¹ The PADC had found that a mobile network operator discriminated against a person with disabilities by requiring all clients, including the complainant, to visit the company's offices in person in order to sign a service contract, while the complainant, a stroke and hip joint replacement survivor, was prevented from doing so due to mobility issues. The PADC ruled that the company's refusal to allow contracts to be closed by proxy disadvantaged people with disabilities, for which the company had failed to present any justification (indirect discrimination). The PADC ordered the company to immediately discontinue their practice of requiring in-person signing of contracts, to change their general terms in that respect and fined them BGN 2 500 (EUR 1 250).

It is not clear whether existing disability discrimination bans would be interpreted in court as an obligation to provide (design/manufacture) goods which are usable by people with disabilities.

a) Distinction between goods and services available publicly or privately

In Bulgaria, national law does not distinguish between goods and services available to the public (e.g. in shops, restaurants and banks) and those only available privately (e.g. those restricted to members of a private association).²⁶²

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

²⁵⁸ PSEA, Article 16 and Article 178(1.3).

²⁵⁹ PADA, Article 6(1) and Article 37.

²⁶⁰ VRC, Decision No. 1486 of 11 December 2019 in Case No. 1872/2019.

²⁶¹ SAC, Decision No. 6072 of 10 May 2018 in Case No. 1225/2017.

²⁶² PADA, Article 6(1) and Article 37.

In Bulgaria, national legislation prohibits discrimination in the area of housing as formulated in the Racial Equality Directive.²⁶³ The provision is general, implicitly including housing. It covers all five grounds.

In practice, refugees face serious difficulties in finding accommodation, for financial and other reasons. Landlords typically require advance payment for one to three months. In addition, based on anecdotal evidence, foreign nationals face race and religious discrimination, as well as discrimination against families with many children.²⁶⁴ As a result, the most vulnerable are at risk of homelessness.²⁶⁵

a) Trends and patterns regarding housing segregation for Roma

In Bulgaria, there are patterns of housing segregation of the Roma. The majority of Roma live in segregated areas ('ghettos'). As segregation in general does not relate simply to legal issues, but can also be a de facto situation, the separation of Roma housing from the rest of the population constitutes segregation and, as such, a breach of fundamental rights.

As an inextricably linked – as opposed to separate – issue, the Roma in the segregated areas mentioned above have dire living conditions, including severely substandard housing, some of it ramshackle, with very limited access to basic infrastructure, security of tenure or essential services such as public transport, emergency medical aid, waste collection, policing and, for some, even electricity and running water supplies. In many places, local authorities have for decades ignored Roma housing and infrastructure problems, investing nothing in the development of Roma residential areas. The authorities in many places have consistently refused to include Roma residential areas in urban planning and to regulate them. Forced evictions and the lack of social protection for the people rendered homeless by them have further compounded this situation.

This deprivation of basic public services and security of tenure cannot be factually or conceptually extricated from the segregation of Roma areas. It would amount to a serious misunderstanding to believe that racialised collective forced evictions and (extreme) poverty are 'clearly distinguishable' and 'not to be mixed' with Roma racial segregation. It is because Roma areas are segregated that their residents can be, and are, kept in inhuman/degrading housing conditions and subjected to collective forced evictions that would not be conceivable with regard to any other ethnic group, and certainly not to the majority population.

The 2012 ECtHR decision against Bulgaria in *Yordanova and Others v. Bulgaria* (collective forced eviction threatening Romani community)²⁶⁶ has not been implemented: no legislative amendments have been undertaken to place relevant authorities under a duty to consider, when making decisions about forced evictions, the individual circumstances of the people affected, including their special vulnerabilities, as well as the authorities' own failures to deal with the situation sooner, and to provide alternative accommodation where warranted so as not to reduce dependent people to homelessness. The implementation of this judgment, delivered in an emblematic case represented by the author of this report, is currently under enhanced supervision by the Committee of Ministers and the ECtHR.²⁶⁷

In the *Yuseinova and Others v. Bulgaria* case, eviction proceedings were brought against a number of Roma families. The applicants, brought by the author of this report, subsequently represented by a substitute, alleged that, if they were evicted and their homes demolished, there would be a violation of their right to respect for their family life

²⁶³ PADA, Article 6(1).

²⁶⁴ See UNHCR Bulgaria, 2016 report, p. 12, available (in BG) at: www.unhcr.org/bg/wp-content/uploads/sites/18/2016/12/2016-AGD-PA-Report-Final-BG.pdf.

²⁶⁵ See UNHCR Bulgaria, 2016 report, p. 12, available (in BG) at: www.unhcr.org/bg/wp-content/uploads/sites/18/2016/12/2016-AGD-PA-Report-Final-BG.pdf.

²⁶⁶ *Yordanova and others v. Bulgaria*. No. 25446/06, 24 April 2012.

²⁶⁷ See ECtHR, 'Country Factsheet: Bulgaria', available at: <https://rm.coe.int/1680709740>.

and home, unless the authorities found a permanent adequate alternative solution to accommodate them without delay, keeping the members of each family together. The applicants also complained of deficiencies in the domestic procedure for deciding on eviction and demolition, and enforcing such decisions, which lacks a proper proportionality analysis. The applicants further alleged that their collective forced eviction and the demolition of their homes, in an arbitrary fashion after the authorities had tolerated them for many years and without accounting for the vulnerability of the families or providing them with an adequate shelter, would constitute an act of racial discrimination against them as Roma, given that non-Roma families would not be treated similarly. On 4 June 2019, the Court delivered an inadmissibility decision. During the proceedings, all but one of the applicants withdrew their complaints. It is not clear why they did so, although their representative claimed it was a result of undue pressure from the authorities.²⁶⁸ The Court, however, found that these applicants had withdrawn their applications and that respect for human rights did not require the Court to continue examining the cases. As for the remaining applicant, the Court found that he had submitted his application out of time.

In the *Dimitrova and Others v. Bulgaria* case, brought similarly on behalf of Roma families threatened by forced eviction, the ECtHR declared the complaints inadmissible (decision of 11 July 2017) for failure to exhaust domestic remedies (the Court found the application before the domestic court 'was initially chaotic and even after clarification remained unclear and unstructured' (para 75 of the decision)). In the *Aydarov and Others v. Bulgaria* case, declared inadmissible by the ECtHR (decision of 2 October 2018), also brought on behalf of Roma families threatened by forced eviction, the ECtHR did not grant interim relief under Rule 39 but requested information concerning the applicants' situation from the authorities, which prompted the latter to impose a temporary halt on a set of eviction enforcement proceedings.

Complaints filed with the UN Human Rights Committee are not on record as having a more tangible impact.

The authorities generally do not ensure that no eviction takes place in the long run.

²⁶⁸ A note by the third-party intervener is available at: <http://www.errc.org/cikk.php?cikk=4997>.

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

In Bulgaria, national legislation provides for an exception for genuine and determining occupational requirements.²⁶⁹ It is valid for all grounds. The wording is: 'The following shall not constitute discrimination: [...] different treatment of persons based on a characteristic related to [protected] grounds [...] where, by reason of the nature of a particular occupation or activity, or of the conditions it is carried out in, such a characteristic constitutes an essential and determining occupational requirement, the aim is legitimate and the requirement does not exceed what is necessary to accomplish it [...].'

In 2019, in a case brought under the PADA, the SAC ruled *ex officio* to make a reference for a preliminary ruling to the CJEU in a case brought by a blind person against a court chairperson and a judge for not appointing her to serve as a juror in criminal cases.²⁷⁰ The Court's question to the CJEU was: Are the rules in Article 5(2) of the CRPD and in Articles 1(1-3) and 4(1) of Directive 2000/78/EC to be interpreted as allowing a blind person to participate in criminal trials as a juror, or is non-blindness a genuine and determining occupational requirement for a juror, whereby the exclusion of a blind person does not amount to disability discrimination? The case is still pending before the CJEU.

The facts are as follows: after the impugned denials of appointment, the electronic random assignment of cases was introduced, following which the complainant was able to serve as a juror. This was one of her arguments in the domestic proceedings: that it was shown by experience that she was capable of serving despite her disability. The respondent judges' defence was that the principles of immediacy (of evidence appraisal), of establishing the objective truth and of decision-makers' inner conviction in criminal trials implied that having sight was a genuine and determining occupational requirement for a juror. The PADC had ruled in the complainant's favour, finding that there was direct discrimination on the grounds of disability. On appeal, the lower court had confirmed the PADC's decision. The court had taken into account the fact that the complainant had been able to serve as a juror after having been randomly assigned once that was made possible, which meant that she could perform the job regardless of her disability.

The SAC ruled on the issue of a genuine and determining occupational requirement in a case where, under the applicable secondary legislation, applicants for service as police officers could not be older than 40 years.²⁷¹ The Court found the maximum age requirement to be discriminatory as the Minister of the Interior, the respondent, had not submitted any proof that it was objectively justified as a necessary and proportionate means to pursue a legitimate aim.

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

In Bulgaria, national law provides for an exception for employers with an ethos based on religion or belief.²⁷² The exception is for 'different treatment of persons on grounds of religion, faith or gender with respect to an occupation carried out in religious institutions or organisations where, by reason of the nature of the occupation, or of the conditions it is carried out in, religion, faith or gender constitutes an essential and determining professional requirement in view of the nature of the institution or organisation, where the aim is legitimate and the requirement does not exceed what is necessary to accomplish it; [...]'. There is an inconsistency in wording between the directive and the PADA: rather than 'genuine, legitimate and justified', under the PADA the occupational requirement is

²⁶⁹ PADA, Article 7(1.2).

²⁷⁰ SAC, Ruling of 25 July 2019 in Case No. 1084/2018.

²⁷¹ SAC, Decision No. 11854 of 14 August 2019 in Case No. 10095/2018.

²⁷² PADA, Article 7(1.3).

'genuine and determining'. However, that may not be material in practice. The PADA also exempts 'different treatment of persons on grounds of religion/faith [...] in religious education or training, including training or education for the purposes of carrying out an occupation in a religious-ethos institution'.²⁷³ This means that religious discrimination is allowed in access to religious education or training with no proportionality required. There is no wording in the law to prevent this exception leading to discrimination on grounds other than religion. There are no recorded instances (and no recorded case law) where this exception has resulted in discrimination on grounds of sexual orientation.

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

In Bulgaria, national legislation does not provide for an exception for the armed forces in relation to age or disability discrimination. The PADA makes no such exception.

4.4 Nationality discrimination (Article 3(2))

a) Discrimination on the ground of nationality

In Bulgaria, national law includes exceptions relating to difference of treatment based on nationality. In principle, the PADA treats nationality as a protected ground, banning all forms of discrimination based on it in all fields of life.²⁷⁴ It makes a significant exception, however, for differential treatment based on nationality provided for under primary legislation.²⁷⁵ Therefore, executive and local government bodies, as well as private parties, are not allowed to treat non-nationals differently based on their nationality, unless Parliament has authorised such treatment by law. Under the PADA, both nationality and a lack of any nationality are included in the concept of nationality as a protected ground.²⁷⁶ In Bulgaria, nationality (as in citizenship) is explicitly mentioned as a protected ground in national anti-discrimination law.²⁷⁷

In 2018, the SAC confirmed a lower-court decision, which repealed a PADC decision holding a local mayor accountable for harassment on grounds of national origin and origin against an indeterminate number of people, as well as incitement to race discrimination. The mayor had publicly opposed the enrolment of refugee children in the local school. The PADC imposed a fine of BGN 250 (EUR 125) and an injunction on him to abstain from such statements.

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

The law does not stipulate any relationship between nationality and race/ethnicity, either in terms of indirect discrimination, or otherwise. No case law has discussed overlaps between nationality and race/ethnic discrimination.²⁷⁸

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

In Bulgaria, there are no exceptions in relation to disability and health and safety as allowed under Article 7(2) of the Employment Equality Directive. There are no such exceptions for other grounds either.

²⁷³ PADA, Article 7(1.4).

²⁷⁴ PADA, Article 4(1).

²⁷⁵ PADA, Article 7(1.1).

²⁷⁶ PADA, Article 7(1.1) expressly exempts legal differences of treatment based on a lack of nationality, as well as nationality.

²⁷⁷ PADA, Article 4(1).

²⁷⁸ In 2003, when the directives were transposed via the PADA, there were a number of legal provisions differentiating on grounds of nationality. There still are. They have never been reviewed to reveal whether they might be indirectly discriminatory against racial groups.

However, according to the Healthy and Safe Working Conditions Act, employers have a duty to assign to their employees only tasks that are compatible with their capabilities,²⁷⁹ considering the specific dangers for employees with reduced work capacity.²⁸⁰ Furthermore, there are a number of laws and secondary legislation instruments governing specific fields, such as transport, including aviation, and other risk-intensive occupations, that provide for health requirements for access to employment in these fields. These norms providing for ability-based restrictions without any proportionality requirement are arguably in conflict with the PADA's prohibition of disability discrimination.

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

4.6.1 Direct discrimination

In Bulgaria, national law provides for specific exceptions for direct discrimination on the ground of age. According to the PADA, there are six exceptions for age altogether, three of which refer to other laws providing for age differentiation. The latter do not require proportionality – a (potential) issue.²⁸¹ For the other three exceptions, the PADA requires proportionality.²⁸²

The first exception for age discrimination under the PADA, which is not subject to proportionality, is for pension ages, including occupational pensions.²⁸³ The second exception not subject to proportionality is for measures and programmes under the Employment Promotion Act.²⁸⁴ The latter include positive measures based on age. The third exception not subject to a proportionality test is the setting of a maximum age for eligibility for loans under the Students and Doctoral Students Loans Act.²⁸⁵

The exceptions which do provide for objective justification are for: setting requirements for minimum age, professional experience or length of service for recruitment or for access to certain advantages linked to employment;²⁸⁶ setting maximum age requirements for recruitment linked to the training requirements of the post in question or the need for a reasonable period of employment before retirement;²⁸⁷ and setting requirements for minimum and maximum age for access to training or education.²⁸⁸ The latter exception may fall within the scope of Directive 2000/78/EC as it implicitly applies to vocational training.

In 2018 (there being no 2019 cases), the SAC justified a university's rule setting a maximum age for access to recruitment for a teaching post (associate professor; *доцент*).²⁸⁹ The complainant who was not considered for the job on grounds of being older than required was turned down by the PADC and the Varna Administrative Court, whose decision was confirmed by the SAC. The courts failed to conduct a proportionality analysis, invoking instead the law conferring 'academic autonomy' on universities. The SAC's decision did not even mention the maximum age set by the university, which it justified, or the complainant's age. The SAC concluded that the complainant's treatment was not unfavourable because it was not personal; the rule would be the same for all people of his age.

²⁷⁹ HSWCA, Article 16(1.2a).

²⁸⁰ HSWCA, Article 16(1.3).

²⁸¹ PADA, Article 7(1.8-9) and (1.12).

²⁸² PADA, Article 7(1.5-6) and (1.11).

²⁸³ PADA, Article 7(1.8).

²⁸⁴ PADA, Article 7(1.9).

²⁸⁵ PADA, Article 7(1.12).

²⁸⁶ PADA, Article 7(1.5).

²⁸⁷ PADA, Article 7(1.6).

²⁸⁸ PADA, Article 7(1.11).

²⁸⁹ SAC, Decision No. 4159 of 30 March 2018 in Case No. 4591/2016.

a) Justification of direct discrimination on the ground of age

In Bulgaria, national law does not provide for justifications for direct discrimination on the ground of age.²⁹⁰

Since 2016, the SAC has consistently held, in a number of cases, that employees or civil servants dismissed on grounds of having become entitled to an old age and seniority pension were not discriminated against on grounds of age because, under the law, the grounds for their dismissal were not their age but their entitlement to a pension, and their entitlement to a pension was independent of age, as seniority was taken into account too.²⁹¹ The SAC seems to regard taking seniority into account as quite different from taking age into account, ignoring the link between the two and not elaborating why. It has also ignored the fact that age *per se* is also a factor for pension entitlement under the law. The Supreme Court of Cassation (final instance in civil cases) (SCC) has produced similar case law.

In 2018, the SAC continued this tendency in at least two cases,²⁹² as did the SCC.²⁹³ None of these rulings discussed proportionality or any other manner of justification. In one of its 2018 rulings, the SCC invoked CJEU C-250/09 and C-268/09.

In 2019, the SAC held that the dismissal of a police officer upon his acquiring pension rights was not discriminatory.²⁹⁴ It was in accordance with a legislative provision giving the Minister of the Interior, the officer's employer, discretion to dismiss any police employee who became entitled to a pension. The SAC held that the employer had no duty to select, based on professional criteria, who among the employees with pension rights to dismiss (who was capable of performing the job). It was irrelevant that other employees with pension rights were not dismissed. The employer had unfettered discretion to choose who to dismiss. The SAC made similar rulings in other cases of dismissal of people who had acquired pension rights, in other professional contexts governed by different legislation providing for dismissal on the basis of pension entitlement.²⁹⁵

b) Permitted differences of treatment based on age

In Bulgaria, national law permits differences of treatment based on age for activities within the material scope of Directive 2000/78/EC.²⁹⁶ Examples include: positive measures, including employment promotion measures; special protection for underage employees/workers; maximum age requirements for access to student loans; age and seniority pension requirements; minimum and maximum age requirements for access to education and training (proportionality test); minimum age, professional experience and seniority requirements for being hired or for certain work-related advantages (proportionality test); maximum age requirements for being hired due to training requirements for the job, or to the need for a reasonable period of employment prior to retirement (proportionality test).

²⁹⁰ PADA, Article 4(2).

²⁹¹ SAC, Decision No. 611 of 12 July 2016 in Case No. 1541/2016. SAC Decision No. 4418 of 14 April 2016 in Case No. 4245/2016.

²⁹² For instance, SAC, Decision No. 2988 of 9 March 2018 in Case No. 13638/2017, Decision No. 4727 of 12 April 2018 in Case No. 2769/2018.

²⁹³ SCC, Ruling No. 368 of 18 May 2018 in Case No. 483/2017, Ruling No. 401 of 28 May 2018 in Case No. 1882018.

²⁹⁴ SAC, Decision No. 2711 of 25 February 2019 in Case No. 57042017.

²⁹⁵ For instance, SAC, Decision No. 3922 of 18 March 2019 in Case No. 65162017; Decision No. 17303 of 17 December 2019 in Case No. 2461/2019.

²⁹⁶ PADA, Article 7(1.5-6, 8-9, 11-12 and 14-15).

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

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

4.6.2 Special conditions for young people and older workers

In Bulgaria, there are special conditions set by law for older and younger workers in order to promote their vocational integration. According to the Labour Code, employees under 18 are entitled to special protection and an employer may assist young employees.²⁹⁷ The minimum age for access to employment is 16 years.²⁹⁸ As an exception, 15 and 16-year-olds may be employed for light jobs that are not dangerous or harmful to them and do not hamper their regular schooling or vocational training.²⁹⁹ Such people may be employed only after a comprehensive medical examination certifying their capability for the job and that it won't harm their health or development.³⁰⁰ The employment of any such individual must be authorised by the authorities.³⁰¹ Similar requirements are provided for 16 to 18-year-olds.³⁰² Employees under 18 may not do work which is beyond their capabilities or harmful or involves risks that an underage person is assumed to be unable to understand or to avoid due to their immaturity.³⁰³ Employers are under a duty to take special care of employees under 18 by providing them with adapted conditions for work and vocational training.³⁰⁴ An employer is under a duty to warn employees under 18 and their parents of the risks involved in the job and of the health and safety measures.³⁰⁵ Employees under 18 may not work more than 35 hours a week or seven hours a day, including vocational training time.³⁰⁶ Such employees are entitled to no fewer than 26 working days annual leave.³⁰⁷ These entitlements only apply to employees under 18.

Older workers are entitled to special protection too. In cases where workers are dismissed after having become entitled to a seniority and old age pension, regardless of the basis for their dismissal, they are entitled to compensation equivalent to the amount of two monthly salaries. If they have worked for the employer for the last ten years, the compensation is equivalent to the amount of six-monthly salaries.³⁰⁸ By contrast, workers who are made redundant prior to having reached pension age are only entitled to no more than one month's salary in compensation.

According to the Employment Promotion Act, an employer who creates a new job and hires a person no older than 29 years to do it is entitled to public money for reimbursement of that individual's salary for up to 18 months.³⁰⁹ An employer who creates a new intern position and hires a person no older than 29 years is entitled to public money for reimbursement of the intern's salary for up to nine months.³¹⁰ If the intern has a basic level of education or lower and no qualifications, the reimbursement period may extend to

²⁹⁷ Labour Code, last amended 6 November 2018, Article 294(6).

²⁹⁸ Labour Code, Article 301(1).

²⁹⁹ Labour Code, Article 301(2).

³⁰⁰ Labour Code, Article 302(1).

³⁰¹ Labour Code, Article 302(2).

³⁰² Labour Code, Article 303.

³⁰³ Labour Code, Article 304.

³⁰⁴ Labour Code, Article 305(1).

³⁰⁵ Labour Code, Article 305(2).

³⁰⁶ Labour Code, Article 305(3).

³⁰⁷ Labour Code, Article 305(4).

³⁰⁸ Labour Code, Article 222(3).

³⁰⁹ Employment Promotion Act, adopted 20 December 2001, Article 36.

³¹⁰ Employment Promotion Act, Article 41. An intern in this case is a person with professional qualifications but no work experience.

12 months.³¹¹ In all cases, recruits must be registered with the Employment Agency as job seekers. Furthermore, special conditions are provided for older workers. An employer who creates a new job and hires a person older than 55 years is entitled to public money for reimbursement of that individual's salary for up to a year.³¹²

4.6.3 Minimum and maximum age requirements

In Bulgaria, there are exceptions permitting minimum and maximum age requirements in relation to access to employment and training. The PADA permits the setting of requirements for minimum age, professional experience or length of service for recruitment or for access to certain advantages linked to employment, provided that it is objectively justified by a legitimate aim and the means to accomplish it do not exceed what is necessary.³¹³ For example, an employer wishing to hire a manager would be entitled to require job applicants to have at least seven years of relevant professional experience. The employer would then be entitled to provide said manager with a company car (not provided to other staff). It further permits the setting of maximum age requirements for recruitment linked to the training requirements of the post in question or the need for a reasonable period of employment before retirement, provided that it is objectively justified by a legitimate aim and the means to accomplish it do not exceed what is necessary.³¹⁴

4.6.4 Retirement

a) State pension age

In Bulgaria, there is no state pension age at which individuals must begin to collect their state pensions or must retire.

In Bulgaria, there is a state pension age at which individuals may begin to collect their pensions. The ages at which individuals become entitled to receive an old age pension are set by law.³¹⁵ Age is not the only criterion for entitlement to such a pension. The number of years of service is taken into account too.³¹⁶ For example, to be entitled to a retirement pension in 2020, a woman must be 61 years and six months old, and have 35 years and 10 months of service.³¹⁷ If she does not have such a length of service, she must have a minimum service of 15 years and be 66 years and six months old.³¹⁸ The relevant pensionable ages are different for women and men.³¹⁹ There are also differences for certain professions and occupations and for the civil service.³²⁰ In the general case, there is no need for an individual to defer receipt of their pension. They can continue their employment while collecting it. If an individual wishes to work beyond the state pension age, the pension can be deferred but it does not need to be deferred. An individual can collect a pension and still work.

b) Occupational pension schemes

³¹¹ Employment Promotion Act, Article 41a.

³¹² Employment Promotion Act, Article 55a.

³¹³ PADA, Article 7(1.5).

³¹⁴ PADA, Article 7(1.6).

Under a new provision, age is not a factor for a specific category of public officials. Under Article 69g of the Social Security Code (adopted in 2018, in force as of 1 January 2019), judges, prosecutors and investigators who as of 31 December 2018 have at least 35 years of legal service, of which at least two thirds were in the judiciary, may claim a pension regardless of their age.

³¹⁶ Social Security Code (*Кодекс за социално осигуряване*), adopted in 2018, in force as of 1 January 2019, last amended 18 December 2018, Article 68.

³¹⁷ National Social Security Institute: <https://www.noi.bg/pensions/grantpensions/1854-posv13>.

³¹⁸ National Social Security Institute: <https://www.noi.bg/pensions/grantpensions/1854-posv13>.

³¹⁹ Social Security Code, Article 68. The respective ages are 61 for women and 64 for men. These ages are to be gradually increased under the legislation until they reach 65 for women and 65 for men. However, age alone is not sufficient. An individual also needs a certain number of years of work experience during which they made social security payments.

³²⁰ Social Security Code, Articles 69-69g.

In Bulgaria, there is a standard age at which people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements. Workers, both women and men, become entitled to receipt of occupational pensions at the age of 60.³²¹ As an exception, they can start collecting their occupational pensions five years earlier, provided that this is set in a collective agreement.³²² If an individual wishes to work longer, payments from such occupational pension schemes can be deferred, but this is unnecessary. An individual can collect a pension and still work.

c) State imposed mandatory retirement ages

In Bulgaria, there are state-imposed mandatory retirement ages, but these are *not* generally applicable. In certain sectors only, such as the professional army³²³ and the police,³²⁴ the relevant special laws impose age limits after which both women and men can no longer serve. However, there is no bar to them finding other employment and still collecting their pension.

d) Retirement ages imposed by employers

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

e) Employment rights applicable to all workers irrespective of age

The law on protection against dismissal and other laws protecting employment rights apply to all workers irrespective of age, even if they remain in employment after attaining pensionable age or any further age. After becoming a pensioner, an employee may choose whether to leave employment. Protection against dismissal and other employment rights apply to employees who choose to stay irrespective of age. This applies to all employees, apart from those in the armed forces and police and some in academia.

However, under the Labour Code, when an individual acquires the right to an old age pension, they are subject to dismissal, at the employer's discretion, on that specific ground – having become entitled to such a pension.³²⁵ That is to say, employers may not dismiss pensioners on other (unlawful) grounds, but may do so on this particular ground. This means that, even if people are not required by law to stop working upon becoming entitled to a pension, they are not protected against losing their job on the grounds of becoming entitled to a pension.

Employers may also dismiss a worker who was hired after s/he became entitled to an old age pension and exercised her/his right to claim such a pension.³²⁶ In other words, employers can freely dismiss people whom they hired as pensioners, on the grounds of the latter being pensioners. It is also possible for the employer to dismiss: a) an employee who opted to receive a reduced pension a year earlier than the statutory age upon acquiring the requisite number of years of service; and b) such an employee who the employer hired after s/he had opted for a reduced pension.³²⁷

³²¹ Social Security Code, Article 243(4).

³²² Social Security Code, Article 243(6).

³²³ Defence and Armed Forces of the Republic of Bulgaria Act (*Закон за отбраната и въоръжените сили на Република България*), in force as of 12 May 2009, last amended 28 May 2019, Article 160(1). For soldiers, the limit is 46 years; that limit is raised for each higher rank, with 62 years as the limit for the highest-ranking officers.

³²⁴ Ministry of the Interior Act, Article 226(1). The limit is 60 years.

³²⁵ Labour Code, Article 328(10).

³²⁶ Labour Code, Article 328(10)(b).

³²⁷ Labour Code, Article 328(10)(a) and (c).

Additionally, professors, assistant professors and doctors of science (holders of PhDs) are subject to dismissal, at the employer's discretion, when they reach 65 years.³²⁸ They still nominally retain employment rights, but they effectively have no protection against dismissal on age grounds. In the CJEU *Georgiev* case (C-250/09), the Bulgarian Government submitted that this national legislation pursued a social policy aim linked to the training and employment of teaching staff and to the application of a specific labour market policy which takes account of the specific situation of the staff in the discipline concerned, the needs of the university establishment under consideration and the professional abilities of the person covered. The CJEU considered that this statement did not amount to clearly specifying the aim, but concluded that the stated aim may be consonant with the intention of allocating professorial posts in the best possible way between the generations, in particular by appointing young professors. In this sense, the CJEU reasoned, encouragement of recruitment in higher education by means of the offer of posts as professors to younger people may constitute a legitimate aim.

Professors, assistant professors and doctors of science (holders of PhDs) would be exempted (protected) from such an age-based dismissal if the respective academic council has decided to extend their labour contracts for a further year (but no more than three consecutive years for professors and no more than two consecutive years for assistant professors).³²⁹

Similarly, civil servants are subject to dismissal on grounds of having become entitled to a pension.

Furthermore, the special laws governing the police and armed forces provide for mandatory retirement of officers at specified ages. In those cases, retirees are free to engage in other employment while collecting their pensions.

In all the cases outlined above, following a dismissal on grounds of pension entitlement, an individual may take up other employment. In practice, many pensioners are employed. They do bear the insecurity implied since it is possible for their (new) employer to dismiss them at their discretion because they are pensioners.

In 2019, the courts continued to rule that this does not amount to age discrimination.³³⁰

f) Compliance of national law with CJEU case law

In Bulgaria, national legislation is, arguably, in line with CJEU case law on age regarding mandatory retirement, in the light of the broad discretion enjoyed by Member States in their choice not only to pursue a particular aim in the field of social and employment policy, but also in the definition of measures capable of achieving it. As stated above, in all cases, the people concerned can seek alternative employment.

The compatibility with the directive of domestic legislation allowing dismissal on grounds of age/retirement entitlement was scrutinised in joined Cases C-250/09 and C-268/09, *Vasil Ivanov Georgiev v. Tehnicheski universitet*. The Court reiterated that a legislation's (underlying) aim of intergenerational balance might be legitimate. Domestic judicial interpretation would be required to establish whether this is, in fact, the aim pursued by this legislation.

In *Georgiev*, the Court stressed the relevance of the fact that the legislation is not based solely on a specific age, but takes account of the fact that the individuals concerned are

³²⁸ Labour Code, Article 328(10).

³²⁹ Labour Code, Article 328(10).

³³⁰ For instance, SAC, Decision No. 2711 of 25 February 2019 in Case No. 5704/2017; Decision No. 3922 of 18 March 2019 in Case No. 6516/2017; SCC, Ruling No. 497 of 19 June 2019 in Case No. 881/2019.

entitled to financial compensation by way of a retirement pension. The Court concluded that the setting of an age limit for the termination of a contract of employment did not exceed what is necessary to achieve employment policy aims, such as intergenerational balance, provided that that national legislation reflects those aims in a consistent and systematic manner (see also *Petersen*).³³¹

While it is true that in *Georgiev*, the relevant age was five years higher than the then general retirement age, which the Court expressly noted, it is also noteworthy that in this case, compulsory retirement was at stake, whereas under the generally applicable legislation employers have discretion to retain pensioners or not – i.e. there is always a possibility for a pensioner to keep their (precarious) employment indefinitely. Moreover, in the meantime, the general retirement age for men has been raised, and as at 2020, it is 64 years and three months,³³² i.e. almost the same as in *Georgiev* (65 years).

As held by the Court in *Georgiev*, interpretation by the national court would be required to ascertain whether such a legislative age limit genuinely reflects a concern to achieve the aims pursued in a consistent and systematic manner, i.e. whether the legislation is rational and constant. As the generally applicable legislation covers everyone, it does not seem to entail (selective) arbitrariness.

In *Georgiev*, the Court held that the legislation was clearly different from that examined in *Mangold*³³³ and appeared to be capable of being justified as the age in question (as of 2019, the generally applicable age was circa 61 for women and circa 64 for men) was higher than that in *Mangold* (which was 52), and also because the legislation in *Mangold* took the age of the worker as the only criterion, whereas the Bulgarian legislation uses entitlement to retirement as its criterion.

To recapitulate, given the broad discretion that the Court recognises states have in choosing their social and employment policy aims and the means by which to pursue them, judicial interpretation might be required to establish whether this legislation is out of line with the directive.

4.6.5 Redundancy

a) Age and seniority taken into account for redundancy selection

In Bulgaria, national law does not permit age or seniority to be taken into account in selecting workers for redundancy. Under the Labour Code, the only criteria for selection for redundancy are lower qualifications and poorer work performance.³³⁴ However, this has limited significance as once an employee becomes entitled to an old age pension, this in itself is a legal basis for an employer to dismiss them, even if there is no redundancy.³³⁵ It is the same for people who opted to receive a reduced pension one year earlier than pensionable age upon reaching the requisite number of years of service.³³⁶ In the case of professors, associate professors and doctors of science (holders of PhDs), once they reach the age of 65, this in itself is a legal basis for an employer to dismiss them, even if there is no redundancy (with limited exceptions based on decisions by the respective academic councils).³³⁷

b) Age taken into account for redundancy compensation

³³¹ Judgment of 12 January 2010, *Petersen v. Berufungsausschuss für Zahnärzte für Den Bezirk Westfalen-Lippe*, C-341/08.

³³² National Social Security Institute: <https://www.noi.bg/pensions/grantpensions/1854-posv13>.

³³³ Judgment of 22 November 2005, *Mangold v. Helm*, C-144/04.

³³⁴ Labour Code, Article 329(1).

³³⁵ Labour Code, Article 328(10).

³³⁶ Labour Code, Article 328(10a).

³³⁷ Labour Code, Article 328(10).

In Bulgaria, national law provides for compensation for redundancy. Such compensation is affected by the age of the worker. Workers who are dismissed after having become entitled to retire, on any basis, implicitly including redundancy, are entitled to compensation equivalent to the amount of two monthly salaries.³³⁸ This is preferential treatment compared to workers who are made redundant prior to becoming entitled to a pension – they are entitled to no more than one salary in compensation.³³⁹ If workers dismissed after having become entitled to retire have worked with the employer for the last ten years, their compensation is equivalent to the amount of six monthly salaries.

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

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

4.8 Any other exceptions

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

- different treatment of persons on grounds of religion/faith in religious education or training, including training or education for the purposes of carrying out an occupation in a religious-ethos institution.³⁴⁰

³³⁸ Labour Code, Article 222(3).

³³⁹ Labour Code, Article 222(1).

³⁴⁰ PADA, Article 7(1.4).

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

a) Scope for positive action measures

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

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

- different treatment of people with disabilities in training or education aimed at equalising their opportunities;³⁴¹
- special measures for the benefit of disadvantaged people or groups aimed at equalising their opportunities, as far as and as long as such measures are necessary;³⁴²
- special protection measures provided for by law for the benefit of parentless children, minors, single parents and people with disabilities;³⁴³
- measures aimed at protecting the distinctive identity of people belonging to ethnic, religious and linguistic minorities and their rights, alone or with other members of their groups, to preserve and develop their culture, to profess and exercise their religion and to use their language;³⁴⁴
- measures in training or education aimed at guaranteeing the participation of people belonging to ethnic minorities, as far as and as long as such measures are necessary.³⁴⁵

The PADA places a general duty on all authorities to take measures to equalise opportunities for disadvantaged groups,³⁴⁶ as well as to guarantee participation by ethnic minorities in education, whenever necessary to accomplish the objectives of equality law.³⁴⁷ The PADA requires authorities to take such measures as a priority for the benefit of victims of multiple discrimination.³⁴⁸ However, no such measures are on record.

There are a number of positive policy measures in place for the benefit of ethnic groups, in particular, Roma. The case law has been ambivalent with respect to them. In 2018 (there were no cases in 2019), the SCAC repealed a decision by the PADC, which had upheld positive measures for Roma students.³⁴⁹ The PADC had found the Minister of Education not liable for ethnic discrimination on grounds of having provided for scholarships exclusively for Roma school students. The complainant association had alleged that non-Roma students were discriminated against as the impugned scholarships were only available to Roma students. The grants were provided under a targeted project aimed at preventing school dropout by Roma students.

The SCAC considered the measure to be directly discriminatory against non-Roma people. The SCAC compared the impugned scholarships to generally available scholarships for academic achievement and noted that the latter were only awarded to excellent or very good students, while Roma scholarships were not dependent on a high-achieving academic record, a minimum achievement being sufficient. In addition, for the purposes of general

³⁴¹ PADA, Article 7(1.10).

³⁴² PADA, Article 7(1.14).

³⁴³ PADA, Article 7(1.15).

³⁴⁴ PADA, Article 7(1.16).

³⁴⁵ PADA, Article 7(1.17). The law does not specify the measures allowed. Any measure falling into this category is accepted.

³⁴⁶ As of 2019, there are no examples where measures have been taken to equalise opportunities for LGBT individuals, among other vulnerable groups.

³⁴⁷ PADA, Article 11(1).

³⁴⁸ PADA, Article 11(2).

³⁴⁹ SCAC, Decision No. 7471 of 10 December 2018 in Case No. 9628/2018.

scholarships for high academic achievement, very good students were required to demonstrate socio-economic need in order to become recipients, whereas Roma scholarship recipients were not required to show economic hardship. Moreover, the amounts awarded with the general academic achievement scholarships, even for the best students, were several times lower than the levels of Roma scholarships awarded even to the poorest achievers. The court concluded that students should indeed be encouraged to continue their studies but not on the basis of ethnicity. Ethnic-based scholarships were not the only means to the legitimate aim pursued and they disproportionately disadvantaged non-Roma students. Lack of funds was not the only reason for Roma school dropout (there was also a lack of motivation) and there were also indigent non-Roma students; Roma students should be encouraged to make more of an academic effort before being awarded financial stimuli.

This judgment could not be considered to be in line with Directive 2000/43/EC, as it overlooks the fact of disproportionate Roma exclusion and marginalisation in schooling, among other relevant facts, such as overwhelming Roma poverty and social disadvantage, not comparable to the economic and educational opportunities generally enjoyed by majority families and children. In particular, the SCAC's decision does not take into consideration Article 5 of Directive 2000/43/EC, which clarifies that the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin. In contravention of Article 5 of the Directive, the SCAC used the principle of equal treatment as a reason to invalidate positive action. The SCAC did not, in its reasoning, refer to the limitations to positive action drawn up by the CJEU in its judgment in case C-193/17 of 22 January 2019 (the *Cresco* judgment).

The SCAC's decision was appealed against by the Centre for Educational Integration of Ethnic Minority Children and Students and by the Protection Against Discrimination Commission (PADC). The case is now pending before the SAC (case No. 5375/2019).³⁵⁰

This is, as yet, an isolated case, no similar legal attacks on positive action being on record.

In 2018, the SAC, in the case of the dismissal of a civil servant along the lines of *Petya Milkova* (case C-406/2015), interpreted the Labour Code system of advance protection against dismissal of employees with disabilities (prior authorisation by the Labour Inspectorate in cases of recognised illnesses included in a list provided for under secondary legislation) as a positive measure to compensate for inequality, which should benefit the entire vulnerable category of people with disabilities.³⁵¹ The SAC held that the complainant in the case should benefit from such advance protection, regardless of the Civil Servant Act, which provides for no such entitlement for civil servants. The SAC held that the complainant, who had not benefitted from such protection, was therefore unlawfully dismissed.

b) Quotas in employment for people with disabilities

In Bulgaria, national law provides for quotas for the employment of people with disabilities. According to the Labour Code, employers with more than 50 employees are under a duty to annually set aside 4-10 % of their jobs as suitable to accommodate people with disabilities, *inter alia*.³⁵² 'Accommodating' here means assigning current employees or new recruits with disabilities to jobs that are suitable for their altered or reduced working capacity. 'Accommodating' is based on official indications by the relevant medical-administrative bodies that certify/assess people with disabilities. Being 'accommodated' as per such an official indication is not equivalent to having one's disability/reduced working

³⁵⁰ The SAC decided the case on 13 January 2020 (after the cut-off date for this report), confirming the lower court's decision and reasons: SAC, Decision No. 458 of 13 January 2020 in Case No. 5375/2019.

³⁵¹ SAC, Decision No. 4151 of 30 March 2018 in Case No. 494/2015.

³⁵² Labour Code, Article 315(1).

capacity assessed/certified. Setting aside jobs as suitable for accommodating people with disabilities is not equivalent to actually hiring as many such people as there are such jobs. Jobs suitable for accommodating employees who have a disability may be taken by people without disabilities – while there are not enough people with disabilities to take them all. In such cases, as soon as there is a new recruit with a disability and with an ‘accommodating’ indication, a person without a disability who has a job suitable for ‘accommodating’ will lose their job, and it will be taken by the new recruit. In that sense, jobs set aside for accommodating are placed at the disposal of people with disabilities with an official accommodating indication. The employer has no duty to actually find people with disabilities to be the job holders.

Under the Labour Code, there is no explicit provision to the effect that these jobs may be taken by people outside the employer’s organisation, including people who were not previously employed. However, the situation is such in practice. Where a job applicant with a disability is qualified to take an adapted job, they will be hired if there is such a position. The Labour Code stipulates that an employer who fails to discharge a duty under the Code is liable to a fine of between EUR 750 and EUR 7 500 (BGN 1 500 and BGN 15 000) (Article 414(1)). This is a general provision on sanctions and is not specific to non-implementation of quotas. In the case of quotas not being implemented, a fine would be imposed on the employer for the overall situation, not per unfilled quota place. If, upon a subsequent inspection, the employer is found still not to have complied, a fine for a repeat violation would be imposed on them – a higher amount (between BGN 20 000 and BGN 30 000 (EUR 10 000-15 000)) (Article 414 (2) Labour Code).

In addition, labour inspectorates are competent to order employers to eliminate breaches of the Labour Code (Article 404). Not obeying such an order leads to a fine (Article 415). According to statistics from the Agency for People with Disabilities, in 2016 (no data are available for 2017-2019), 32 859 positions were set aside; 18 756 of them for people with permanent disabilities; 11 083 posts were actually occupied by people with disabilities and 11 829 by people with permanent disabilities; 5 381 positions set aside were advertised as vacant.³⁵³ These data are incomplete and unreliable because, as the Agency explicitly recognises in its 2016 report, 65 out of 98 regional labour bureaux supplied data; possibly not all employers informed their bureau (2 346 did); there are no data on the number of employers who were subject to this duty; and the numbers stated for occupied and vacant posts don’t seem to match up with the overall number of accommodated positions. ‘Accommodated’ here means made suitable for persons with reduced or altered working capacity.

Disability quotas are also provided for under the Civil Servant Act.³⁵⁴ Authorities with more than 50 staff are bound to designate at least 2 % of all positions for people with long-term disabilities.³⁵⁵ Authorities with between 26 and 50 staff must designate at least one position.³⁵⁶ Candidates for these positions compete only with other people with disabilities.³⁵⁷ In 2015, an amendment entered into force requiring 1 % to be set aside among civil servants in the Ministry of the Interior who are not police ‘organs’, among civil servants in the ‘National Security’ State Agency who are not directly involved in its specific activities and among civil servants in the ‘Technical Operations’ State Agency (secret surveillance) who have employment contracts with the agency.³⁵⁸

The People with Disabilities Act (PDA) introduced additional employment quotas for people with long-term disabilities. Employers with 50 to 99 employees must hire at least one person with a long-term disability, while employers with 100 or more employees must hire

³⁵³ Available at: <http://ahu.mlsp.government.bg/portal/document/51085> (in BG).

³⁵⁴ Civil Servant Act, entered into force 28 August 1999, Article 9a.

³⁵⁵ Civil Servant Act, Article 9a(1.1).

³⁵⁶ Civil Servant Act, Article 9a(1.2).

³⁵⁷ Civil Servant Act, Article 9a(1.2).

³⁵⁸ Civil Servant Act, Article 9a(1.3).

at least two people with long-term disabilities per 100 members of staff (Article 38(1)). Accommodated posts set aside under the Labour Code (existing quota duties) are not taken into consideration for purposes of compliance with the new PDA duties (Article 38(2) PDA). Accommodated posts will be reserved for existing employees (who might become disabled). The PDA quota requires new employees to be hired. In case of non-compliance, employers are subject to fines (the maximum amount is BGN 5 000 (EUR 2 500), doubled in cases of repeat violations). Alternatively, a non-complying employer would pay monthly compensation for every unfilled quota place (payments would contribute to the state budget). A monthly payment would be equivalent to 30 % of the minimum wage (in 2019, BGN 168 (EUR 84)). This means that an employer may avoid (the risk of) being fined by opting to pay monthly compensation.

The new PDA duty does not concern public authorities employing civil servants, only private employers. Therefore, it does not affect existing quota duties under the Civil Servants Act.

6 REMEDIES AND ENFORCEMENT

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

a) Available procedures for enforcing the principle of equal treatment

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

- Judicial proceedings before the general (civil) courts.³⁵⁹
- Judicial proceedings before the administrative courts for public sector respondents (under case law).³⁶⁰
- Specialised quasi-judicial proceedings before the PADC, the independent equality body, with judicial review by two instances of administrative courts.³⁶¹ This is complemented by a follow-up procedure for damages before the courts (administrative courts for public-law respondents and civil courts for others).³⁶²

A victim can choose between the judicial and PADC remedies. The courts can make a declaration of discrimination and award compensation for damages, as well as order the respondent to take remedial action or to abstain from or to terminate particular action or inaction found to be in breach of the law. The equality body can make a finding of discrimination, order preventive or remedial action and impose financial sanctions.³⁶³ It cannot award compensation.

Under the PADA, the provisions on the judicial remedy before the general courts expressly indicate as competent the civil courts, whoever the respondent, public or private. However, where the respondent is a public authority, the case law has moved towards recognising as competent not the civil courts, but the administrative ones. The PADC remedy is universally applicable, regardless of the respondent. Both remedies are binding.

While under the Labour Code, the Chief Labour Inspectorate (CLI) is competent to exercise overall oversight of compliance with the Labour Code and to impose sanctions, this procedure is not relevant for purposes of discrimination protection. The CLI has no (known) practice of enforcing the Labour Code's prohibition of discrimination.

Under the Criminal Code, similarly, provisions on discriminatory criminal acts, such as incitement to discrimination, hate-based violence or vandalism, mobbing or interference in religious practice, lack enforcement due to unwillingness by the Prosecutor's Office to protect minorities attacked by individuals belonging to the majority.

b) Barriers and other deterrents faced by litigants seeking redress

According to the PADA, both the judicial and the PADC procedures are exempt from costs, both state fees and expenses.³⁶⁴ However, for a number of years, the case law has failed to respect this and parties have been ordered to pay each other's costs on losing, as well as court fees. On top of that, the PADC has been successfully seeking costs when

³⁵⁹ PADA, Article 71.

³⁶⁰ For instance, SAC, Ruling No. 10400 of 3 August 2018 in Case No. 12325/2017.

³⁶¹ PADA, Articles 47, 50, and 68(1).

³⁶² PADA, Article 74.

³⁶³ The maximum sanction which may be imposed on an individual for an act of discrimination is the equivalent of EUR 1 000. For legal persons this is EUR 1 250. For a repeated offence, the sanction is automatically double. For a failure to abide by a decision of the equality body, the maximum sanction is EUR 5 000. Where such a failure continues for more than three months after the decision imposing this sanction entered into force, the next sanction is up to EUR 10 000.

³⁶⁴ PADA, Article 53 and Article 75(2).

complainants appeal against its decisions before the administrative court.³⁶⁵ Where complainants are unsuccessful, the court has been ordering them to pay the PADC staff attorneys' fees. The reason that the courts have ignored the PADA's exemption of litigants from costs is that, under this legislative rule, costs should be recuperated from courts' budgets.

However, in 2019, at long last, the SAC explicitly recognised that the PADA, as *lex specialis*, provides for a special rule on fees and costs, and parties are therefore exempt from both.³⁶⁶ Nevertheless, this ruling has not settled the issue, as in other cases the SAC has continued to award costs and demand court fees at the expense of the parties.³⁶⁷

Litigants are free to represent themselves in both judicial and PADC procedures.³⁶⁸ Before the Supreme Court of Cassation a complaint only needs to be signed by a lawyer³⁶⁹ and complainants can appear unrepresented at hearings. In practice, litigants without a lawyer would be at a disadvantage in court where proceedings are complicated and formal. Before the equality body, which has quasi-investigative powers and whose proceedings are informal and accessible, complainants are not as dependent on a lawyer. On the other hand, the PADC is located in the capital city, which poses a geographical barrier.

Because of case law contradictions in respect of the competent courts in discrimination cases against public authorities, cases which were heard by a civil court have on appeal been remanded to an administrative court, and vice versa, to start all over again, for no reason other than the courts' contradictory construction of competence rules in such cases.³⁷⁰ This breaches litigants' rights to proceedings of a reasonable length.

While the PADA seems clear enough that the civil courts are competent to hear all discrimination claims and the administrative courts are only competent in damages cases where the PADC has already found discrimination, the case law has been inconsistent as regards the competence of the administrative courts as opposed to the civil courts in terms of claims against public bodies. After years of judicial competence disputes between the civil and administrative courts, in 2015, the SCC and the SAC jointly ruled that in all cases of alleged discrimination against public bodies, the administrative courts were competent, including where no PADC proceedings had taken place prior to the filing of a claim with the court.³⁷¹

However, in 2017-2018, the contradictions persisted. In 2017, in at least three cases, the SAC ruled that, on the contrary, the administrative courts were only competent to hear a damages claim against a public body where the claimant first brought proceedings before the PADC and secured a discrimination finding by it, whereas the civil courts were competent in all other cases.³⁷² In those three cases, the SAC declared lower court decisions inadmissible and years of litigation were wasted for the claimants. In 2018, the SAC went back to ruling that administrative courts were competent in all cases against public bodies, including where there had been no PADC proceedings preceding a claim.³⁷³

³⁶⁵ The PADC bases this practice on an interpretative ruling (*тълкувателно решение*) by the SAC – No. 3 of 13 May 2010, rendered in commercial case No. 5 of 2009 (see PADC letter No. 44-00-1609 of 20 April 2015). This ruling is of general application and not specific to cases under the PADA. Its application to PADA cases contradicts the PADA, Article 75(2).

³⁶⁶ SAC, Ruling of 4 July 2019 in Case No. 6182/2019.

³⁶⁷ SAC, Ruling No. 7627 of 21 May 2019 in Case No. 7982/2017, Ruling of 18 July 2019 in Case No. 5927/2019.

³⁶⁸ For Supreme Court proceedings, both administrative (or judicial review) and civil, appellants only need to have a lawyer or *juris consult* to countersign their cassation appeal (Article 284(2) of the Civil Procedure Code and Article 18(1) of the Administrative Procedure Code) and the law does not require them to be represented at hearings.

³⁶⁹ Civil Procedure Code (*Граждански процесуален кодекс*), Article 284(2).

³⁷⁰ For instance, SAC, Ruling No. 10400 of 3 August 2018 in Case No. 12325/2017.

³⁷¹ Interpretative Decree 2/2014 of 19 May 2015.

³⁷² SAC, Decision No. 8753 of 5 July 2017 in Case No. 8115/2016; Decision No. 8583 of 4 July 2017 in Case No. 7679/2015; Ruling (*Определение*) No. 9034 of 11 July 2017 in Case No. 6859/2017.

³⁷³ For instance, SAC, Ruling No. 10400 of 3 August 2018 in Case No. 12325/2017.

The case law remains unclear and unpredictable. The reasons for its shifting contradictions are unknown to the author of this report. A possible hypothesis is that each category of courts – administrative and civil – uses perceived ambiguities in the applicable legal provisions to avoid part of the caseload associated with litigation under the PADA.

In 2019, the SCC and the SAC again jointly issued an interpretative ruling, reversing the ruling from 2015. Under the 2019 ruling, in all cases of alleged discrimination in which no PADC proceedings had taken place prior to the filing of a claim with the court, whether against private or public bodies, the civil courts were competent, whereas the administrative courts were competent only to hear claims for compensation following a PADC ruling establishing discrimination on the part of a public body.³⁷⁴

The time limit for the civil court remedy is the general limit for civil cases – five years. For the PADC remedy, it is three years. In 2019, in a case in which a complainant had first brought proceedings before the PADC and then, after obtaining a finding of discrimination, had filed a court claim for compensation based on that finding, the SCC problematically held that the period of five years to file a court claim ran from the breach, and the bringing of PADC proceedings had not stopped it, wherefore it had long elapsed and the claim was inadmissible.³⁷⁵ Effectively, this means that, contrary to the PADA, complainants are barred in practice from claiming compensation in cases in which they go to the PADC first, as the period of five years will likely always have elapsed by the time a PADC decision becomes final (there being two instances of judicial review of PADC decisions).

There is no limit on the amounts of compensation the courts can award. The maximum amounts of sanctions imposable by the PADC are provided for under the PADA and appear reasonable, even if their effectiveness as a deterrent in practice is unknown. Also unknown is the rate of implementation of PADC decisions imposing fines.

While minority groups, most notably the Roma, but also LGBT people and others, often face a hostile public environment in terms of hate speech and general prejudice, litigation taken by Roma, LGBT people and other minority individuals and groups is not rare. On the contrary, minorities do actively use the PADA as a tool against hate speech, in particular; Roma and LGBT activists are among the most dynamic in this respect. On the other hand, there are no studies to show how much *more* actively minorities would use the PADA were it not for hate speech, or whether, in a more tolerant environment, their litigation focus would shift to other discrimination claims, such as employment disadvantage, school segregation, arbitrary housing decisions and a plethora of other pressing issues.

c) Number of discrimination cases brought to justice

In Bulgaria, statistics on the number of cases related to discrimination brought to justice are available. However, these statistics are not comprehensive, adequately disaggregated, harmonised or updated and may feature unclear overlaps, as well as gaps. Statistics are available for the SCAC, hearing PADC-decided cases on appeal as a first instance, as well as discrimination claims against public bodies. In 2019, 131 such cases were filed with the SCAC (out of 4 517 cases in total filed with the relevant chamber of the court, the one dealing *inter alia* with PADA cases).³⁷⁶ No statistics are available for the number of PADA cases decided.

³⁷⁴ Interpretative Decree No. 1 of 16 January 2019.

³⁷⁵ SCC, Ruling No. 219 of 14 March 2019.

³⁷⁶ See report (in BG) on the activities of Sofia City Administrative Court in 2019 (*Доклад за дейността на Административен съд София-град през 2019 г.*), available at: <http://www.admincourts Sofia.bg/LinkClick.aspx?fileticket= IAX-vjdBkw%3d&tabid=252>.

There are no statistics for the Supreme Administrative Court hearing PADA cases on judicial review as a final instance.³⁷⁷ There are no statistics for the administrative courts hearing discrimination cases as a first instance (damage claims against public bodies).

According to Supreme Judicial Council statistics for the district (first instance) civil courts, in the first half of 2019, 133 cases were initiated under the PADA.³⁷⁸ In addition, at the beginning of 2019, there were 248 PADA cases pending from the previous period. Altogether, 381 new and previously filed PADA cases were pending in the first half of 2019. In that period, 65 PADA cases were resolved. In four of these, the claim was fully upheld; in six cases, the claim was partially upheld; and in 11 cases, the claim was dismissed. Forty-three cases were terminated (on admissibility grounds); one was settled; and 35 decisions were appealed.

According to Supreme Court of Cassation statistics, in 2018, eight PADA cases were brought with that court – six claims for a declaration of discrimination and two claims for compensation.³⁷⁹ There are no data for 2019 yet.

The PADC produces statistics concerning its own caseload, as part of its annual report addressed to Parliament, but these reports are only available later in the year. Although there is no such requirement under the law, the PADC only publishes its annual reports on its website after Parliament approves them. Parliament can, in practice, delay this indefinitely. Considerable delays occurred in 2012-2014. The PADC statistics are only partially, and not exhaustively, ground-, and field-disaggregated. Disaggregation is carried out by the PADC panel dealing with a set of protected grounds (not one protected ground). The PADC panel's report on their docket not following a standardised, exhaustive template. In some instances, case numbers pertaining to individual grounds are reported, in others this is not the case. For the purposes of its records, the PADC treats 'exercise of labour rights' not as a field, but as a protected ground, thwarting adequate field disaggregation. In 2018, the PADC received 600 complaints and *actio popularis* motions, and instituted 721 proceedings.³⁸⁰ The PADC initiated *ex officio* proceedings on 386 occasions (mostly to do with architectural inaccessibility), and rendered 511 decisions altogether.³⁸¹ There are no data yet for 2019.

d) Registration of discrimination cases by national courts

In Bulgaria, discrimination cases are registered as such by (certain) national courts. However, the statistics are not ground-, or field-disaggregated. They are publicly available.

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

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

In Bulgaria, associations, organisations and trade unions are entitled to act on behalf of victims of discrimination. Before the equality body, any entity may represent an individual

³⁷⁷ Telephone interview with the Court's Head Statistician, 23 April 2015; Supreme Administrative Court, Activity Report for 2017, available (in BG) at: http://www.vss.justice.bg/root/f/upload/24/2019-09-24_SK-VSS-t38.pdf; see also [www.sac.government.bg/home.nsf/0/3405C044C0A4A032C2257BEA003351D0/\\$FILE/%D0%94%D0%9E%D0%9A%D0%9B%D0%90%D0%94%202017.pdf](http://www.sac.government.bg/home.nsf/0/3405C044C0A4A032C2257BEA003351D0/$FILE/%D0%94%D0%9E%D0%9A%D0%9B%D0%90%D0%94%202017.pdf) (Annex No. 111).

³⁷⁸ Supreme Judicial Council Aggregated Statistical Tables on the Courts' Activities for 2019.

³⁷⁹ Supreme Court of Cassation (2018), 'Statistical Data for 2017', p. 25, available at: <http://www.vks.bg/analizi-i-dokladi/vks-doklad-prilagane-zds-2018-prilozhenie2.pdf>.

³⁸⁰ PADC (2018) *Годишен отчет за 2018 г. (Annual Report 2018)*, p. 7, available at (in BG): <http://kzd-nondiscrimination.com/layout/images/stories/2015/otchet/KZD-ot4et-2018-bg.pdf>.

³⁸¹ PADC (2018) *Годишен отчет за 2018 г. (Annual Report 2018)*, p. 7, available at (in BG): <http://kzd-nondiscrimination.com/layout/images/stories/2015/otchet/KZD-ot4et-2018-bg.pdf>.

or another entity.³⁸² Before the civil courts, trade unions and legal persons operating for non-profit purposes registered in the public interest may represent victims.³⁸³ Legal persons operating for non-profit purposes are foundations or associations.³⁸⁴ Those which self-identify as acting in the public interest register with the Ministry of Justice.³⁸⁵ They are subject to stricter requirements.³⁸⁶ Arguably, a non-profit organisation which is not registered under national legislation as being 'in the public interest' can still claim standing before the courts, by substantiating that, in fact, its activities are in the public interest.³⁸⁷

There is no legal duty for NGOs or trade unions to act. It is, however, a common practice for NGOs (not for trade unions) to represent victims of discrimination (although not directly). Usually, NGOs provide lawyers to represent claimants or take court action on their own (the NGO's) behalf (*actio popularis*). Rarely, they also put forward the NGO itself (as opposed to an individual lawyer) as a representative for a claimant. In such cases, a lawyer would represent the NGO which represents a victim.

b) Engaging in proceedings in support of victims of discrimination (joining existing proceedings)

In Bulgaria, associations, foundations and trade unions are entitled to act in support of victims of discrimination. Before the civil courts, trade unions and legal persons operating for non-profit purposes in the public interest may enter cases brought by victims in an 'interested party' capacity.³⁸⁸ There is no legal duty for NGOs or trade unions to do this. There is no formal possibility under the law for NGOs or trade unions to join cases before the PADC.

Generally, NGOs do not use their 'interested party' standing to support claimants before the courts.

c) *Actio popularis*

In Bulgaria, national law allows associations, foundations and trade unions to act in the public interest on their own behalf, without a specific victim to support or represent (*actio popularis*). According to the PADA, any entity can bring proceedings before the PADC without identifying a specific victim.³⁸⁹ No special requirements apply; incorporation is enough. However, under settled Supreme Administrative Court case law, including in 2018, public interest law litigants expressly have no standing to appeal against PADC decisions, as such litigants are said to lack 'a legal interest', not being personally affected by a PADC decision.³⁹⁰ This means that public interest NGOs and minority activists bringing PADC proceedings in cases where the rights of many unspecified victims were infringed are excluded from access to judicial review of unfavourable PADC decisions. This is a serious hindrance for public interest litigation. Before the PADC, *actio popularis* litigants may seek the same remedies as victims.

Before the civil courts, trade unions and public interest non-profit organisations can take *actio popularis* action, 'where the rights of many parties are infringed' (Article 71(3), PADA). Entity incorporation is required. Non-profit organisations not formally registered as

³⁸² Administrative Procedure Code (Административнопроцесуален кодекс), last amended 18 November 2018, Article 18(2).

³⁸³ PADA, Article 71(2).

³⁸⁴ Legal Persons for Non-profit Purposes Act (Закон за юридическите лица с нестопанска цел), last amended 27 November 2018, Article 1(2).

³⁸⁵ Legal Persons for Non-profit Purposes Act, Article 2(1 and 3).

³⁸⁶ Legal Persons for Non-profit Purposes Act, Chapter 3.

³⁸⁷ Legal Persons for Non-profit Purposes Act, Article 38(1) – specifies which activities qualify as public interest ones.

³⁸⁸ PADA, Article 71(2).

³⁸⁹ PADA, Article 50(3).

³⁹⁰ For instance, SAC, Decision No. 7863 of 12 June 2018 in Case No. 697/2017; Ruling No. 6491 of 17 May 2018 in Case No. 5486/2018.

being in the public interest need to substantiate how their activities are publicly useful in fact. Both trade unions and non-profits need to substantiate how the alleged discrimination affected many people. There is no legal definition of 'many'. In the past, in one case, judges accepted as few as 10 as enough. In another case, they frustrated implementation of the legal provision, requiring that victims be enumerated, and each individual listed by name. Trade unions and non-profit organisations can explicitly (only) seek a declaration of discrimination and a court order for the respondent to stop and abstain from the impugned conduct. The listing is exhaustive. A claim for damages is clearly, if implicitly, excluded. No special rules apply concerning the shifting of the burden of proof.

In 2018-2019, the courts and the PADC decided a number of public interest cases brought by activists and NGOs, some of whom belonged to the relevant victim category (sharing its legal interest) (Roma, people with certain illnesses, minority believers)³⁹¹ and some of whom did not.³⁹² In a PADC case brought by the Jehovah's Witnesses minority denomination on behalf of all of its members and followers against hate speech broadcasts targeting them, the SAC expressly held that the claimant entity had standing to seek such protection.³⁹³ In this case, the PADC and the courts of two instances exercising judicial review over its decisions legally qualified the impugned verbal conduct as harassment within the meaning of the PADA, i.e. of the directive. In 2019, not under PADA but under general tort law, the SCC ruled twice in favour of a minority religious organisation seeking protection on its own behalf against hate speech targeting all believers belonging to its denomination.³⁹⁴ This SCC case is relevant to the implementation of the directive as the impugned conduct was, on the facts, very similar to the one legally qualified in 2018 by the SAC as harassment within the meaning of the PADA, i.e. the directive.

d) Class action

In Bulgaria, national law allows associations, foundations and trade unions to act in the interest of more than one individual victim (class action) for claims arising from the same event. Under general civil procedure law, organisations which exist for the protection of a particular category of victims or for the protection of people from a particular type of violation have standing to bring 'collective claims' in court.³⁹⁵ Such claims can be brought on behalf of *all* victims of a single violation where their 'circle cannot be exactly defined but is definable'.³⁹⁶ Litigant entities would need to prove incorporation and the fact that they exist 'for the protection' of the relevant victim category. In addition, they are expressly required by law to prove their abilities to 'seriously and in good faith' defend the collective interest harmed, as well as to bear the burden of taking the case, including costs and expenses.³⁹⁷ Entities would need to clarify the circumstances defining the relevant 'circle of victims'. They can claim on behalf of *all* victims that a tortious action or inaction be declared unlawful, that the respondent be ordered to stop the violation and/or to correct its consequences for the collective interest, and to pay compensation.³⁹⁸

In terms of whether this remedy belongs to an opt-in or an opt-out model, it should be noted that, under the law, the relevant persons/entities have standing to bring action on behalf of all victims of the alleged violation, which would indicate an opt-out model. Indeed, under the law, victims may opt out within a certain time limit, which the court confirms

³⁹¹ For instance, Burgas Administrative Court, Decision No. 564 of 23 March 2018 in Case No. 1786/2017; PADC, Decision No. 450 of 20 November 2018 in Case No. 180/2017; SAC, Decision No. 2138 of 16 February 2018 in Case No. 13552/2016; PADC, Decision No. 183 of 3 May 2018 in Case No. 287/2016; SAC, Decision No. 7863 of 12 June 2018 in Case No. 697/2017; SAC, Decision No. 4238 of 2 April 2018 in Case No. 70/2017.

³⁹² For instance, SCAC, Decision No. 7471 of 10 December 2018 in Case No. 9628/2018.

³⁹³ SAC, Decision No. 4238 of 2 April 2018 in Case No. 70/2017.

³⁹⁴ SCC, Decision 74 of 18 March 2019 in Case No. 120/2017, Decision No. 206 of 26 March 2019 in Case No. 4762/2017.

³⁹⁵ Civil Procedure Code, Article 379.

³⁹⁶ Civil Procedure Code, Article 379(1).

³⁹⁷ Civil Procedure Code, Article 380(3).

³⁹⁸ Civil Procedure Code, Article 379(2-3).

(Article 383(1.2)). Those persons are then free to pursue their right in a separate trial. On the other hand, there is also a procedure for including additional victims or organisations, also by express ruling of the court; this amounts to an opt-in procedure (Article 383(1.1)). The decision in the case explicitly has effect vis-à-vis the persons who brought the claim, as well as those persons who claim to be victims and who did not opt out (Article 386(1)). Where the decision upholds the claim, persons who opted out can also avail themselves of that decision (Article 386(1)). The law does govern the relationship between the claimants and the victims in terms of payment of damages (Article 387).

No special rules on shifting the burden of proof apply to general collective claims. General provisions on collective claims implicitly apply to discrimination cases too. In such cases, the rule on shifting the burden of proof under the PADA should arguably apply. In practice, however, this has not been tested in the courts.

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

In Bulgaria, national law requires a shift of the burden of proof from the complainant to the respondent. The PADA requires this in all anti-discrimination proceedings, implicitly for any form of discrimination, where the claimant produces (presents) facts from which an *inference* that discrimination is present can be made.³⁹⁹

Implementation of the rule on shifting the burden of proof is rudimentary. While judges and the PADC now regularly invoke the shifting the burden of proof rule, this is usually more declaratory than practical, and they appear still to lack meaningful comprehension of the rule. There has been no training on it for judges. Only one case (sex discrimination) is on record where the ruling hinged on shifting the burden of proof. The SAC found that sex was the reason for the less favourable treatment on grounds that the respondent failed to establish a legitimate reason.⁴⁰⁰

In 2019, the SCC repeatedly ruled: 'Where discrimination is claimed, the primary burden of proof is on the claimant. They have to prove the facts based on which it is warranted to presume that they have been discriminated against. Only in such a case the law shifts the burden onto the respondent to prove the reverse [...] The case law is consistent that a claimant's failure to bear the onus of proof that the law assigns them is a sufficient reason to dismiss the claim.'⁴⁰¹

In 2019, the SAC ruled: '[The impugned treatment] is not linked to disability. Even if it is accepted that [the complainant] succeeded in creating a presumption of unequal treatment, this presumption within the meaning of Article 9 PADA has been categorically rebutted in the proceedings, as it has been established that the difference in treatment (non-appointment) in comparison with the similarly situated comparators is not due to the protected ground of disability but to an objective difference [...]'.⁴⁰² The Court made a similar analysis in at least one other case, using the phrase 'prima facie presumption'.⁴⁰³ In two other cases, it used an even more appropriate formulation: 'In PADC proceedings pursuant to the imperative rule of Article 9 PADA, the complainant is to provide proof that gives rise to a warranted presumption of possible discrimination against them based on the stated protected ground.'⁴⁰⁴

However, in another case, the SAC used different, problematic language: 'According to Article 9 of the PADA, the party claiming to be a victim of discrimination must prove facts

³⁹⁹ PADA, Article 9.

⁴⁰⁰ SAC, Decision No. 274 of 09 January 2012 in Case No. 1319/2011.

⁴⁰¹ For instance, SCC, Ruling No. 497 of 19 June 2019 in Case No. 881/2019; Ruling No. 595 of 22 July 2019 in Case No. 109/2019.

⁴⁰² SAC, Decision No. 4284 of 22 March 2019 in Case No. 10891/2017.

⁴⁰³ SAC, Decision No. 4659 of 28 March 2019 in Case No. 10268/2017.

⁴⁰⁴ SAC, Decision No. 11184 of 18 July 2019 in Case No. 79/2018, Decision No. 12865 of 1 October 2019 in Case No. 5114/2018.

that give rise to a conclusion that discrimination is at hand. And only once discrimination has been proven, the respondent party has to prove that the principle of equal treatment has not been breached.⁴⁰⁵

In 2018, the SAC invoked the rule on shifting the burden of proof to hold that the claimant, in an architectural inaccessibility case, did not have the burden of proving the non-pecuniary damages he incurred as a result of the established inaccessibility of the urban environment; those damages were presumed and the respondent bore the burden of refuting them.⁴⁰⁶ For the rule on shifting the burden of proof, the court relied on Article 14 of the ECHR (in abstract) rather than the directives. The SAC held in one more recent disability rights case that an act of discrimination by presumption resulted in non-pecuniary damages, relying on Article 14 of the ECHR and on the PADA.⁴⁰⁷

In another 2018 decision, the SAC held that, under the rule on shifting the burden of proof, a claimant needed to establish facts relative to all of the elements of (direct) discrimination, including the protected ground and the causal link between that ground and the impugned treatment.⁴⁰⁸ In yet another 2018 decision, in a Roma forced eviction case, the SAC held that shifting the burden of proof was not applicable even though discrimination was alleged, as the proceedings were based not on the PADA but on the Territory Planning Act (judicial review of administrative eviction orders).⁴⁰⁹

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

In Bulgaria, there are legal measures of protection against victimisation. The PADA expressly prohibits victimisation as a form of discrimination.⁴¹⁰ Victimisation is defined as: a) less favourable treatment of a person who has taken, is presumed to have taken or will presumably take any action for protection against discrimination; b) less favourable treatment of a person where a person associated with them has taken, is presumed to have taken, or will presumably take any action for protection against discrimination; c) less favourable treatment of a person who refused to discriminate.⁴¹¹ The term 'a person' has not been interpreted as excluding groups of persons from protection. Nominally, it could be interpreted in that way but that is not likely. Therefore, protection is accorded for victimisation by presumption and by association too. Action for protection against discrimination may include, but is not limited to, bringing proceedings before the equality body or the court, in either victim or third-party capacity, or testifying in proceedings.⁴¹² Therefore, any person who assists any action against discrimination in any way is entitled to protection from victimisation.

In 2018 (there being no 2019 cases on record), the Sofia City Court confirmed a decision by the Sofia District Court upholding a claim by an equal rights activist that a TV host had victimised him by using his show to disparage him, impairing his reputation, in response to PADC proceedings brought by the activist against the journalist for hate speech on the part of the latter.⁴¹³ The journalist was ordered to publish the decision in a daily newspaper chosen by the claimant and to abstain from further victimising him in any manner, as well as being ordered to pay him compensation for non-pecuniary damages to the amount of BGN 1 500 (EUR 750). In this case, the claimant was subjected to adverse treatment/adverse consequences as a reaction to his having brought a complaint before the PADC, thereby initiating PADC proceedings aimed at enforcing compliance with the right not to be discriminated against as provided by the directives. The adverse treatment

⁴⁰⁵ SAC, Decision No. 6577 of 7 May 2019 in Case No. 10380/2017.

⁴⁰⁶ SAC, Decision No. 356 of 10 January 2018 in Case No. 8993/2016.

⁴⁰⁷ SAC, Decision No. 363 of 10 January 2018 in Case No. 9234/2016.

⁴⁰⁸ SAC, Decision No. 4159 of 30 March 2018 in Case No. 4591/2016.

⁴⁰⁹ SAC, Decision No. 14889 of 4 December 2018 in Case No. 7354/2018.

⁴¹⁰ PADA, Article 5.

⁴¹¹ PADA, Additional Provision § 1(3).

⁴¹² PADA, Additional Provision § 1(3).

⁴¹³ Sofia City Court, Decision of 20 December 2018 in Case No. 1476/2018.

the claimant was subjected to consisted of his being publicly denigrated on television, including by being vilified as a 'snitch' for having filed a complaint against the journalist responsible for alleged discrimination.

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 PADC can impose financial sanctions of between BGN 250 (EUR 125) and BGN 2 000 (EUR 1 000) (for individuals) or BGN 2 500 (EUR 1 250) (for legal persons), amounts that would arguably be dissuasive to the majority of individuals and small enterprises.⁴¹⁴ While medium-sized and large businesses might not be deterred by these amounts, the bad publicity arguably motivates them to actively engage in proceedings and in settlements where complainants are open to the latter. PADC fines are not awarded to the victim as compensation but go to the PADC budget.⁴¹⁵ Where a breach is repeated, the sanction is doubled.⁴¹⁶ These sanctions are uniformly applicable to all sectors and fields, including the private and public sectors, as well as fields outside employment. The PADC can, furthermore, order particular remedial action by discriminators and suspend the execution of employers' decisions where those may result in discrimination.⁴¹⁷ The civil courts do not impose fines. They award compensation for damages (Article 71(1.3), PADA). They may also issue injunctions.

In 2018, the PADC, in a hate speech case brought against a media company and its executive officer, imposed the following sanctions, including structural remedies: a fine of the maximum amount for individuals (BGN 2 000 (EUR 1 000)), an injunction to abstain from publishing any articles similar to the impugned one and an injunction to introduce internal prevention mechanisms to filter discriminatory material.⁴¹⁸ In deciding on these sanctions, in particular the maximum fine, the PADC expressly took into account the fact that, in 2010, it had twice found the same company liable for similar violations.

b) Compensation – maximum and average amounts

There is no maximum amount of compensation.⁴¹⁹ The courts can award any amount they consider fair (non-pecuniary damages) or proven (pecuniary damages). There is no information available concerning the average amount of compensation awarded to successful discrimination victims. It appears clear that the awards are the highest in disability cases, especially architectural inaccessibility cases. In 2018, the Supreme Court of Cassation (SCC) expressly held that there was no restriction on the type of damages that a claimant in a discriminatory dismissal case could claim; all damages directly resulting from the impugned act were subject to compensation.⁴²⁰ In 2019, the SCC reversed previously settled case law that in no cases, including discrimination cases, can legal persons incur, or claim, non-pecuniary damages.

In 2019, the Varna Regional Court held that discrimination per se equated to damages incurred, without a claimant having to prove such damages.⁴²¹ The court awarded BGN 1 500 (EUR 750) to a blind person who had been denied access to a healthcare-

⁴¹⁴ PADA, Articles 78-80.

⁴¹⁵ PADA, Article 83.

⁴¹⁶ PADA, Article 81.

⁴¹⁷ PADA, Article 76.

⁴¹⁸ PADC, Decision No. 450 of 20 November 2018 in Case No. 180/2017.

⁴¹⁹ This concerns indemnification of a victim's pecuniary or non-pecuniary damages, whatever those might be in the particular case, and not financial punishment by the state by decision of the equality body.

⁴²⁰ SCC, Decision No. 144 of 8 June 2018 in Case No. 4603/2017. See also Ruling No. 266 of 23 March 2017 in Case No. 4603/2016.

⁴²¹ VRC, Decision No. 1486 of 11 December 2019 in Case No. 1872/2019.

related administrative service via an authorised representative (his son) – the competent public authority had required him to file the relevant application himself.

c) Assessment of the sanctions

It is not known whether sanctions are effective, proportionate and dissuasive in practice, even if one were to assume that decisions imposing PADC sanctions are fully implemented, and it is not known if this is so. The rate of implementation of PADC decisions imposing fines and structural redress is not known. Whether a specific fine is an effective deterrent would depend on the size of the organisation sanctioned and whether it is a business or a non-profit organisation. Similarly, the rate of implementation of court structural relief injunctions, such as accessibility orders, is not known.

In 2019, the SAC ruled that the PADC has no authority to issue injunctions to public bodies, only to private natural and legal persons.⁴²² Vis-à-vis public bodies that are found to have discriminated, the PADC has the authority only to make recommendations. See further detail in Section 3.1.3.b).

⁴²² SAC, Decision No. 15498 of 14 November 2019 in Case No. 3959/2018.

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

In Bulgaria, the Protection Against Discrimination Commission (PADC) has been designated as a specialised body within the meaning of Article 13 of the Racial Equality Directive. It has existed since 2004, with a mandate to enforce and promote equality on an open-ended list of grounds, including race/ethnicity.

- b) Political, economic and social context of the designated body

While politicians from xenophobic parties do regularly attack the PADC when its annual reports are discussed in Parliament, other parties, including the Turkish minority-backed Movement for Rights and Freedoms (MRF), the socialist party and the ruling GERB, have supported it.⁴²³ There is no evidence of direct political interference in the PADC's governance (if the fact is disregarded that by choosing PADC members, the President and Parliament influence the body's subsequent performance).

The PADC's budget has been increasing steadily. From BGN 2 248 000 (EUR 1 124 000) in 2016,⁴²⁴ it reached BGN 2 570 000 (EUR 1 285 000) in 2018.⁴²⁵ In 2019, it was BGN 2 784 000 (EUR 1 392 000).⁴²⁶ At the same time, the PADC has stated that three of its regional offices are no longer operational due to a lack of the funds needed to staff them.⁴²⁷ According to the PADC, the 21 operational PADC regional offices are each staffed by a single employee.⁴²⁸ In four of the country's 28 regions, the PADC has yet to establish a regional office, allegedly not having the means to secure local office space.⁴²⁹ Where PADC regional offices do exist, they are hosted in the respective regional governor's offices (rather than in facilities of the PADC's own).⁴³⁰

Generally, the PADC has become publicly accepted as a relevant, accessible institution and the public have been using the PADC in proceedings before it as a matter of course.

- c) Institutional architecture

In Bulgaria, the designated body does not form part of a larger body with multiple mandates. According to the PADC, the PADC is a stand-alone equality body.

Under the PDA, the PADC takes part in the newly established Monitoring Council under the law. The Monitoring Council ensures that Bulgaria implements the CRPD (PDA, Article 11). The PADC's chairperson appoints two of the Council's nine members (PDA, Article 12(1)). The PADC's and the Ombudsman's respective administrations alternate in servicing the Council's administration, each for terms of two years (PDA, Article 12(4)). The Council prepares: opinions and recommendations to public bodies to prevent and abort violations of the rights of people with disabilities; periodic reviews and assessments of national

⁴²³ See media reports at: www.dnes.bg/politika/2018/05/17/v-ns-ima-li-smisyl-ot-komisiyata-po-diskriminacia.376733.

⁴²⁴ State Budget Act 2016 (Закон за държавния бюджет за 2016 г.), Article 28.

⁴²⁵ State Budget Act 2018, Article 29.

⁴²⁶ State Budget Act 2019, Article 28.

⁴²⁷ Official PADC information officially provided to the author of this report on 16 February 2018 under access to public information legislation.

⁴²⁸ Official PADC information officially provided to the author of this report on 16 February 2018 under access to public information legislation.

⁴²⁹ Official PADC information officially provided to the author of this report on 16 February 2018 under access to public information legislation.

⁴³⁰ Official PADC information officially provided to the author of this report on 16 February 2018 under access to public information legislation.

legislation and bills, and practice in terms of compliance with the CRPD; and annual reports on the actions undertaken to implement the CRPD (PDA, Article 14).

Furthermore (on unknown legal (or policy) grounds, the PADC having no mandate under the law to deal with any criminal justice issues), the PADC serves as the OSCE National Contact Point for Hate Crime (NCPHC).⁴³¹ The PADC's activities as the NCPHC consist of coordinating the collection and analysis of hate crime data by the Supreme Judicial Council, the Supreme Court of Cassation, the Supreme Prosecutor's Office of Cassation and the Ministry of the Interior. The PADC then uses their data to fill in the relevant OSCE questionnaire annually.⁴³²

In addition, the PADC is a UN-accredited National Human Rights Institution (NHRI) within the meaning of the Paris Principles. The PADC's level of accreditation is 'B', i.e. it is an 'observer member' as opposed to a 'voting member'. An observer member does not fully comply with the Paris Principles or has not yet sufficiently substantiated that claim. The reasons given by the Sub-Committee on Accreditation (SCA), the deciding body, for accrediting PADC as a 'B' institution include the fact that the PADC does not have a mandate to protect and promote all human rights.⁴³³ Furthermore, the SCA has found that, 'the existing [domestic] legislation does not provide a clear, transparent and participatory selection process that promotes the independence of, and public confidence in, [the PADC]'.⁴³⁴ The SCA has encouraged the PADC to advocate for legislative amendments to: publicise PADC member vacancies; maximise the number of potential candidates from a wide range of societal groups; promote broad consultation and/or participation in the application, screening and selection process; and ensure pluralism in its composition.⁴³⁵

d) Status of the designated body/bodies – general independence

i) Status of the body

The PADC is a collegiate body consisting of nine members, including at least four lawyers.⁴³⁶ Under the law, it manages its own budget, part of the state budget.⁴³⁷ It is expressly defined as having its own legal personality.⁴³⁸ Parliament elects five of its members, including the chairperson and deputy chairperson, and the President appoints four. Under rules adopted by Parliament and the President in 2017 governing nominations and selection procedures for PADC members, the only substantive criterion is having 'knowledge and experience in human rights protection' pursuant to Article 42 (1.2) PADA. Under the President's rules, NGOs and individuals have standing to nominate candidates. However, the President's discretion in choosing among nominees remains legally

⁴³¹ See: <https://www.kzd-nondiscrimination.com/layout/index.php/component/content/article/2/1355-2019-02-19-15-14-36>.

⁴³² See, *inter alia*, PADC, *Annual Report 2016*, p. 158, available at: www.kzd-nondiscrimination.com/layout/images/stories/2015/otchet/%D0%9E%D1%82%D1%87%D0%B5%D1%82%202016.pdf.

⁴³³ International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, *Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA) Geneva, 25 – 28 October 2011*, pp. 9-10, available at: <https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA%20REPORT%20OCTOBER%202011%20-%20FINAL%20%28with%20annexes%29.pdf>.

⁴³⁴ International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, *Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA) Geneva, 25 – 28 October 2011*, pp. 9-10, available at: <https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA%20REPORT%20OCTOBER%202011%20-%20FINAL%20%28with%20annexes%29.pdf>.

⁴³⁵ International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, *Report and Recommendations of the Session of the Sub-Committee on Accreditation (SCA) Geneva, 25 – 28 October 2011*, pp. 9-10, available at: <https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA%20REPORT%20OCTOBER%202011%20-%20FINAL%20%28with%20annexes%29.pdf>.

⁴³⁶ PADA, Article 41(1).

⁴³⁷ PADA, Article 40(3).

⁴³⁸ PADA, Article 40(3).

unfettered and non-transparent. The newly adopted rules do not govern the making of the presidential choice, nor do they require reasons for it to be articulated; they exclusively govern nominations. Under Parliament's new procedure, only MPs and parliamentary groups have standing to propose candidates. PADC members have a five-year term of office.⁴³⁹ The PADC adopts its own regulations to govern its activities and structure, including its administration's competences and numbers.⁴⁴⁰ In accordance with its own regulations, the PADC chairperson establishes the structure of PADC's administration and the job descriptions of its employees.⁴⁴¹ S/he appoints, promotes and dismisses employees⁴⁴² and contracts external experts.⁴⁴³ The PADC is accountable to Parliament only. Under the law, it reports annually in writing to Parliament on its activities.⁴⁴⁴

The PADC establishes equality law violations; issues injunctions to prevent or terminate breaches and to restore the status quo ante; sanctions perpetrators; brings judicial review actions; files claims with the civil courts; joins court proceedings in an *amicus curiae* capacity; makes recommendations to public bodies; gives opinions on draft legislation; assists victims of discrimination in filing complaints; carries out independent research; and publishes independent reports.⁴⁴⁵ It informs the public about equality law provisions and carries out other activities as stipulated in its own regulations.⁴⁴⁶

ii) Independence of the body

The PADC is an independent body by law. In the PADA, it is expressly defined as an 'independent specialised state body'.⁴⁴⁷ In practice, however, the independence of the PADC has arguably been curbed by non-transparent election procedures for members, resulting in Parliament and the President choosing individuals who lack the personal qualities and professional qualifications to enable them to form opinions independently of any authority or of public opinion. While both Parliament and the President adopted rules on PADC member nominations in 2017, the President's decision-making process remains fully discretionary and non-transparent under these rules. The parliamentary procedure provides for transparency, although not necessarily for accountability, as the selection process remains political and its outcome is not necessarily merit based. PADC members have included Parliament-elected individuals belonging to extreme nationalist parties, such as Ataka. Their anti-minority stances have arguably affected PADC case law accordingly.

As discussed above in Section 7.c Institutional Architecture, the PADC is accredited as a 'B' rather than an 'A' National Human Rights Institution under the Paris Principles, as it does not fully conform to the Paris Principles regarding independence. The 2017-member nomination rules do not fully address these concerns.

The PADC has avoided a critical approach to public figures or practices on controversial matters and in some cases has protracted proceedings against politicians and officials.

Furthermore, the PADC regional representatives operate from offices provided for free by regional governors (part of the executive), located in regional government buildings.⁴⁴⁸ It is unclear at what level of independence a PADC regional representative would operate in practice, if they were dealing with a complaint against the regional government. The same

⁴³⁹ PADA, Article 41(2).

⁴⁴⁰ PADA, Article 46.

⁴⁴¹ Regulations on the Structure and Activities of the Protection Against Discrimination Commission (*Правилник за устройство и дейността на Комисията за защита от дискриминация*), Article 9(5).

⁴⁴² Regulations on the Structure and Activities of the Protection Against Discrimination Commission, Article 9(6).

⁴⁴³ Regulations on the Structure and Activities of the Protection Against Discrimination Commission, Article 9(7).

⁴⁴⁴ PADA, Article 40(5).

⁴⁴⁵ PADA, Article 47.

⁴⁴⁶ PADA, Article 47.

⁴⁴⁷ PADA, Article 40(1).

⁴⁴⁸ Information officially provided by the PADC to the author of this report on 16 February 2018.

is true of PADC regional representatives' relationships with municipal governments. PADC regional representatives rely on municipal mayors and employees in each municipality to organise on-site consultations for potential complainants.⁴⁴⁹ The relevant municipal employee is in charge of securing office space for PADC on-site consultations – most likely, in a local government facility, as well as local public visibility for the event.⁴⁵⁰ It is unclear at what level of practical independence a PADC regional representative would act, if a victim required her/his assistance to complain against the local government hosting the consultation.

e) Grounds covered by the designated body/bodies

Under the law, the PADC deals with an open-ended list of grounds: gender, race, national origin, ethnicity, human genome, nationality, origin, religion or faith, education, beliefs, political affiliation, personal or social status, disability, age, sexual orientation, family status, property status or any other ground provided for by law or by international treaty to which Bulgaria is a party.⁴⁵¹

The PADC has stated that the six EU-protected grounds receive 'adequate and proportionate expert attention' in PADC proceedings, not specifying what particular mechanism exists to ensure this.⁴⁵² In practice, the PADC acts on every admissible complaint or third party motion, instituting proceedings and rendering a decision (it deals with inadmissible and irregular complaints by giving guidance as to how the document may be corrected). Therefore, the number of PADC proceedings and decisions dealing with a particular ground reflects the number of complaints or third-party motions filed on that ground.

There is no indication that the PADC has been using its powers to initiate proceedings *ex officio* or to bring court proceedings in such a way so as to compensate for potential under-reporting of cases on a particular ground. In fact, the PADC has never initiated court proceedings on any ground. It has also arguably underused its mandate to initiate *ex officio* proceedings, doing so rarely and arguably not in the most important cases. The PADC has not initiated its own proceedings in controversial cases seriously affecting highly vulnerable people, such as collective arbitrary forced evictions of Roma families. There does not appear to be any internal institutional mechanism in place to ensure that the PADC prioritises under-reported grounds by using its powers to conduct surveys and assist victims. Its victim assistance activities seem to respond to demand by proactive potential complainants coming forward to ask for such assistance, with little, it seems, being done to compensate for a lack of activity in disenfranchised communities, such as segregated and destitute Roma settlements.

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

i) Independent assistance to victims

The PADC is competent under the law to provide independent assistance to victims in filing their complaints.⁴⁵³ The law does not specify the type of proceedings this provision refers to, i.e. whether PADC proceedings or court proceedings or both. However, the use of the word 'complaints' may be taken to suggest that the provision refers to PADC proceedings, as court proceedings would be initiated by a claim. The PADC does not specify what PADC assistance to victims shall entail. While the PADC has powers under the PADC to collect evidence *ex officio*, including in proceedings brought by complainants,⁴⁵⁴ the law does not

⁴⁴⁹ Information officially provided by the PADC to the author of this report on 16 February 2018.

⁴⁵⁰ Information officially provided by the PADC to the author of this report on 16 February 2018.

⁴⁵¹ PADC, Article 4(1).

⁴⁵² Information provided by the PADC to the author of this report on 16 February 2018.

⁴⁵³ PADC, Article 47(9).

⁴⁵⁴ PADC, Articles 55-57.

define those powers as assistance to victims. In addition, the PADA provision on victim assistance specifies that assistance relates to the filing of a complaint, arguably not extending beyond filing a complaint.

According to the PADC's own regulations, its Administrative and Legal Services Directorate shall provide independent legal aid to victims.⁴⁵⁵ The regulations do not specify what that assistance entails. Under these regulations, the PADC's 'regional representatives' provide 'methodical' help (probable intended meaning, 'methodological') and independent consultations to 'citizens and natural persons' regarding the PADA.⁴⁵⁶ The regulations do not specify what the help and consultations entail. The PADC has stated that it assists complainants by explaining what the PADC's powers are, how its proceedings are structured, what a complaint must look like in order to be admissible, how an irregular complaint should be amended, what proof must be provided, etc.⁴⁵⁷ Regional representatives help locally-based parties obtain copies of documents in their cases (heard by the PADC in the capital city), inspect collected evidence, enquire about the stage proceedings have reached.⁴⁵⁸ Victims are given an opportunity to inspect case files, including collected evidence, in the PADC regional offices, sparing them the cost of travelling to the PADC central office in Sofia where PADC proceedings take place.⁴⁵⁹

Regional representatives consult people at the PADC regional offices in regional capital cities, during on-site consultations in municipalities or in individual's homes by prior appointment (for people with disabilities).⁴⁶⁰ The PADC regional representatives are said to be available for the range of questions interested parties might have about using PADA remedies. Under the PADA, PADC proceedings are tax-free and the losing party bears no procedural expenses.⁴⁶¹ The PADC relies on this as an aspect of victim assistance. However, in court proceedings for judicial review of PADC decisions, the PADC as a matter of course claims, and is awarded, court expenses against the losing party, including complainants (victims).

For 2018, PADC reported having assisted 1 156 discrimination victims and having held 677 regional consultations for the public, with a total of 4 236 members of the public having visited its regional offices and consultations.⁴⁶² The data for 2019 are not yet available (the PADC's report not having been published).

In terms of practical independence, as mentioned, PADC victim assistance at the regional and municipal levels is questionable, as PADC regional representatives who provide that assistance are hosted free of charge by regional and local governments and receive pro bono logistical support from mayors' administrations.

In terms of effectiveness, there appears to be no mechanism in place to evaluate the quality of victim consultation and assistance provided by the PADC. The professional qualifications and experience of PADC staff providing victim assistance are unclear. The PADC provided no information on this when asked by the author of this report. It is also unclear how the numbers of PADC-reported victim consultations correlate to the demand for victim assistance. It is also unclear what is done to assist victims, other than people with disabilities, who are deterred from seeking assistance due to social isolation. PADC claims of outreach being done are not specific and no statistics are available.

⁴⁵⁵ Regulations on the Structure and Activities of the Protection Against Discrimination Commission, Article 20(1.1).

⁴⁵⁶ Regulations on the Structure and Activities of the Protection Against Discrimination Commission, Article 23(2.1).

⁴⁵⁷ Information provided by the PADC to the author of this report on 16 February 2018.

⁴⁵⁸ PADC replies to questions from the country expert for the purposes of this survey, 16 February 2018.

⁴⁵⁹ PADC replies to questions from the country expert for the purposes of this survey, 16 February 2018.

⁴⁶⁰ PADC replies to questions from the country expert for the purposes of this survey, 16 February 2018.

⁴⁶¹ PADA, Article 52.

⁴⁶² PADC (2018) *Годишен отчет за 2018 г. (Annual Report 2018)*, p. 7, available (in BG) at: <http://kzd-nondiscrimination.com/layout/images/stories/2015/otchet/KZD-ot4et-2018-bq.pdf>.

ii) Independent surveys and reports

The PADC does have the competence to conduct independent surveys and publish independent reports. The law expressly provides for this.⁴⁶³

In the PADC's practice, publishing reports has largely been taken to mean publishing the PADC's annual activity reports to Parliament. Those reports have not contained information resulting from any surveys of discrimination since 2009. Indeed, the PADC has carried out few surveys of discrimination and inequalities. It has reported only five studies over the course of its existence (under the law, as of 2004; in practice, as of 2005).⁴⁶⁴ Those studies mostly contain sociological data on prejudices against various vulnerable groups.⁴⁶⁵

As a whole, the PADC studies and their findings lack public visibility or influence. They are not an established, cited authority. They are not clearly visible on its website or easily findable elsewhere online. In the PADC annual reports to Parliament, the information given on its survey findings is not substantive or specific. As a whole, the PADC annual reports avoid any analysis of the current political, social, and legal situation in terms of discrimination and equality and instead focus on accentuating the PADC's activities.

The PADC demonstrated a distinct lack of independence with regard to a study it carried out in 2011 and publicly disowned after public and official backlash. The study, 'National independent [PADC] study on stereotypes and prejudices in school textbooks, teaching materials, curricula and pre-school and primary school plans', published on the PADC's website in 2012,⁴⁶⁶ was construed by the media as advocating for iconic Bulgarian writers' works to be removed from textbooks. In particular, a reference in the study to a poem by Hristo Botev, a symbolic national revolutionary poet, as an example of discriminatory portrayal of non-Bulgarians, was considered outrageous by many: '[...] But damn, mother, damn this Turkish black banishment that exiled us in your youth [...]' (*Но кълни, майко, проклинай таз турска черна прокуда, дето нас млади пропъди*). There was an outcry and the then minister of education held two press conferences to assure everyone that no iconic writers would be abolished from the curricula. At the second press conference, held at the behest of the then and now Prime Minister Boyko Borissov, the education minister declared on behalf of Borissov and the government that, 'Anyone who allows themselves to fake our historical past will be viewed as a person encroaching on Bulgaria's national security'.⁴⁶⁷

The PADC then proceeded to publicly state that it had no recollection or record of how the study was commissioned but that it was commissioned during the previous PADC members'

⁴⁶³ PADA, Article 47(10-11).

⁴⁶⁴ PADC information officially provided to the author of this report on 16 February 2018. The reports are: *Дискриминация и необективните нагласи въз основа на етническа принадлежност, пол, увреждане, сексуална ориентация, възраст и вявания* (Discrimination and partial attitudes based on ethnicity, gender, sexual orientation, disability, age and belief) (2007); *Предразсъдъци и дискриминация срещу имигрантите и бежанците* (Prejudices and discrimination against immigrants and refugees) (2009); *Предразсъдъци и дискриминация срещу малцинствени деца и деца с увреждания в образователната система* (Prejudices and discrimination against minority children and children with disabilities in the educational system) (2009); *Проучване и оценка на въздействието на икономическата криза и бюджетните съкращения върху уязвимите групи* (A survey and evaluation of the impact of the economic crisis and budget cuts on vulnerable groups) (2014); and *Национално представително социологическо изследване на териториален признак с цел идентифициране и изработване на профили на групите и общностите, най-силно засегнати от риск от дискриминация* (A nationally representative sociological study on a territorial basis aiming at identifying and developing profiles of the groups and communities most affected by a risk of discrimination) (2016/2017).

⁴⁶⁵ PADC information officially provided to the author of this report on 16 February 2018.

⁴⁶⁶ Available at: www.kzd-nondiscrimination.com/layout/images/stories/izsledwane_na_kzd/KZD-reshenie.doc.

⁴⁶⁷ See media reports, *inter alia*, at: www.dnevnik.bg/bulgaria/2012/08/14/1887858_sergeri_ignatov_botev_ostava_v_uchebnicite/; http://www.dnevnik.bg/bulgaria/2012/08/16/1889323_kabinetut_posegatelstvoto_vurhu_istoriata_e_zaplaaha/.

term of office. It then removed the study from its website.⁴⁶⁸ Later, on an unspecified date, the study was reinstated on the website. This incident is an indication that the PADC has not been independent in practice when carrying out its mandate to survey discrimination and publish its findings (and possibly its other mandates).

As mentioned above, PADC annual activity reports addressed to Parliament avoid any analysis of the current political, social and legal situation in terms of discrimination and equality. The reports focus instead on accentuating the PADC's activities. This approach on the part of PADC is arguably part of a policy of avoiding controversy in the parliamentary debates on the PADC reports. These parliamentary discussions and the ensuing parliamentary approval of the PADC's reports are tied to subsequent parliamentary approval of the PADC's annual budget for the following year. Avoiding controversy so as to minimise resistance to budgetary approval appears to be a marker of a lack of independence.

iii) Recommendations

The PADC does have the competence to make recommendations on discrimination issues. The law expressly provides for this.⁴⁶⁹ The PADC is also competent to issue injunctions, to public and private actors alike.⁴⁷⁰

In the PADC's practice, it primarily makes recommendations to public bodies (both central and local) within the framework of its proceedings, hearing cases of discrimination. Recommendations have included amending discriminatory (secondary) legislation and internal regulations or administrative practice, including architectural environments. Outside the context of its adjudicating role, the PADC provides opinions, possibly including recommendations, on draft legislation and policy within the framework of joint working groups with other public institutions.⁴⁷¹ The proceedings, the PADC role in them and the outcomes are not transparent.

While the PADC is relatively active in making recommendations, no data are available to reliably assess the effectiveness or scale of this activity, as substantive analysis is needed to establish the number of cases where a recommendation was warranted but was not made, in order then to compare this with the number of cases where a recommendation was actually made. Furthermore, given the PADC's power to impose injunctions, its choices to make a recommendation instead in a larger number of cases also require substantive analysis to determine their level of justifiability. There is also no data on the rate of implementation of PADC recommendations or on its policy and practice on securing implementation. It is unclear what the PADC does if bodies ignore its recommendations.

In terms of independence, there are no reliable data to assess whether the PADC's decisions about whether or not to make a recommendation, and what to recommend and to whom, are possibly affected by internalised dependence resulting from members' and employees' inadequate personal integrity or professional qualifications, non-transparent selection procedures or budget constraints. For instance, it is a matter of speculation whether PADC members and employees are independent in practice when considering what recommendations to make to regional governors who provide the PADC with office space free of charge or to municipal mayors who provide logistical support for PADC local outreach free of charge.

⁴⁶⁸ See media reports, *inter alia* at: www.dnevnik.bg/bulgaria/2012/08/17/1890029_komisiiata_sreshtu_diskriminaciiata_se_otreche_ot/; <https://news.bg/bulgaria/ot-kzd-zashtitiha-skandalnoto-izsledvane-na-uchebnitsite-gotovi-sa-za-novo.html>.

⁴⁶⁹ PADA, Article 47(6), 47(8) and 47(11).

⁴⁷⁰ PADA, Article 42(2-4).

⁴⁷¹ PADC information officially provided to the author of this report on 16 February 2018.

On the other hand, under settled case law, the PADC recommendations as such are not subject to appeal, as the Supreme Administrative Court considers that they have no legal consequences on the parties receiving these recommendations.⁴⁷² This means that the parts of PADC decisions containing recommendations become final on the decisions being delivered. This should serve as a relatively liberating factor for PADC decision-making regarding recommendations. Of course, there is always public opinion to face.

iv) Other competences

The PADC is first and foremost a quasi-judicial body, hearing, investigating and deciding cases of discrimination, and imposing penalties and injunctions.⁴⁷³ It is also competent to take and join court cases.⁴⁷⁴ The PADC is further competent to provide opinions on draft legislation and policy,⁴⁷⁵ keep a public register of its decisions and injunctions,⁴⁷⁶ inform the public of equality law provisions⁴⁷⁷ and undertake other activities as stipulated under its own regulations.⁴⁷⁸

g) Legal standing of the designated body/bodies

In Bulgaria, the designated body has legal standing to:

- bring discrimination complaints on behalf of identified victims to court;
- bring discrimination complaints on behalf of non-identified victims to court – possibly, subject to judicial interpretation;
- bring discrimination complaints *ex officio* to court – possibly, subject to judicial interpretation;
- intervene in legal cases concerning discrimination, for example, as an *amicus curiae*.⁴⁷⁹

In practice, however, the PADC has not been using these powers and they remain nominal. The reasons for this possibly include a lack of resources, financial and human, as PADC members and staff are occupied with producing their own case law and defending their decisions before two instances of administrative courts charged with judicial review. In addition, PADC members possibly prefer a less controversial (more neutral) adjudicator role to directly opposing parties in court. There is no research to substantiate these tentative evaluations by the author of this report.

h) Quasi-judicial competences

In Bulgaria, the body is a quasi-judicial institution. Its decisions are binding. It has power to impose fines (no compensation), as well as to issue remedial and preventive injunctions. Arguably, the levels of monetary sanctions provided for under the law are not sufficient to deter companies other than non-profit organisations or small businesses.⁴⁸⁰ PADC decisions are subject to judicial review before two instances of administrative courts, including the Supreme Administrative Court.

The PADC does not publish representative data on its practices of following up on the implementation of its decisions. There are no statistics on the implementation rates of its

⁴⁷² For instance, SAC, Decision No. 5302 of 24 April 2018 in Case No. 11143/2016.

⁴⁷³ PADA, Article 47(1-4).

⁴⁷⁴ PADA, Article 47(5).

⁴⁷⁵ PADA, Article 47(8).

⁴⁷⁶ PADA, Article 47(7).

⁴⁷⁷ PADA, Article 47(12).

⁴⁷⁸ PADA, Article 47(13).

⁴⁷⁹ PADA, Article 47(5): '[The PADC] shall appeal against administrative acts in breach of this or other laws governing equal treatment, and shall bring claims before the court, and join, as an interested party, lawsuits brought under this or other laws governing equal treatment.'

⁴⁸⁰ Under Article 78(1) of the PADA, the maximum fine for a breach of equality law is BGN 2 000 (EUR 1 000).

decisions. In its annual reports to Parliament the PADC only publishes 'examples' of cases where it took some action to secure implementation and the concerned party either implemented or did not implement the respective decision. The PADC does not clarify in its reports whether these examples are representative. It only gives four to five examples in each annual report whereas it issues hundreds of decisions every year. In some of the PADC-reported examples, when a PADC decision in a case enters into force, the PADC sends out an invitation to the concerned party to implement the decision voluntarily.⁴⁸¹ In response, some parties send PADC financial evidence that they have paid their fine⁴⁸² or evidence that they complied with a remedial injunction - for instance, to create architectural accessibility (such as a purchase contract for a piece of equipment or building alteration designs).⁴⁸³ In one case where the PADC ordered a respondent to adopt intra-institutional equality rules, to prove implementation the party sent the PADC a copy of the rules, along with a statement that the rules were posted in the company's offices for employees to take note of.⁴⁸⁴ In a case where the PADC ordered an internet news company to moderate user comments in order to exclude hate speech, the respondent notified the PADC that it had undertaken action to improve its automatic word filtering system.⁴⁸⁵ It is unclear whether in that case the PADC was satisfied with the company taking action or whether it insisted on further results.

In a case where the respondent organisation only informed the PADC that its management were notified of the PADC decision ordering the respondent to reform its ageist job competition rules, the PADC has not reported having taken any further action to demand substantive implementation.⁴⁸⁶ In some cases, the PADC appears to accept statements by respondents that a PADC decision was implemented despite a lack of any specific information as to the measures taken or proof.⁴⁸⁷

In some cases, the PADC has reported having sent the respective entity an invitation for voluntary implementation and, when no implementation followed, the PADC reported no further PADC action.⁴⁸⁸

In its 2018 report, the PADC has provided, as the only information on the implementation of its decisions, three examples of cases in which the respondents notified the PADC of having implemented its decisions concerning them.⁴⁸⁹ The report contains no information on steps taken by the PADC itself. Similarly, the examples given in the PADC's 2017 report are of four cases in which the respondents notified the PADC of implementation.⁴⁹⁰ In only

⁴⁸¹ See PADC, *Годишен отчет за 2017 г. (Annual Report for 2017)*, p. 156, available (in BG) at:

<https://www.kzd-nondiscrimination.com/layout/images/stories/2015/otchet/%D0%9E%D0%A2%D0%A7%D0%95%D0%A2.2017.pdf>.

⁴⁸² PADC, *Годишен отчет за 2016 г. (Annual Report for 2016)*, pp. 137-139, available at: www.kzd-nondiscrimination.com/layout/images/stories/2015/otchet/%D0%9E%D1%82%D1%87%D0%B5%D1%82%202016.pdf.

⁴⁸³ PADC, *Годишен отчет за 2016 г. (Annual Report for 2016)*, pp. 137-139, available at: www.kzd-nondiscrimination.com/layout/images/stories/2015/otchet/%D0%9E%D1%82%D1%87%D0%B5%D1%82%202016.pdf. See also PADC, *Годишен отчет за 2015 г. (Annual Report 2015)*, pp. 81-83, available at: www.kzd-nondiscrimination.com/layout/images/stories/2015/otchet/Otchet_2015_KZD.pdf.

⁴⁸⁴ PADC, *Годишен отчет за 2015 г. (Annual Report for 2015)*, pp. 81-83, available at: www.kzd-nondiscrimination.com/layout/images/stories/2015/otchet/Otchet_2015_KZD.pdf.

⁴⁸⁵ PADC, *Годишен отчет за 2015 г. (Annual Report for 2015)*, pp. 81-83, available at: www.kzd-nondiscrimination.com/layout/images/stories/2015/otchet/Otchet_2015_KZD.pdf.

⁴⁸⁶ PADC, *Годишен отчет за 2014 г. (Annual Report for 2014)*, pp. 74-79, available at: http://kzd-nondiscrimination.com/layout/images/stories/2015/godishenotchet2014/Otchet_2014.pdf.

⁴⁸⁷ PADC, *Годишен отчет за 2014 г. (Annual Report for 2014)*, pp. 74-79, available at: http://kzd-nondiscrimination.com/layout/images/stories/2015/godishenotchet2014/Otchet_2014.pdf.

⁴⁸⁸ PADC, *Годишен отчет за 2014 г. (Annual Report for 2014)*, pp. 74-79, available at: http://kzd-nondiscrimination.com/layout/images/stories/2015/godishenotchet2014/Otchet_2014.pdf.

⁴⁸⁹ PADC, *Годишен отчет за 2018 г. (Annual Report for 2018)*, pp. 60-62, available at: <https://kzd-nondiscrimination.com/layout/images/stories/2015/otchet/KZD-ot4et-2018-bg.pdf>.

⁴⁹⁰ PADC, *Годишен отчет за 2017 г. (Annual Report for 2017)*, pp. 156-157, available at: <https://www.kzd-nondiscrimination.com/layout/images/stories/2015/otchet/%D0%9E%D0%A2%D0%A7%D0%95%D0%A2.2017.pdf>.

one of those cases, the PADC reports having sent the respondent an invitation for voluntary implementation. The 2019 report is not yet available.

As there are no statistical data on the rates of implementation of PADC decisions, it is unclear whether its decisions are respected in practice.

i) Registration by the body/bodies of complaints and decisions

In Bulgaria, the body does register the number of complaints of discrimination made and decisions issued. However, it does not methodically break the data down by ground, field, type of discrimination, etc. For instance, in the PADC annual report for 2016, the data are only broken down by specialised panel (each dealing with more than one ground) and not by specific ground, field, form of discrimination or other criteria. These incomplete PADC statistics are available to the public. The PADC publishes the data in its annual reports to Parliament, which are accessible on its website after Parliament approves them (which it sometimes delays). According to the PADA, the PADC shall keep a public register of its decisions and injunctions.⁴⁹¹

In 2018, the PADC received 600 complaints and *actio popularis* motions and instituted 721 proceedings.⁴⁹² The PADC initiated *ex officio* proceedings on 386 occasions and rendered 511 decisions altogether.⁴⁹³ Disability was an alleged ground of discrimination in 459 proceedings, age in 51 proceedings and ethnicity in 28 proceedings.⁴⁹⁴ In 181 cases, disability was the only alleged ground and in 20 cases, age was the only alleged ground.⁴⁹⁵ There was one sexual orientation case.⁴⁹⁶ In six race/ethnicity cases, the PADC found discrimination; it rejected 12 such complaints and dismissed six on procedural grounds.⁴⁹⁷ In 2018, the PADC decided five cases related to religion.⁴⁹⁸ In 2018, the PADC rejected 116 multiple discrimination allegations and found multiple discrimination in 57 cases; it dismissed 52 such allegations on procedural grounds.⁴⁹⁹

In 2017, 535 complaints and *actio popularis* motions were filed with the PADC (according to the PADC, 478 complaints and 42 motions (the numbers do not match)).⁵⁰⁰ Based on these, 300 cases were instituted.⁵⁰¹ In 2017, 15 PADC cases concerned ethnicity (no race cases); one case concerned religion/faith; two cases – conviction; 50 cases – disability; there were no sexual orientation cases; and multiple discrimination (including grounds not protected under EU law) – 135 cases.⁵⁰² In 2016, the PADC reported 938 complaints and

⁴⁹¹ PADA, Article 47(7).

⁴⁹² PADC, *Годишен отчет за 2018 г. (Annual Report for 2018)*, p. 7, available at: <http://kzd-nondiscrimination.com/layout/images/stories/2015/otchet/KZD-ot4et-2018-bg.pdf>.

⁴⁹³ PADC, *Годишен отчет за 2018 г. (Annual Report for 2018)*, p. 7, available at: <http://kzd-nondiscrimination.com/layout/images/stories/2015/otchet/KZD-ot4et-2018-bg.pdf>.

⁴⁹⁴ PADC, *Годишен отчет за 2018 г. (Annual Report for 2018)*, p. 11, available at: <http://kzd-nondiscrimination.com/layout/images/stories/2015/otchet/KZD-ot4et-2018-bg.pdf>.

⁴⁹⁵ PADC, *Годишен отчет за 2018 г. (Annual Report for 2018)*, p. 29, available at: <http://kzd-nondiscrimination.com/layout/images/stories/2015/otchet/KZD-ot4et-2018-bg.pdf>.

⁴⁹⁶ PADC, *Годишен отчет за 2018 г. (Annual Report for 2018)*, p. 29, available at: <http://kzd-nondiscrimination.com/layout/images/stories/2015/otchet/KZD-ot4et-2018-bg.pdf>.

⁴⁹⁷ PADC, *Годишен отчет за 2018 г. (Annual Report for 2018)*, p. 14, available at: <http://kzd-nondiscrimination.com/layout/images/stories/2015/otchet/KZD-ot4et-2018-bg.pdf>.

⁴⁹⁸ PADC, *Годишен отчет за 2018 г. (Annual Report for 2018)*, p. 20, available at: <http://kzd-nondiscrimination.com/layout/images/stories/2015/otchet/KZD-ot4et-2018-bg.pdf>.

⁴⁹⁹ PADC, *Годишен отчет за 2018 г. (Annual Report for 2018)*, p. 33, available at: <http://kzd-nondiscrimination.com/layout/images/stories/2015/otchet/KZD-ot4et-2018-bg.pdf>.

⁵⁰⁰ PADC, *Годишен отчет за 2017 г. (Annual Report for 2017)*, pp. 152-153, available at: www.kzd-nondiscrimination.com/layout/images/stories/2015/otchet/%D0%9E%D0%A2%D0%A7%D0%95%D0%A2.2017.pdf.

⁵⁰¹ PADC, *Годишен отчет за 2017 г. (Annual Report for 2017)*, pp. 152-153, available at: www.kzd-nondiscrimination.com/layout/images/stories/2015/otchet/%D0%9E%D0%A2%D0%A7%D0%95%D0%A2.2017.pdf.

⁵⁰² PADC, *Годишен отчет за 2017 г. (Annual Report for 2017)*, p. 13, available at: www.kzd-nondiscrimination.com/layout/images/stories/2015/otchet/%D0%9E%D0%A2%D0%A7%D0%95%D0%A2.2017.pdf.

46 *actio popularis* motions, 368 proceedings and 510 decisions.⁵⁰³

The data for 2019 is not yet available.

j) Stakeholder engagement

In Bulgaria, the designated body engages with stakeholders as part of implementing its mandate, including trade unions, national and European NGOs, employers' organisations (such as the Bulgarian Industrial Association, the Bulgarian Chamber of Commerce and Industry and the Bulgarian Industrial Capital Association), central and local government authorities, universities and foreign embassies.

k) Roma and Travellers

The PADC does not treat Roma as a priority. It has stated that it does not have designated, additional funding to treat Roma as a priority.⁵⁰⁴ The PADC reports that most Roma-based complaints it deals with concern hate speech in the media, which in practice means that most of these motions are brought by Roma rights activists in the public interest as opposed to direct victims of practical discrimination (less favourable treatment in healthcare, education, social services, etc.).

⁵⁰³ PADC, *Годишен отчет за 2016 г. (Annual Report for 2016)*, p. 135, available at: www.kzd-nondiscrimination.com/layout/images/stories/2015/otchet/%D0%9E%D1%82%D1%87%D0%B5%D1%82%202016.pdf.

⁵⁰⁴ PADC, *Годишен отчет за 2016 г. (Annual Report for 2016)*, p. 135, available at: www.kzd-nondiscrimination.com/layout/images/stories/2015/otchet/%D0%9E%D1%82%D1%87%D0%B5%D1%82%202016.pdf.

8 IMPLEMENTATION ISSUES

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

- a) Dissemination of information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)

Information dissemination by Bulgaria has been limited, with only the PADC taking such action. It has consisted of arguably superficial and insufficient general awareness-raising measures, briefing journalists on PADC pending cases and hearings,⁵⁰⁵ the numbers of complaints and third-party motions, the prevalence of certain protected grounds or fields, the number of decisions, including precedents⁵⁰⁶ and the possibilities for individuals to be assisted centrally and regionally.⁵⁰⁷ The PADC has also organised seminars for legal practitioners, Ministry of Interior officials and educators.

There has been insufficient or no community outreach, with groups such as the Roma and people with sensory impairments remaining isolated from the dissemination.

- b) Measures to encourage dialogue with NGOs with a view to promoting the principle of equal treatment (Article 12 Directive 2000/43 and Article 14 Directive 2000/78)

The PADC has not involved NGOs in cooperation or dialogue in any inclusive or meaningful way. In the past, it engaged in selective contacts with some NGOs on a non-transparent basis. There is no mechanism for NGOs to provide the PADC with their input on the law or practice, other than joining individual cases in an 'interested party' capacity (with discretionary permission from the PADC). The PADC has not engaged important, if any, NGOs in consultations regarding amendments to the legislation it has reportedly initiated.

- c) Measures to promote dialogue between social partners to give effect to the principle of equal treatment within workplace practices, codes of practice and workforce monitoring (Article 11 Directive 2000/43 and Article 13 Directive 2000/78)

No such action is on record.

- d) Addressing the situation of Roma and Travellers

The National Council for Cooperation on Ethnic and Integrational Issues within the Government is the body charged with coordinating and controlling the implementation of the National Strategy of the Republic of Bulgaria for Integration of the Roma (2012 - 2020). This body is not dedicated to the Roma exclusively. Within it, there is a Commission for Roma Integration.

8.2 Measures to ensure compliance with the principle of equal treatment (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

- a) Compliance of national legislation (Articles 14(a) and 16(a))

Bulgaria has not taken the necessary measures to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished.

According to general legal principles, the PADA, as *lex specialis*/more recent/primary law, should override general, older and secondary legislation that conflicts with it. In practice, this depends on judicial interpretation. There is no special mechanism to ensure that

⁵⁰⁵ Letter No. 12-10-34 of 13 July 2015 addressed to the Bulgarian Helsinki Committee.

⁵⁰⁶ Letter No. 12-10-34 of 13 July 2015 addressed to the Bulgarian Helsinki Committee.

⁵⁰⁷ Letter No. 12-10-34 of 13 July 2015 addressed to the Bulgarian Helsinki Committee.

existing discriminatory norms are set aside, other than litigation before the courts or the PADC.

According to the PADA, all public authorities, including local government, are required to respect the aim of not allowing any direct or indirect discrimination when drafting legislation, as well as when applying it.⁵⁰⁸ This mainstreaming duty complements the general duty under the PADA for all public authorities to take all possible and necessary measures to achieve the aims of PADA.⁵⁰⁹ Formally, this provides a sufficient legal basis for bodies to revise any legislation that contradicts the PADA. In practice, this has not been done. A failure to do so could be challenged before the PADC on general non-implementation grounds under the PADA, there being no special provision on sanctions referring to this particular duty. The PADC could then, under the PADA, make a declaration and impose a sanction and also issue an instruction or recommendation for implementation.

The case law is contradictory in terms of whether parties can seek protection from discriminatory norms under PADA procedures. In the past (2014), the SAC made a restrictive interpretation to the effect that the PADC was incompetent to declare a legal norm discriminatory.⁵¹⁰ The Constitutional Court (CC) had to declare such a norm unconstitutional (concerning primary law) or the administrative courts had to repeal such a norm under general administrative procedure (concerning secondary legislation). (Standing to bring CC proceedings is limited - no individual may do this and only directly affected parties can seek judicial review of secondary legislation.) While this has not become settled case law, as of 2019, the case law is still contradictory in terms of whether the PADC or the courts can declare a legal norm discriminatory in PADA proceedings.

For instance, in 2019, the SAC and the SCC quite positively jointly held that every administrative act, including a piece of secondary legislation, is unlawful if it is discriminatory, and a discriminatory administrative act gives rise to standing to claim protection before the administrative court, including for damages resulting from the said act.⁵¹¹ The SCC separately ruled that, to find discrimination, established inequality was relevant, regardless of whether it was according to legal norms as the PADA aims at finding and sanctioning all inequality.⁵¹² The Varna Regional Court ruled similarly.⁵¹³

However, in at least two other cases, the SAC held that the impugned treatment could not be discriminatory as it was based on the applicable law.⁵¹⁴

In 2018, SAC held that a university had discretion to adopt a rule limiting access to applying for certain academic jobs on grounds of age (maximum age requirements) and the complainant's treatment (he was not considered as an applicant because of being older) could not constitute discrimination as it was not personal, but provided for under a general rule.⁵¹⁵ On the other hand, the same court has established as its settled case law, following *Petya Milkova* (Case C-406/15), that the (administrative) courts must set aside legislation depriving civil servants with disabilities of the advance protection against dismissal that employees enjoy and, by implication therefore, any legislation conflicting with EU equality rights.⁵¹⁶ Other examples of case law accepting that legal norms can be declared discriminatory in PADA proceedings include a case where the PADC held that a piece of

⁵⁰⁸ PADA, Article 6(2).

⁵⁰⁹ PADA, Article 10.

⁵¹⁰ SAC, Decision No. 5645 in Case No. 15991/2013; and Decision No. 15637 in Case No. 1925/2014.

⁵¹¹ SAC and SCC, joint Ruling No. 28 of 2 April 2019 in Case No. 5A/2019.

⁵¹² SCC, Ruling No. 424 of 31 May 2019 in Case No. 919/2019.

⁵¹³ VRC, Decision No. 1486 of 11 December 2019 in Case No. 1872/2019.

⁵¹⁴ SAC, Decision No. 6946 of 9 May 2019 in Case No. 8352/2017; Decision No. 8325 of 4 June 2019 in Case No. 45/2019.

⁵¹⁵ SAC, Decision No. 4159 of 30 March 2018 in Case No. 4591/2016.

⁵¹⁶ See, *inter alia*, SAC, Decision No. 4151 of 30 March 2018 in Case No. 494/2015; Decision No. 6558 of 17 May 2018 in Case No. 12550/2017.

secondary legislation was indirectly discriminatory as it did not provide for extramural studies in law;⁵¹⁷ and a number of cases where the SAC declared secondary legislation excluding certain categories of patients from fully-funded treatment for their diseases discriminatory,⁵¹⁸ as well as other secondary legislation in breach of disability equality rights.⁵¹⁹

There are various rules in primary and secondary legislation that arguably contradict PADA.⁵²⁰ A major effort is required to ensure that all laws and regulations are brought into conformity with the principle of equality.⁵²¹

b) Compliance of other rules/clauses (Articles 14(b) and 16(b))

Bulgaria has not taken the necessary measures to ensure compliance with Article 14(b) of Directive 2000/43 and Article 16(b) of Directive 2000/78 – ensuring that contracts, collective agreements, internal rules of businesses and the rules governing independent occupations, professions, workers’ associations or employers’ associations that are contrary to the principle of equal treatment are, or may be, declared null and void or are amended.

Legal action would have to be taken in each individual case in which such rules/clauses contradict the PADA in order to have the court declare them null and void, or otherwise unlawful (but not amend them – that would have to be done by the party or parties that adopted them in the first place).

⁵¹⁷ PADC, Decision No. 144 of 28 March 2018 in Case No. 28/2018.

⁵¹⁸ SAC, Decision No. 363 of 10 January 2018 in Case No. 9234/2016; Decision No. 2138 of 16 February 2018 in Case No. 13552/2016; Decision No. 5302 of 24 April 2018 in Case No. 11143/2016, and more – see Section on ‘Case law’ below.

⁵¹⁹ SAC, Decision No. 7706 of 11 May 2018 in Case No. 4602/2018

⁵²⁰ Examples of directly discriminatory legislation: Bulgaria, Judiciary Act (*Закон за съдебната власт*), Article 162 (mental health related disability (‘mental illness’) bar (www.lex.bg/laws/ldoc/2135560660) (in BG); Higher Education Act (*Закон за висшето образование*), Article 4 (unfettered discretion for universities to differentiate on grounds of age, race and sex, *inter alia*) (<https://lex.bg/laws/ldoc/2133647361>) (in BG); Defence and Armed Forces Act (*Закон за отбраната и въоръжените сили*), Article 141 (age bars to employment) (www.comd.bg/en/acts/republic-bulgaria-defence-and-armed-forces-act); Ministry of the Interior Act (*Закон за Министерството на вътрешните работи*), Article 155 (age and health bars to employment, referring to an ordinance by the Minister) (www.lex.bg/laws/ldoc/2136243824) (in BG); Diplomatic Service Act (*Закон за дипломатическата служба*), Article 27 (mental disability (‘chronic mental illness’) bar) (www.lex.bg/bg/laws/ldoc/2135565718) (in BG); Classified Information Protection Act (*Закон за защита на класифицираната информация*), Article 40 (mental disability (‘mental illnesses’) bar) (www.lex.bg/laws/ldoc/2135448577) (in BG); Access and Disclosure of Documents and Declaration of Affiliation of Bulgarian Nationals with State Security [...] Act (*Закон за достъп и разкриване на документите и за обявяване на принадлежност на български граждани към Държавна сигурност [...]*), Article 6 (mental disability (‘mental illness’) bar to access to employment) (www.comdos.bg/media/Normativna%20osnova/ADDAABCSISBNSA-15.02.2013.doc); Norms which discriminate indirectly would be far more numerous and time-consuming to identify.

⁵²¹ The whole body of legislation, including statutory law and secondary legislation, should be reviewed and analysed for incompatibilities with the PADA. Careful thinking should be done to devise ways of harmonising conflicting norms with the PADA. This will not only require conflicting norms to be amended or repealed, but also for the PADA to be revised in order to allow for additional legitimate exceptions.

9 COORDINATION AT NATIONAL LEVEL

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

Within the Council of Ministers (the Government), the National Council for Cooperation on Ethnic and Integrational Issues (NCCEII) is a consultative body with a mandate to assist with governmental policy on minorities and to coordinate between the government and NGOs representing minorities.⁵²² The NCCEII is comprised of senior public officials and ethnic minority NGO representatives. Its tasks include promoting ethnic equality and studying the specific problems facing ethnic minorities.⁵²³ The NCCEII 'coordinates the implementation and carries out ongoing monitoring regarding the National Strategy of the Republic of Bulgaria for Roma Integration (2012-2020)' and the action plan for the strategy's implementation.⁵²⁴ At regional level, there are 27 councils on ethnic and integration issues; these are local versions of the NCCEII. They are comprised of regional and local government representatives, regional communal services suppliers, NGOs and municipal 'ethnic issues' experts. Similar consultative councils also exist at municipal level.

Under the Minister of Education, there is a Centre for Educational Integration of Children and Students from Ethnic Minorities. Its task is to assist the Ministry of Education in implementing educational integration of minority students.⁵²⁵ It develops and funds projects promoting equal access to education for ethnic minority students.⁵²⁶ It fundraises from donor institutions and receives a subsidy from the Ministry of Education's budget.⁵²⁷

Under the PDA, a Monitoring Council has been established, comprised of nine members, to observe and report on compliance with the CRPD. It includes representatives of the Ombudsman; the PADC; organisations of, and for, people with disabilities; and academia. Another consultative body, the National Council for People with Disabilities, has been established within the Council of Ministers. Its members represent the state; organisations of, and for, people with disabilities; employees' organisations; employers' organisations; and municipalities. Its role is to be a vehicle for cooperation and coordination in formulating disability rights policy. In particular, it is competent to give opinions on draft legislation and strategic programming and plans.

The Agency for People with Disabilities, an executive body within the Ministry of Labour and Social Policy (MLSP), takes part in coordinating the policy on the rights of people with disabilities, and is charged with specific duties, such as maintaining a database of people with disabilities.⁵²⁸

⁵²² Regulations on the Structure and Activities of the National Council for Cooperation on Ethnic and Integration Issues (*Правилник за устройството и дейността на националния съвет за сътрудничество по етническите и интеграционните въпроси към министерския съвет*), Article 1, available (in BG), at: www.lex.bg/laws/ldoc/2135541318.

⁵²³ Regulations on the Structure and Activities of the National Council for Cooperation on Ethnic and Integration Issues, Article 2(1.5), available at: www.lex.bg/laws/ldoc/2135541318.

⁵²⁴ See: https://iisda.government.bg/ras/executive_power/council/222 (in BG).

⁵²⁵ Decree N 4 of the Council of Ministers of 11 January 2005 establishing the CEICSEM, Article 1.

⁵²⁶ Decree N 4 of the Council of Ministers of 11 January 2005, Article 2.

⁵²⁷ Decree N 4 of the Council of Ministers of 11 January 2005, Article 9.

⁵²⁸ PDA, Article 10(3).

Within the MLSP, the Policy for Persons with Disabilities, Equal Opportunities and Social Assistance Directorate develops policy and programmes for vulnerable groups.⁵²⁹ At the MLSP, there is also a Social Inclusion Directorate.⁵³⁰

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

There is no national action plan on anti-racism or anti-discrimination.

⁵²⁹ Information on the Ministry of Labour and Social Policy's website, available (in BG) at: www.mlsp.government.bg/index.php?section=POLICIESI&lang=eng&I=306.

⁵³⁰ Administrative Registry, State Administration Information System, available (in BG) at: http://iisda.government.bg/ras/executive_power/ministry_organigram/87?verId=181203000000038001.

10 CURRENT BEST PRACTICES

In 2018-2019, the PADC has been operating its self-initiated 'Accessible Bulgaria' campaign, monitoring the physical accessibility of public and commercial places by means of *ex officio* inspections and encouraging email and telephone inaccessibility reports by any party. As of October 2018, the PADC had inspected 538 sites and found 60 to be accessible.⁵³¹ For the remaining 478 sites, the PADC had initiated proceedings to find and sanction discrimination. There were 165 cases against banks and insurance companies; 149 against state and municipal institutions; 89 against mobile network companies; and 75 against other service providers, mostly pharmacies and post offices. The majority of inaccessible sites were in Sofia (66 proceedings), followed by Lovech (30), Varna (26) and Burgas (22). Several dozen banks, mobile network providers and other companies built an accessible environment on their physical sites before the PADC ruled in the proceedings brought against them. The PADC has been rewarding accessible places by giving them visibility in the media, awarding them accessibility certificates and promoting their practices with the support of domestic celebrities.

⁵³¹ PADC, *Interim Report on the Implementation of the 'Accessible Bulgaria' Campaign*, available at: <https://www.kzd-nondiscrimination.com/layout/images/stories/2015/%D0%BC%D0%B5%D0%B6%D0%B4%D0%B8%D0%BD%D0%B5%D0%BD%20%D0%B4%D0%BE%D0%BA%D0%BB%D0%B0%D0%B4%202%20%D0%BE%D0%BA%D1%82%D0%BE%D0%BC%D0%B2%D1%80%D0%B8%202018.pdf>.

11 SENSITIVE OR CONTROVERSIAL ISSUES

11.1 Potential breaches of the directives at the national level

Legislation

- The definition of incitement to discrimination in the PADA, including instructions to discriminate, expressly requires direct intent.
- The definition of racial segregation in the PADA expressly requires the state of separation to be 'compelled'.⁵³² This is arguably in breach of the directives' definitions of direct discrimination, which have no 'compelled' element but instead outlaw any race-based less favourable treatment. Since *Brown v. Board of Education* (1954), when the racist 'separate but equal' doctrine was defeated, it has been established in discrimination/human rights law/legal theory that racial segregation is a form of less favourable treatment, i.e. discrimination. The 1965 UNCERD Convention bans all forms of racial segregation (Article 3). In its 1995 General Recommendation No. 19, the CERD Committee clarified that this ban applies to 'all forms of racial segregation in all countries', with 'the obligation to eradicate all practices of this nature include[ing] the obligation to eradicate the consequences of such practices undertaken or tolerated by previous Governments in the State or imposed by forces outside the State'. The Committee observed that 'a condition of partial segregation may also arise as an unintended by-product of the actions of private persons': 'In many cities residential patterns are influenced by group differences in income, which are sometimes combined with differences of race, colour, descent and national or ethnic origin, so that inhabitants can be stigmatized and individuals suffer a form of discrimination in which racial grounds are mixed with other grounds.' The Committee therefore affirmed that 'a condition of racial segregation can also arise without any initiative or direct involvement by the public authorities'. Failing to outlaw all racial segregation is additionally in breach of Article 2(1) of Directive 2000/43/EC, which prohibits *all* discrimination. Similarly, the ECtHR has consistently held in Roma segregation cases that no waiver of the right to non-discrimination is possible.⁵³³ While opinions differ as to whether housing segregation is banned under the directive, it seems undisputed that segregation in education, including 'non-coercive' segregation, is banned. The issue being pointed out here is that, under the PADA, 'non-coercive' racial segregation is exempted in any field (including in the field of education), which is at variance with international discrimination law.
- The PADA defines indirect discrimination in an unclear, confusing way, thwarting implementation. The definition is not sufficiently clear to ensure consistent interpretation in line with EU law – it has instead resulted in contradictory case law (with some rulings demonstrating a correct approach to the concept, and others at variance with the directives).

Case law

- In breach of the *Firma Feryn*⁵³⁴ principle that no actual individual victim is required for discrimination to be found, recent case law has required one

In 2019, the two supreme courts, the Supreme Administrative Court, the final instance court for reviewing PADC decisions, and the Supreme Court of Cassation, the final instance court for PADA civil court cases, ruled in cases of anti-Roma hate speech that, in order for harassment or incitement to discrimination to be found, the claimant needs to have been

⁵³² PADA, Additional Provision, § 1(6).

⁵³³ For instance, *D.H. v. Czech Republic*, No. 57325/00, 13 November 2007; *Sampanis v. Greece*, No. 32526/05, 5 June 2008; *Oršuš v. Croatia* [GC], No. 15766/03, 16 March 2010.

⁵³⁴ Judgment of 10 July 2008, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn N, C-54/07*.

specifically targeted and affected by the impugned statements.⁵³⁵ 'Abstract' statements, targeting an unidentified circle of persons, including a racial, ethnic or religious community, are not banned under the concept of harassment – or other forms of discrimination, including less favourable treatment, victimisation, racial segregation. In essence, discrimination requires a specific victim.

In line with this new restrictive trend, a lower instance court denied harassment found by the PADC, as the complainant had failed to prove that they had been personally affected, and the respondent had not manifested ethnic-based negativity towards a specific person. The lack of a specific victim meant there was no violation under the PADA.⁵³⁶

These decisions are in contravention of the *Firma Feryn* ruling that wholesale discriminatory statements are outlawed regardless of whether an individual victim is identified. While the *Firma Feryn* case concerned employment specifically, the PADA, being a comprehensive law, is not limited to the scope of the directives and therefore expressly applies to overarching anti-minority statements, as explained elsewhere in this report, in so far as such statements meet its definition of harassment. By virtue of its all-embracing nature, such expression includes/affects the fields covered by the directive. The case law described above as problematic has resisted a finding of harassment not for reasons of scope, as scope is not an issue under the universally applicable PADA, but for reasons involving the impugned speech lacking a specific target. Such problematic case law would equally apply in the field of employment under the PADA, as well as in other fields not covered by the directives, as the PADA governs discrimination, including harassment, in the same manner in all fields, including those covered by the directives and those beyond the latter's scope.

The problematic decisions described above have precedents. In 2014, the SAC held that a concrete discrimination victim needs to be identified.⁵³⁷ Discrimination has to be a concrete fact and not a hypothetical possibility.

While other decisions in 2019 and in the past, including by the SAC and the SCC, have recognised PADA violations where categories of people and not specific individuals were targeted, the problematic decisions discussed above are bound to have an influence on future cases. The case law is inconsistent and unreliable.

- Breach of Article 2(1) of Directive 2000/43/EC and Article 2(1) of Directive 2000/78/EC prohibiting *all* discrimination, as well as Article 7(1) of Directive 2000/43/EC and Article 9(1) of Directive 2000/78/EC requiring protection for *all* victims. This involves three categories of fallacies, discussed below as, respectively, A, B, and C

A. Case law has introduced various restrictions regarding discriminatory norms, also affecting the principles of the primacy and effectiveness of EU equality law (due teleological construction of national law)

The SAC has made a number of holdings contradicting EU law (as well as the PADA), relevant as of 2019 as explained below at Section 12.2:⁵³⁸

- A legal provision cannot constitute discrimination as it is not a concrete action or omission. The adoption of a legal provision is not a concrete action or omission either.

⁵³⁵ SCC, Decision No. 2 of 19 June 2019 in Case No. 3203/2018; Decision No. 819 of 29 November 2019 in Case No. 2596/2019; SAC, Decision No. 636 of 15 January 2019 in Case No. 7229/2018; SAC, Decision No. 14026 of 21 October 2019 in Case No. 12163/2018.

⁵³⁶ SCAC, Decision No. 4590 of 3 July 2019 in Case No. 4299/2019 in a case concerning an anti-Roma newspaper publication.

⁵³⁷ SAC, Decision No. 15637 of 19 December 2014 in Case No. 1925/2014. The case concerned the application of an age bar under secondary legislation.

⁵³⁸ SAC, Decision No. 15637 of 19 December 2014 in Case No. 1925/2014. The case concerned the application of an age bar under secondary legislation.

- The PADC may not declare laws to be discriminatory: a law that was not declared unconstitutional by the Constitutional Court cannot be discriminatory.
- The PADC may not declare secondary legislation to be discriminatory either: secondary legislation that has not been declared unlawful by the SAC (under general administrative procedure) could not be discriminatory.
- Where the PADC finds a legal norm to contradict equality law, it may not declare a breach of the law. It may not order the responsible authority to repeal or amend the impugned norm. The PADC may only make a recommendation or take legal action before the SAC (where secondary legislation is concerned).

In 2019, the SAC, in at least two cases, held that the impugned treatment could not be discriminatory as it was based on the applicable law, i.e. denying discrimination provided for under legislation.⁵³⁹ On the other hand, inconsistently, the SAC and the SCC jointly held, also in 2019, that every administrative act, including a piece of secondary legislation, is unlawful if it is discriminatory, and a discriminatory administrative act gives rise to standing to claim protection before the administrative court, including for damages resulting from the said act.⁵⁴⁰ The SCC separately ruled, in another instance, that, to find discrimination, established inequality was relevant, regardless of whether it was according to legal norms as the PADA aims at finding and sanctioning all inequality.⁵⁴¹ The Varna Regional Court ruled similarly.⁵⁴² The case law, therefore, is contradictory as to whether discrimination provided for under legislation is banned by the PADA.

As of 2019, while the problematic case law referenced above has not become settled, it has not been conclusively recalled either. The conflicting trends do not appear to be necessarily ground- or field-specific. Some of the restrictive decisions exhibited anti-Roma bias. Other did not seem to be triggered by a particular ground.

B. Misinterpretation of the due causality in cases where a protected ground played a causative part along with other reasons (mixed-reasons cases)

The SAC has repeatedly breached the mixed reasons standard, holding that the reason for unequal treatment must 'in all cases be a protected ground'.⁵⁴³ The SCAC has copied that approach.⁵⁴⁴ In one case, the SAC held that age was 'only one of a series of criteria' for the impugned treatment, denying discrimination on this basis, among other reasons.⁵⁴⁵

However, in a 2019 case, the SAC correctly stated that 'it is enough to establish that [a protected] ground constitutes a basic, meaningful reason for less favourable treatment'.⁵⁴⁶ The case law is contradictory.

C. Misinterpretation of the lacking requirement for intent in cases where unconscious bias was at play or other perceived motives for the impugned behaviour – the 'no intent required' standard

The SAC has failed to find discrimination as, *inter alia*, the treatment was not proven to be 'conscious'.⁵⁴⁷ See Sections 2.2 a) and 2.4 a) for further detail.

⁵³⁹ SAC, Decision No. 6946 of 9 May 2019 in Case No. 8352/2017, Decision No. 8325 of 4 June 2019 in Case No. 45/2019.

⁵⁴⁰ SAC and SCC, joint Ruling No. 28 of 2 April 2019 in Case No. 5A/2019.

⁵⁴¹ SCC, Ruling No. 424 of 31 May 2019 in Case No. 919/2019.

⁵⁴² VRC, Decision No. 1486 of 11 December 2019 in Case No. 1872/2019.

⁵⁴³ SAC, Decision No. 6577 of 7 May 2019 in Case No. 10380/2017, Decision No. 6946 of 9 May 2019 in Case No. 8352/2017, Decision No. 14026 of 21 October 2019 in Case No. 12163/2018.

⁵⁴⁴ SCAC, Decision No. 8325 of 20 December 2019 in Case No. 11063/2019, Decision No. 4590 of 3 July 2019 in Case No. 4299/2019.

⁵⁴⁵ SAC, Decision No. 12865 of 1 October 2019 in Case No. 5114/2018.

⁵⁴⁶ SAC, Decision No. 8758 of 11 June 2019 in Case No. 1014/2019.

⁵⁴⁷ SAC, Decision No. 2922 of 27 February 2019 in Case No. 10318/2016, Decision No. 6577 of 7 May 2019 in Case No. 10380/2017, Decision No. 6946 of 9 May 2019 in Case No. 8352/2017.

The SCC has similarly neglected the 'irrelevance of intent' principle. Importantly, in a case in which the lower court had found no discrimination as the treatment was not intentional, and the complainant had applied for cassation review, asking the SCC to specifically address the question of the relevance of intent, the SCC declined to review the case without giving reasons.⁵⁴⁸

- Breach of the directives' definitions of direct discrimination, which include hypothetical less favourable treatment and comparisons with hypothetical persons (hypothetical comparator)

The SAC has held that hypothetical unequal treatment was excluded from the concept of discrimination.⁵⁴⁹ Additionally, in another case, the SAC has held that a specific person treated more favourably had to be established.⁵⁵⁰

- Breach of the directives' definitions of direct discrimination, which imply a comparison with a similarly situated person who differs in terms of protected ground

The SAC has long-standing problematic case law that, in cases of dismissals based on employees'/civil servants' having become entitled to an old age and seniority pension, dismissed persons should be compared with others in the same group, i.e. those with acquired pension rights (as opposed to different age/seniority groups).⁵⁵¹

- Breach of the directives' burden of proof rule

The PADC and the courts are still struggling with the rule on shifting the burden of proof. See Section 6.3 for more detail.

11.2 Other issues of concern

- Non-adherence to a standard of banning *all* discrimination (Article 2(1) of Directive 2000/43/EC and Article 2(1) of Directive 2000/78/EC), including discrimination by assumption

More often than not, in 2019, as in 2018-2017, the courts have required *obiter* that a protected ground be actual, thereby excluding assumed ones.⁵⁵² In 2018, the SAC held that discrimination was not proven unless, 'the objective fact of [a protected ground] was established'.⁵⁵³ See Section 2.1.3 a) for more detail.

- Institutionalised anti-minority ideology

The current Government rules in coalition with a party which the European Commission against Racism and Intolerance has termed 'ultranationalist/fascist': the VMRO-BND.^{554 555} The current Cabinet includes the leader of this party as a Deputy Prime Minister.

⁵⁴⁸ SCC, Ruling No. 596 of 22 July 2019 in Case No. 680/2019.

⁵⁴⁹ SAC, Decision No. 12865 of 1 October 2019 in Case No. 5114/2018 (a company employee had stated to the complainant that he would be unequally treated if he applied).

⁵⁵⁰ SAC, Decision No. 2922 of 27 February 2019 in Case No. 10318/2016.

⁵⁵¹ SAC, Decision No. 611 of 12 July 2016 in Case No. 1541/2016; Decision No. 4418 of 14 April 2016 in Case No. 4245/2016; Decision No. 2988 of 9 March 2018 in Case No. 13638/2017; Decision No. 4727 of 12 April 2018 in Case No. 2769/2018. SCC, Ruling No. 368 of 18 May 2018 in Case No. 483/2017; Ruling No. 401 of 28 May 2018 in Case No. 188/2018; Ruling No. 2711 of 25 February 2019 in Case No. 5704/2017. For more detail, see Section 4.7.1 a) above.

⁵⁵² SCC, Ruling No. 41 of 25 January 2019 in Case No. 4570/2018. SAC, Decision No. 636 of 15 January 2019 in Case No. 7229/2018, Decision No. 14026 of 21 October 2019 in Case No. 12163/2018, Decision No. 896 of 21 January 2020 in Case No. 1934/2019 (after the cut-off date for this report), Decision No. 2922 of 27 February 2019 in Case No. 10318/2016.

⁵⁵³ SAC, Decision No. 6151 of 11 May 2018 in Case No. 7203/2016.

⁵⁵⁴ Internal Macedonian Revolutionary Organisation - Bulgarian National Movement (*Вътрешна Македонска Революционна Организация - Българско Национално Движение*).

⁵⁵⁵ ECRI, *Report on Bulgaria*, published 16 September 2014.

Equality body practice

The PADC does not use its powers, including its competence to start *ex officio* proceedings, in any strategic way, except in relation to disability rights. It has no defined priorities. It has failed to target serious issues of discrimination, such as Roma segregation in education, Roma destitution and isolation in housing, as well as collective forced evictions, among other structural issues.

There is no reliable measurement of the implementation rate of PADC decisions. In cases of non-compliance, the PADC has no formal powers other than to impose further fines.

Contrary to the PADA, the courts order losing parties in PADA proceedings to pay costs and expenses.⁵⁵⁶ The PADA expressly states that proceedings are exempt from all fees and costs, but the courts frustrate this provision because it requires them to pay the latter from their own budgets. This case law means that complainants against PADC decisions have to pay PADC legal representation costs. The PADC actively seeks costs at the expense of losing complainants, claiming to be bound by law to do so.⁵⁵⁷

Under settled SAC case law, public interest (*actio popularis*) litigants expressly have no standing to appeal against PADC decisions. See Section 6.2 c) for more detail.

The case law has been inconsistent and unreliable as regards the competence of the administrative courts as opposed to the civil courts in anti-discrimination claims against public bodies. This issue is discussed in detail above in Section 6.1.

⁵⁵⁶ See, *inter alia*, SAC, Decision No. 10734 of 1 September 2014 in Case No. 1463/2014; Decision No. 1048 of 27 January 2014 in Case No. 8033/2013; Decision No. 1667 of 6 December 2014 in Case No. 10013/2013; Decision No. 3645 of 14 March 2014 in Case No. 12679/2013.

⁵⁵⁷ PADC, letter No. 44-00-1609 of 20 April 2015, addressed to an individual named Boyko Boev.

12 LATEST DEVELOPMENTS IN 2019

12.1 Legislative amendments

On 1 January 2019, the new law governing the rights of people with disabilities - the People with Disabilities Act (PDA) (adopted 18 December 2018), intended to implement the Convention on the Rights of Persons with Disabilities (CRPD), entered into force. The PDA's language is rights-based and its stated aims are to guarantee people with disabilities full and equal enjoyment of rights and dignity, while making their social inclusion possible and supporting them and their families. The law's stated principles are equal treatment based on an individual approach and individual assessment of needs, as well as personal choice and independence, accessibility and full participation.

The PDA provides for new definitions of 'people with disabilities', 'people with lasting disabilities', reasonable accommodation and a range of other relevant concepts. 'People with disabilities' are 'persons with a physical, mental, intellectual or sensory insufficiency, which in interaction with the environment may hinder their full and effective participation in the life of society'. 'People with lasting disabilities' are 'persons with a long-term physical, mental, intellectual or sensory insufficiency, which in interaction with the environment may hinder their full and effective participation in the life of society, and who are medically certified as having a disability classified as 50 % or more'. The repealed Integration of People with Disabilities Act (IPDA) (repealed as of 1 January 2019) defined 'disability' as 'any loss or impairment of the anatomical structure, physiology or psychology of a given individual'. In the IPDA, 'a person with a long-term disability' was defined as 'a person who, as a result of an anatomical, physiological or psychological disability has long-term reduced possibilities to perform activities in a manner and to a degree possible for a healthy person, and who medical authorities have certified as having reduced working ability, or have certified as having a disability of 50 % more.'

While the new definitions contained in the PDA are closer to the language of Article 1 of the CRPD than to those in the IPDA,⁵⁵⁸ the definition of long-term disability still, unfortunately, retains the medical approach to disability.

The PDA provides for support interventions in the fields of healthcare, education, employment, housing, urban environments, transport, culture, information, sport, public life and justice. It envisages rehabilitation, social services, labour support, accessible information, reasonable accommodation, access to justice and legal defence, personal assistance and personal mobility and more.

A Monitoring Council is established in accordance with the PDA comprised of nine members, to observe and report on compliance with the CRPD. It includes representatives of the Ombudsman, the PADC, organisations of, and for, people with disabilities and academia. Another consultative body, the National Council for Persons with Disabilities, is to be established within the Council of Ministers (the Government). Its members represent the State, organisations of, and for, people with disabilities, employees' organisations, employers' organisations and municipalities. Its role is to be a vehicle for cooperation and coordination in formulating disability rights policy. In particular, it is competent to give opinions on draft legislation and strategic programming and plans.

The PDA governs individual needs assessments, defining their scope, aims and procedure. Based on their individually assessed needs, people with disabilities are entitled to financial assistance for the purposes of obtaining aids, appliances and equipment as needed. People with long-term disabilities are entitled to financial assistance for the purposes of obtaining a car, adapting housing, rehabilitation and renting of municipal accommodation, as well as

⁵⁵⁸ People with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others.

monthly monetary assistance. The levels of the latter are enhanced for the various sub-groups of people with disabilities as compared with the provisions of the repealed IPDA. People with disabilities are furthermore entitled to social services, personal assistance and other support based on their needs as individually assessed.

The PDA also provides for social inclusion support, including five types of rehabilitation, defining the concept and aims of rehabilitation in general as a right, as well as its five types. Under the PDA, students with disabilities are entitled to support in schools based on individual assessments. Schools and higher education institutions have duties to provide inclusive environments, including special adjustments. In the field of employment, people with disabilities are entitled to job-seeking intermediary and consultation services and the government is charged with devising measures to enhance their opportunities. Importantly, the PDA introduces employment quotas for people with long-term disabilities. Employers with 50 to 99 employees must hire at least one person with a long-term disability, while employers with 100 or more employees must hire at least two people with long-term disabilities per 100 employees. In case of non-compliance, employers are subject to fines (the maximum amount is BGN 5 000 (EUR 2 500), doubled in cases of repeat violations).

In addition, employers are under a duty to adjust the workplace to the needs of an individual with disabilities upon hiring. Employers are eligible for public funding awarded by the Agency for Persons with Disabilities for purposes of providing reasonable accommodation of jobs, *inter alia*, including accessibility and special equipment. Employers are also eligible for various other economic stimuli and alleviations linked to employing people with disabilities. The PDA further defines and governs specialised enterprises and cooperatives of people with disabilities. These are entitled to subsidies and tax or social security reliefs. The law further defines and governs protected employment centres designed to provide employment for people with multiple long-term disabilities.

The PDA articulates a range of accessibility and reasonable accommodation rights in terms of public environments, including accessible information and transport and personal mobility. In addition, people with disabilities who experience serious difficulties (these are defined) with taking specific legal actions are entitled to assisted decision-making. Judicial and other institutions are under a duty to provide effective access to justice, including procedural and other support measures.

Under the law, the Agency for People with Disabilities is to create and maintain a database on people with disabilities, including a personal profile for every individual, reflecting their health, educational and socio-economic status, social inclusion possibilities, demographics and other aspects. The data are to be used for policy-formulation. The PDA provides that, 'the data shall be collected and processed in accordance with personal data protection requirements' (Article 82(6)). In practice, this would mean the individuals with disabilities would sign consent forms. (But they would have to sign them if they want to access opportunities and resources under the law.) It would also presumably mean that third parties would not have free access to the database. According to the PDA, the 'terms and conditions on registering, maintaining and using the data [...] shall be governed under the regulations on the implementation of the law' (Article 82(7)). In addition, the Agency for People with Disabilities is to keep a public electronic register of specialised enterprises and cooperatives of people with disabilities, as well as a public electronic register of providers of aids and tools for people with disabilities.

As opposed to the repealed IPDA, the PDA does not ban or define any forms of discrimination. This has no consequences for the equality rights of people with disabilities, as they are fully covered under the PADA. Prohibitions and definitions under the IPDA unnecessarily overlapped with the PADA.

While the PDA provides for reasonable accommodation duties, which can be considered to amount to non-discrimination provisions, these provisions contain no prohibitions of discrimination, nor do they define violations of the said duties as discrimination.

12.2 Case law

Roma

Name of the court: Pazardzhik Regional Court

Date of decision: 25 June 2019

Name of the parties: *European Roma Rights Centre and Bulgarian Helsinki Committee v. MBAL [general hospital] Pazardzhik*

Reference number: Ruling No. 233 in case No. 315/2019

Address of the webpage: Not available

Brief summary: The Pazardzhik Regional Court dismissed an appeal by the two claimant NGOs against a ruling by the trial court, Pazardzhik District Court, confirming the latter. The *actio popularis* claim brought against the local general hospital by the author of this report (subsequently represented by substitutes) concerned a practice of racial segregation in the hospital's maternity wards, consisting of separating Roma women in rooms where no Bulgarian-majority women would be placed. Both the first instance and appeals courts found, on the evidence, that the respondent had succeeded in rebutting any presumption of discrimination raised by the claimants. In particular, the hospital had engaged, *inter alia*, witnesses who testified that they had given birth in the hospital on more than one occasion and had shared rooms with Roma women.

Importantly, on the issue of the concept of racial segregation under the PADA, both judicial instances explicitly agreed with the claim that the element of 'compelled separation' in the legal definition was to be construed in line with the ECtHR's case law to the effect that separation is 'compelled' when it 'does not result from an individual's freely formed will, provided that all the prerequisites to form free will are there'. The courts held that 'the qualification "compelled separation" is not to be taken formally, as a mere absence of compulsion in the strict sense of the word, but instead as clarified by the ECtHR.'

Name of the court: Supreme Administrative Court

Date of decision: 15 May 2019

Name of the parties: *Media Group 24 OOD v. V. Yordanova and Protection Against Discrimination Commission*

Reference number: Ruling No. 7269 in case No. 11803/2017

Address of the webpage:

<http://www.sac.government.bg/court22.nsf/d6397429a99ee2afc225661e00383a86/2a209f339048f3c3c22583fa004fa6d4?OpenDocument> (in BG)

Brief summary: The Supreme Administrative Court (SAC) confirmed a decision by the lower court, which in turn had confirmed a decision by the Protection Against Discrimination Commission (PADC) against a media company owning a news site. The case before the PADC was brought by an individual alleging that the company was liable for failing to moderate anti-Roma hate comments posted on its site. The PADC had agreed that the comments in question constituted harassment on ethnic grounds, and the company was given an instruction to introduce active non-stop comment moderation within 30 days of the PADC's decision. The company appealed before the Plovdiv Administrative Court, which confirmed its liability for the ethnic harassment comments as it had made anonymous posting possible on its site and was therefore responsible for such content. The SAC upheld the finding that the impugned comments impinged upon human dignity, instilled ethnic hatred and contained calls to violence, regardless of the intent behind them or of the lack of any consequences (in terms of actual violence committed). The site owner had failed to take measures to control the content, thereby allowing users to infringe the absolute ban on harassment. The Court did not discuss the fact that the impugned hate comments targeted the Roma community as such, i.e. Roma in general, and not the individual

complainant before the PADC. Conversely, in other anti-Roma hate speech cases outlined below, this Court, as well as the Supreme Court of Cassation (SCC), denied that harassment had taken place as the individual Roma who had brought the cases had not been targeted personally.

Name of the court: Supreme Court of Cassation

Date of decision: 29 November 2019

Name of the parties: *O. I. v. Intermedia*

Reference number: Ruling No. 819 in case No. 2596/2019

Address of the webpage: <http://www.vks.bg/pregled-akt?type=ot-spisak&id=192C8210248FADB0C22584C100336A12> (in BG)

Brief summary: The SCC refused to admit an appeal against a decision by the Sofia City Court (SCtC) in a case of anti-Roma hate comments on a news site similar to the one above, thereby making that decision final. The SCtC had confirmed a decision by the trial court, dismissing a Roma individual's claims against the media company, owner of the site in question. The courts found that the impugned anti-Roma comments did not constitute harassment or incitement to discrimination as alleged since they did not target the claimant personally. The comments were directed against the part of the Roma community that engaged in criminal activity, while the claimant, a journalist, did not belong to that part of the community. The SCC held that harassment and incitement to discrimination, as defined by the law, required that the impugned actions be directed against a specific person – 'otherwise, any negative comment on any site against whomever (including the Roma, as in this case) would be a basis for a claim under [the PADA]'. The SCC admitted that most of the impugned comments 'make no contribution to democratic debate and go beyond freedom of expression, as protected under the Constitution and international law' but 'discrimination as a legal violation could only exist between specific persons'. This ruling is one of several rulings in 2019 requiring anti-Roma hate speech to have specifically targeted an individual victim, arguably in contravention of the *Firma Feryn* principle that wholesale discriminatory statements are outlawed regardless of whether an individual victim is identified.

Name of the court: Supreme Court of Cassation

Date of decision: 19 June 2019

Name of the parties: *K. B and O. I. v. V. Simeonov*

Reference number: *Decision No. 2 in case No. 3203/2018*

Address of the webpage: <http://www.vks.bg/pregled-akt?type=ot-spisak&id=EBBB8E5E3DE36B6DC225841E0026CB53>

(in BG)

Brief summary: The SCC confirmed a decision by the Burgas Regional Court (BRC) to the effect that Valery Simeonov, Deputy Prime Minister at the time, was not liable for anti-Roma harassment (hate speech) by means of public statements, including the following: '[Roma] have become brazen, presuming, and brutalised human-like [creatures], demanding a right to salary without doing work, wanting sickness assistance without being sick, child assistance for children who play with pigs in the street, and maternity assistance for women with the instincts of stray bitches.' Simeonov made the impugned statements in Parliament as an MP in 2014. Two Roma journalists had filed a claim against him, alleging his statements amounted to harassment and incitement to discrimination against the Roma community, as well as the individual claimants. The decision to engage Roma individuals as claimants was made by the author of this report, who brought the case for strategic reasons. As a matter of principle, it was sought that the courts accept that hate speech affects any person belonging to the targeted community. Additionally, the litigator considered that a claim by actual people – publicly visible professionals at that, having reputations – would have more credibility with the courts in terms of empathy with individual dignity. This choice could not be regarded in any way as a reason for the rulings that were given, as the latter are biased; the reason for them is entrenched bias, which would have resulted in the courts finding another, and probably easier, pretext to dismiss

an *actio popularis* claim – possibly to the greater detriment of the law: for example, by denying NGO standing.

The BRC had ruled that, while some of the impugned expressions could be seen as offensive even if they were said to target only a part of the Roma community and not all Roma, no harassment was at hand as the claimants had not established that they were personally affected by those statements. According to the BRC, no specific environment of the claimants', such as a workplace or a residential or recreational area, had been proven to be affected. No assumption could be made that their specific environments had become hostile or degrading based on the content of the impugned statements, or on their media dissemination. Under the PADA burden of proof rule, the onus was on the claimants to establish that their environments had been negatively affected. Similarly, no intent to harass the entire Roma community on the part of the respondent could be established based on the content of his statements. His aim had been different – to analyse severe social problems. The SCC agreed with these reasons. The two claimants were educated people, with careers in journalism and were therefore not targeted by the impugned statements. They did not belong to the part of the Roma community to which the respondent had referred, and they were not personally affected by his statements. The SCC furthermore issued generally applicable interpretative guidance (in response to legal questions formulated by the claimants) to the effect that it was necessary to identify a specific victim in order for harassment to be at hand. The SCC held that a concrete individual had to be personally targeted. The court referred to case law by administrative courts to the same effect. 'Abstract' statements, targeting an unidentified circle of persons, including a (part of a) racial, ethnic or religious community, were not banned under the concept of harassment. This applies to all forms of discrimination, including less favourable treatment, victimisation, racial segregation. For harassment, the law would require a specifically defined environment to have been negatively affected due to concrete behaviour directed personally against a specific individual. A specific environment would mean a workplace, a place of study, a place where services are provided, a place of worship, a place of residence, an authority's premises or the like. In essence, hate speech would not be covered.

Name of the court: Supreme Administrative Court

Date of decision: 15 January 2019

Name of the parties: *V. Simeonov v. A. Assenov*

Reference number: Decision No. 636 in case No. 7229/2018

Address of the webpage:

<http://www.sac.government.bg/court22.nsf/d038edcf49190344c2256b7600367606/211a54167a5a1cb5c225837e0034a472?OpenDocument> (in BG)

Brief summary: In a case similar to the one above, brought by a Roma individual against Valery Simeonov over the same speech, the SAC repealed a decision by the Burgas Administrative Court, which had confirmed a decision by the PADC to the effect that the speech constituted both harassment and incitement to discrimination against the Roma. The SAC held that no harassment against the Roma complainant had been established as he did not self-identify with the Roma as depicted by Simeonov. Therefore, he did not belong to those targeted by the impugned statements, and was therefore not their victim. For harassment to be at hand, a specific individual had to have been targeted. The SAC's reasoning in this decision was reproduced in the SCC's decision summarised above. The SAC explicitly attacked the PADC for having found that the impugned speech was hate speech negatively stereotyping the Roma. The SAC referred to the PADC's decision as 'aggressive moralising'. According to the SAC, by its finding that the speech in question had negatively stereotyped the Roma, the PADC had acted *ultra vires*, creating opposition between two ethnic communities – the Roma and the Bulgarians – and had impermissibly introduced a ban on a person stating that they had been the victims of criminal activity on the part of perpetrators belonging to a different ethnic group. Simeonov was free to express his views as freedom of expression covered not only 'correct' opinions. The PADC had interfered with his freedom of speech, which was a form of censorship. The PADC's

interpretation of the ban on harassment as a legitimate constraint on freedom of expression was unduly expansive. Importantly, the SAC took the view that 'the existing antagonism between the antidiscrimination law and civil liberties could not be resolved at the expense of the latter'. With this decision, which was clearly tainted by institutionalised anti-Roma racism, the Court has introduced a curb both on protection against hate speech under the PADA and on the PADC itself in respect of Roma rights defence, in particular against figures of authority.

Name of the court: Sofia City Administrative Court

Date of decision: 3 July 2019

Name of the parties: *I. K. v. PADC and L. G.*

Reference number: Decision No. 4590 in case No. 4299/2019

Address of the webpage: Temporarily unavailable on the court's webpage

Brief summary: The Sofia City Administrative Court (SCAC) repealed a decision by the PADC to the effect that the appellant, a news site editor, was liable for ethnic harassment which he committed by allowing an anti-Roma article to be published on the site he edited. According to the SCAC, L.G., the complainant before the PADC, had failed to prove that she had been personally affected by the alleged harassment by means of the impugned article. The PADC had wrongly assumed that the term 'Gypsy' used in the title was pejorative. The established case law on the usage of this term was to the effect that it was not objectively a form of unequal treatment. The PADA remedies could not be used to defend one's subjective sense of offence. There was no proof that there was an intent to harass behind the publication. The editorial team were entitled to their choice of writing style. The impugned writing was to be assessed in the context of the social problems it discussed. The freedom of expression of the media implied reflecting diverse viewpoints. It had not been proven that the editor had manifested a negative attitude or intolerance towards a specific person based on ethnicity. The lack of a specific victimised person meant the lack of a violation under the PADA.

Disability

a. Accessibility

Name of the court: Supreme Administrative Court

Date of decision: 4 June 2019

Name of the parties: *P. M. v. Plovdiv Municipality and Railway Infrastructure National Company*

Reference number: Decision No. 8325 in case No. 45/2019

Address of the webpage:

<http://www.sac.government.bg/court22.nsf/d6397429a99ee2afc225661e00383a86/25fa3c590cc27bbac225840a004bf211?OpenDocument> (in BG)

Brief summary: The SAC upheld a decision by the Plovdiv Administrative Court, which in turn had upheld a decision by the PADC whereby P. M.'s complaint had been dismissed. P. M., a three-wheeled mobility scooter user, had alleged that the respondent municipality and company were liable for maintaining a passerelle pedestrian bridge with a lift attached to it, with both those facilities being inaccessible to him as a three-wheeled scooter user. The SAC agreed with the lower instance courts that what mattered was that the bridge and lift complied with the requirements of the applicable secondary domestic legislation on accessibility, as well as with relevant EU regulations (Nos. 181/2011, 1177/2010 and 1107/2006). The SAC, like the lower court, compared the complainant to other persons with mobility issues, such as bicycle users, larger-size buggy and stroller users, etc. to whom the bridge and lift were similarly inaccessible; the complainant was not treated unequally. His mobility scooter was a non-standard mobility device whereas the applicable legislation provided for minimum accessibility rules taking into account standard devices. The court failed to discuss a comparison between the complainant and persons to whom the bridge and lift were accessible. It also failed to discuss the PADA ban on all discrimination, including treatment in line with (indirectly) discriminatory rules.

b. Access to social assistance

Name of the court: Supreme Administrative Court

Date of decision: 12 March 2019

Name of the parties: *Social Assistance Agency, Social Assistance Regional Directorate-Sofia and PADC v. L. B.*

Reference number: Decision No. 3547 in case No. 10671/2017

Address of the webpage:

<http://www.sac.government.bg/court22.nsf/d6397429a99ee2afc225661e00383a86/ef335676e034a18fc22583af0044d95b?OpenDocument> (in BG)

Brief summary: The SAC confirmed a decision by the lower court whereby a decision by the PADC against the complainant had been repealed. The complainant before the PADC, a person with a lasting mobility impairment, had been applying for a long period of time for social assistance but had been denied on grounds of not complying with secondary legislation residence requirements. The complainant lived with his mother in an area different from the one in which he was registered as having his permanent address. The authorities who turned down his numerous requests advised him to change his permanent address registration, without taking into account the difficulties implied by his disability. The SAC does not clarify what the disability-related reason was for the complainant to be unable (unduly inconvenienced) to change his permanent address, beyond merely referring to his mobility issues. The respondent body argued in its defence that no such specific reason was proven, but this argument was dismissed by the court without specific reasons in response. Implicitly, the SAC took issue with the mere (procedural) fact that the respondent body's employees denied the complainant's requests on formal grounds, without addressing in any way his individual situation. The SCAC, the lower court, held that this was a literal interpretation of the relevant rules, resulting in a denial of the complainant's right to social assistance for a prolonged period. This was unequal treatment of him in comparison with others who were able to claim inclusion by the social assistance system. The SAC agreed.

c. Genuine and determining occupational requirement

Name of the court: Supreme Administrative Court

Date of decision: 25 July 2019

Name of the parties: *M. L. and F. S. v. Zh.P.*

Reference number: Ruling in case No. 1084/2018

Address of the webpage:

<http://www.sac.government.bg/court22.nsf/d038edcf49190344c2256b7600367606/2ec5d8b80d156be7c2258442003695c7?OpenDocument> (in BG)

Brief summary: The SAC ruled *ex officio* to make a reference for a preliminary ruling to the CJEU in a case originally brought by a blind person against the chairperson of the Sofia Trial Court, Judge M. L., and another judge on the same court, F. S., for not appointing her to serve as a juror in criminal cases heard by Judge F. S. and for failing to transfer her to another judge in order to be allowed to serve as a juror. Subsequently, following the introduction of electronic random assignment of cases, the complainant had been able to serve as a juror. The judges' defence was that the principles of immediacy (of evidence appraisal), of establishing the objective truth and of decision-makers' inner conviction in criminal trials implied that having sight was a genuine and determining occupational requirement for a juror. The PADC had ruled in the complainant's favour, finding direct discrimination on grounds of disability and fining the judges, respectively, BGN 250 (EUR 125) and BGN 500 (EUR 250). On appeal by the judges, the lower court had confirmed the PADC's decision. The Court had taken into account the fact that the complainant had been able to serve as a juror after having been randomly assigned once that was made possible, which meant that she could perform the job regardless of her disability. On appeal by the judges, the SAC decided to refer the following question to the CJEU: Are the rules of Article 5(2) of the CRPD and of Articles 1(1-3) and 4(1) of Directive 2000/78/EC to be interpreted as allowing a blind person to participate in criminal trials as

a juror, or is non-blindness a genuine and determining occupational requirement for a juror, whereby the exclusion of a blind person does not amount to disability discrimination?

Religion

Name of the court: Supreme Court of Cassation

Date of decision: 18 March 2019

Name of the parties: *Jehovah's Witnesses in Bulgaria v. SKAT TV OOD*

Reference number: Decision no. 274 in case No. 5120/2017

Address of the webpage: <http://www.vks.bg/pregled-akt?type=ot-spisak&id=E9CC17F02B3BE031C22583C0004A7438> (in BG)

Brief summary: The SCC repealed a decision by the Burgas Appellate Court (BAC), which had dismissed a claim by the Jehovah's Witnesses (JWs) for non-pecuniary damages resulting from religious-based hate speech broadcast by the respondent TV company. The BAC had dismissed the claim on grounds that legal persons are incapable of suffering non-pecuniary damages (only natural persons are). The SCC reversed that finding, acknowledging that the claimant entity had standing, and its claim was substantiated as the impugned hate speech, having been televised, had reached an unlimited audience and had seriously damaged the claimant's reputation. The impugned statements, being false, constituted libel, as well as offence. They went beyond the scope of freedom of expression. The court did not qualify them under the PADA as the case had been brought under general tort law. The SCC awarded BGN 3 000 (EUR 1 500) as compensation.

Name of the court: Supreme Court of Cassation

Date of decision: 26 March 2019

Name of the parties: *Jehovah's Witnesses in Bulgaria, G. G. and N. S. v. New Media Group AD*

Reference number: Decision No. 206 in case No. 4762/2017

Address of the webpage: <http://www.vks.bg/pregled-akt?type=ot-spisak&id=E01802339E018400C22583C9002FE624> (in BG)

Brief summary: In a similar case to the one described above, the SCC repealed a decision by the SCtC, which had dismissed claims by the Jehovah's Witnesses denomination and two of its individual members for non-pecuniary damages resulting from religious-based hate speech in a newspaper article published by the respondent press company. The SCtC had dismissed the natural persons' claims on the ground that they were not personally targeted by the impugned publication. The SCtC had dismissed the denomination's claim on grounds that legal persons are incapable of suffering non-pecuniary damages. The SCC reversed those findings, acknowledging that the natural persons had standing regardless of the fact that they were not personally targeted, and the religious entity had standing as well because legal entities were in fact capable of suffering non-pecuniary damages. The SCtC held that the individuals' claims were not substantiated as they had not claimed personal damages of their own, as opposed to the damages inflicted on the denomination as such. They had claimed that they had only incurred damages as the organisation's members – which were the same damages as the organisation's damages. The organisation's claim was substantiated as the impugned hate speech, having been televised, had reached an unlimited audience and had seriously damaged its reputation. The statements, being false, constituted libel. They went beyond the scope of freedom of expression. The publisher was liable because it had a duty to verify the information published. The SCC awarded BGN 2 000 (EUR 1 000) as compensation. The court did not qualify the publication under the PADA as the case had been brought under general tort law. Its decision differs from the ones described above in anti-Roma hate speech cases, where both the SCC and the SAC have found that there is no liability where no specific individual victim is personally targeted (a community as such is targeted instead). Therefore, the current case law is inconsistent on this point.

12.3 Cases brought by Roma and Travellers

A persistent trend in Roma litigation is action against hate speech – complaints and public interest motions by Roma individuals and activists supported by NGOs coming before the PADC and the courts alleging harassment and incitement to discrimination. While the courts' case law varies, the PADC generally takes an effective stance against hate speech. In 2019, however, the two supreme courts initiated a line of precedents to curb the use of harassment and incitements bans for the purpose of anti-Roma hate speech protection. In some Roma cases involving negative stereotyping (but not in all of them, and not in cases on other grounds), they have held that a specific individual had to be personally targeted and affected for harassment to be at hand, 'abstract' statements against communities not being covered.

Another persistent trend is litigation against collective forced evictions of Roma families from public areas and/or unlawful housing (in terms of planning and building requirements).

Figures are not available.

ANNEX 1: MAIN TRANSPOSITION AND ANTI-DISCRIMINATION LEGISLATION

Country: Bulgaria
Date: 31 December 2019

Title of the law: Protection Against Discrimination Act

Abbreviation: PADA

Date of adoption: 16 September 2003

Latest relevant amendment: 19 January 2018

Entry into force: 1 January 2014

Web link: <http://lex.bg/bg/laws/ldoc/2135472223>

Grounds covered: sex, race, national origin, ethnicity, human genome, nationality, origin, religion or faith, education, beliefs, political affiliation, personal or social status, disability, age, sexual orientation, family status, property status or any other ground provided for by law or by international treaty to which Bulgaria is a party

Civil/administrative/criminal law: Civil/administrative

Material scope: Universal

Principal content: Prohibits direct and indirect discrimination, harassment, victimisation, incitement/instruction to discriminate, inaccessible environment, racial segregation; universal personal scope; reasonable accommodation duties; positive duties; shifting burden of proof; specialised body to adjudicate and promote equality; judicial remedy; class actions and *actio popularis* claims; NGO interveners; exemption from costs

Title of the law: People with Disabilities Act

Abbreviation: PDA

Date of adoption: 18 December 2018

Latest relevant amendments: n/a

Entry into force: 1 January 2019.

Web link: <https://www.lex.bg/bg/laws/ldoc/2137189213>

Grounds covered: disability

Civil/administrative/criminal law: Civil/administrative

Material scope: Universal

Principal content: Equal treatment, equal rights and non-discrimination as its aims and fundamental principles; reasonable accommodation duties employment, education, cars and traffic rules; accessibility workplaces, architecture, infrastructure, public transportation, public information, communications & technologies services, sports, services, universal design; positive measures

Title of the law: Pre-School and School Education Act

Abbreviation: PSEA

Date of adoption: 13 October 2015

Latest relevant amendment: 29 December 2018

Entry into force: 1 August 2016

Web link: www.lex.bg/bg/laws/ldoc/2136641509

Grounds covered: Disability, age

Civil/administrative/criminal law: Civil/administrative

Material scope: Education

Principal content: Equal access to education, equality and non-discrimination as its aims and fundamental principles; inclusion and accommodation requirements

Title of the law: Ordinance No 4 on Planning, Implementing and Maintaining Buildings in Accordance with the Requirements of an Accessible Environment for the Population, including People with Disabilities

Abbreviation: n/a

Date of adoption: 1 July 2009

Latest relevant amendment: 15 July 2011

Entry into force: 14 July 2009

Web link: <http://lex.bg/bg/laws/ldoc/2135639181>

Grounds covered: Disability

Civil/administrative/criminal law: Administrative

Material scope: Services (urban architecture and infrastructure)

Principal content: Building accessibility requirements

ANNEX 2: INTERNATIONAL INSTRUMENTS

Country: Bulgaria

Date: 31 December 2019

Instrument	Date of signature	Date of ratification	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)	Yes 7 May 1992	Yes 7 Sept 1992	N/A	Yes	Yes
Protocol 12, ECHR	No	No	N/A	No	N/A
Revised European Social Charter	Yes 21 Sept 1998	Yes 7 June 2000	N/A	Ratified collective complaints protocol? Yes	Yes
International Covenant on Civil and Political Rights	Yes 8 October 1968	Yes 21 Sept 1970	N/A	Yes	Yes
Framework Convention for the Protection of National Minorities	Yes 9 October 1997	Yes 7 May 1999	N/A	N/A	Yes
International Covenant on Economic, Social and Cultural Rights	Yes 8 October 1968	Yes 21 Sept 1970	N/A	No	Yes
Convention on the Elimination of All Forms of Racial Discrimination	Yes 1 June 1966	Yes 8 August 1966	N/A	Yes	Yes
ILO Convention No. 111 on Discrimination	Yes unavailable	Yes 22 July 1960	N/A	N/A	Yes
Convention on the Rights of the Child	Yes 31 May 1990	Yes 3 June 1991	N/A	N/A	Yes
Convention on the Rights of	Yes 27 Sept 2007	Yes 26 Jan 2012	N/A	No	Yes

Instrument	Date of signature	Date of ratification	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?
Persons with Disabilities					

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