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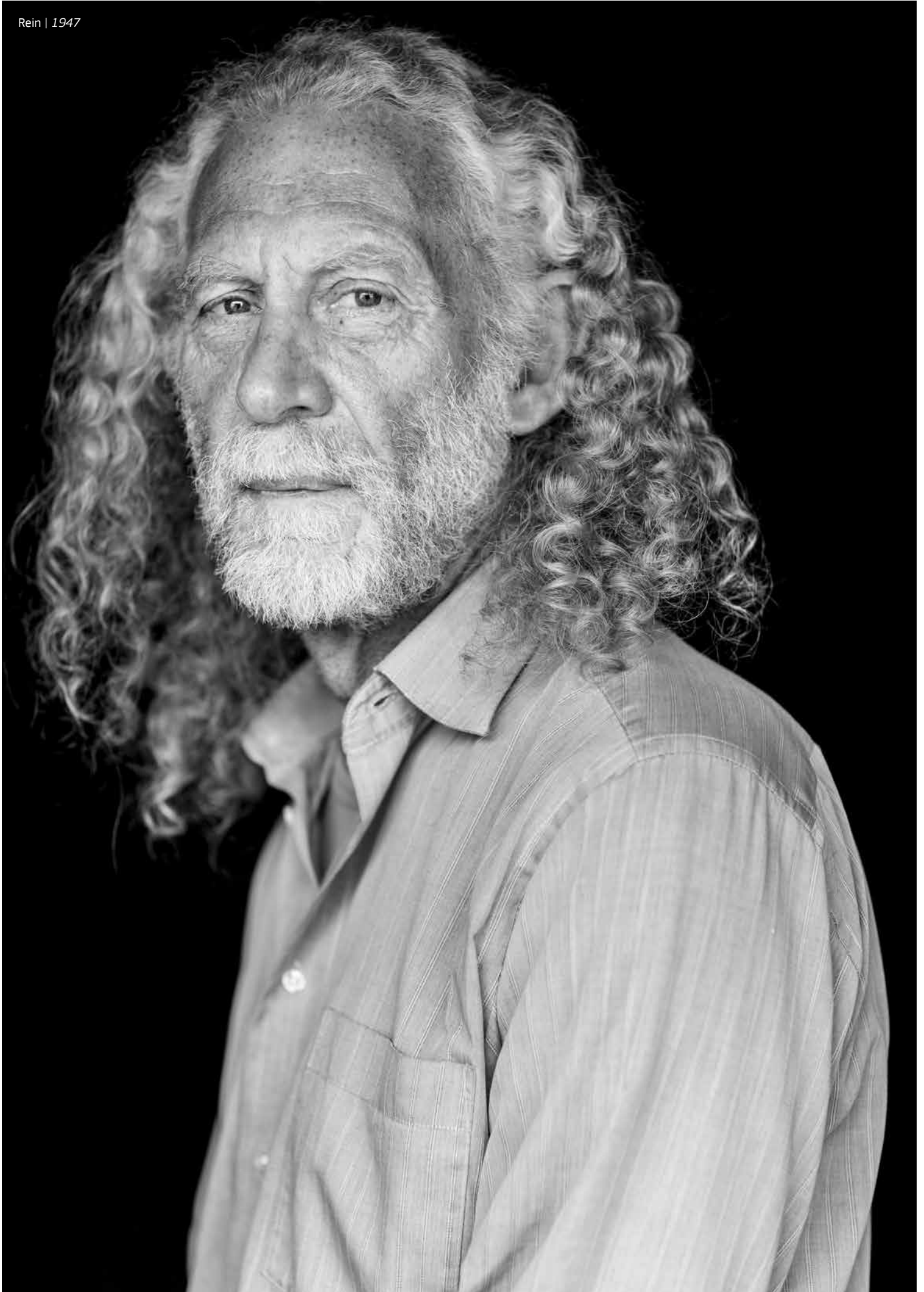
THE EUROPEAN NETWORK OF LEGAL EXPERTS
IN THE NON-DISCRIMINATION FIELD

In this Issue:

- Duty in the United Kingdom to have due regard to equality
- The concept of Discrimination by Association and its application in the EU Member States
- European Legal Policy Update
- CJEU/ECtHR Case Law Update
- European Committee of Social Rights Update
- National Legal Developments

European Anti-discrimination Law Review

No. 18 - 2014



Legal Review prepared by the European Network of Legal Experts in the non-discrimination field (on the grounds of Racial or Ethnic Origin, Religion or Belief, Disability, Age and Sexual Orientation)

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Introduction

The European Network of Legal Experts in the Non-discrimination Field has been managed by Human European Consultancy and the Migration Policy Group (MPG) since 2004. The Network covers all 28 EU Member States, the Former Yugoslav Republic of Macedonia, Turkey and the EEA countries (Iceland, Liechtenstein and Norway) and works with one national expert per country.

The aim of the Network is to monitor transposition of the two anti-discrimination directives¹ at the national level and to provide the European Commission with independent advice and information. It also produces annual country reports, a comparative analysis of anti-discrimination law, the *European Anti-discrimination Law Review* and various thematic reports. Full information about the Network, its reports, publications and activities can be found on its website: www.non-discrimination.net.

This is the eighteenth issue of the *European Anti-discrimination Law Review* produced by the European Network of Legal Experts in the Non-discrimination Field. Barbara Cohen, discrimination law consultant, analyses and comments the existing duty in the United Kingdom to have due regard to equality. Constantina Karagiorgi, former fellow at Central European University (Hungary) contributes with an article on the concept of Discrimination by Association and its application in the EU Member States.

In addition, there are updates on legal policy developments at the European level and updates from the case law of the Court of Justice of the European Union, the case law of the European Court of Human Rights and decisions of the European Committee of Social Rights. At the national level, the latest developments in non-discrimination law in the EU Member States, the Former Yugoslav Republic of Macedonia, Turkey and the three EEA countries can be found in the section on News. These sections have been prepared and written by the Migration Policy Group (Isabelle Chopin and Catharina Germaine-Sahl) on the basis of information provided by the national experts and their own research. The Review provides an overview of the latest developments in anti-discrimination law and policy (the information reflects, as far as possible, the state of affairs as of 15 January 2014).²

Two thematic reports on reasonable accommodation beyond disability written by Professors Emmanuelle Bribosia and Isabelle Rorive and on Measures to combat discrimination beyond employment written by Professor Aileen McColgan have been published. In addition, the latest update of the comparative analysis, *Developing anti-discrimination law in Europe – the 27 Member States, Croatia, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Norway and Turkey compared* has been published. Moreover, two thematic reports on sexual orientation and on the burden of proof are in preparation.

In November 2013, the Network together with the European Network of Legal Experts in the Field of Gender Equality organised their legal seminar involving representatives of the Member States, the Former Yugoslav Republic of Macedonia, Turkey and EEA countries, equality bodies and their own members. The legal seminar covered the six grounds of discrimination protected at the EU level and involved approximately 200 participants.³

Isabelle Chopin
Piet Leunis

¹ Directives 2000/43/EC and 2000/78/EC.

² This section includes a selected number of cases only. For more cases or information please check the Network's website: www.non-discrimination.net.

³ All publications as well as the results of the legal seminar can be found at <http://www.non-discrimination.net/>.

Meet ordinary people in this Review,
facing discrimination.

Members of the European Network of Legal Experts in the Non-discrimination Field

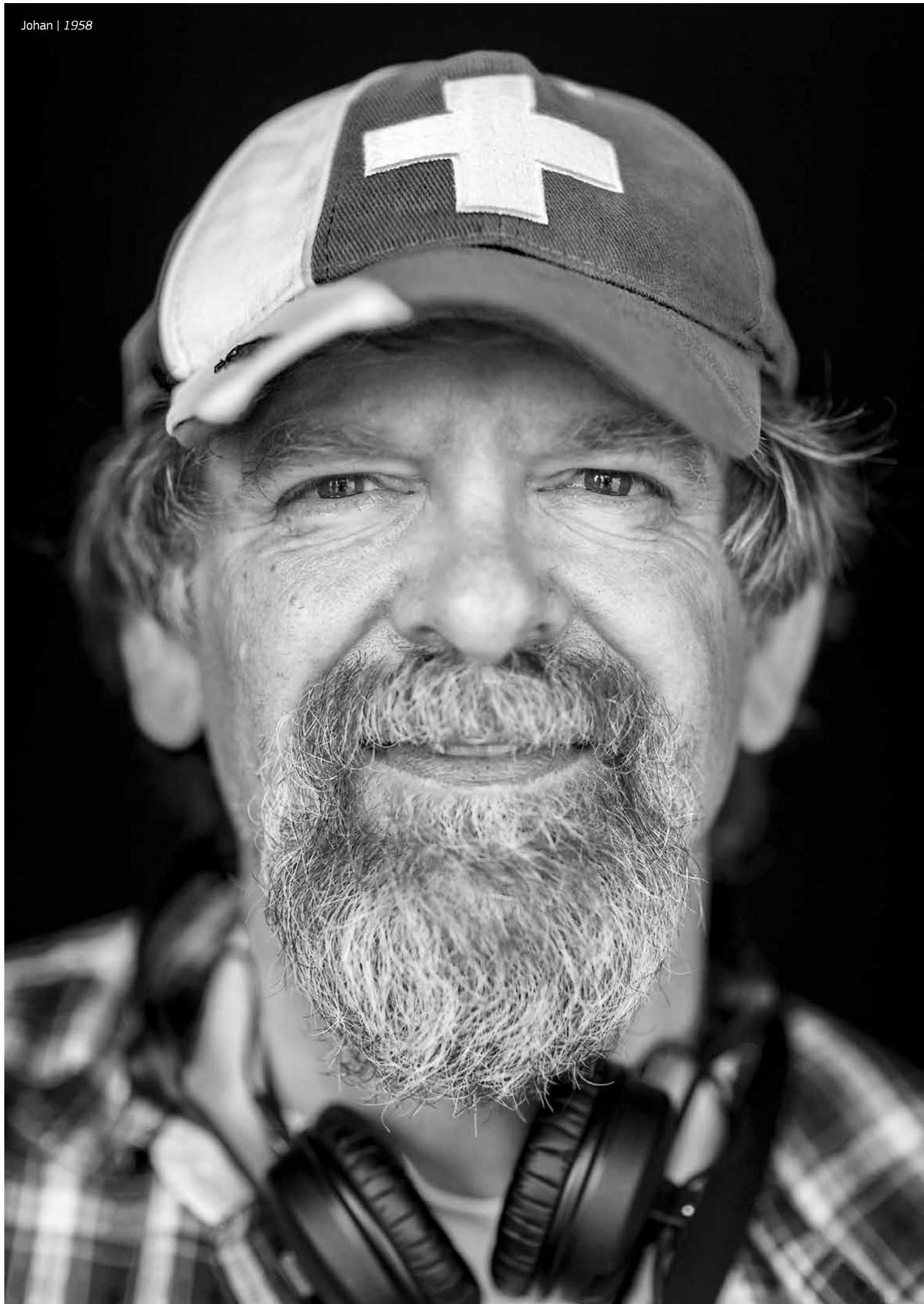
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Duty in the United Kingdom to have due regard to equality

Barbara Cohen⁴

It is incumbent upon every institution to examine their policies and the outcome of their policies and practices to guard against disadvantaging any section of our communities.⁵

...the British Government intends, as a particular priority, to create a statutory obligation on public authorities in Northern Ireland to carry out all their functions with due regard to the need to promote equality of opportunity....⁶

UK legislation has gradually recognised the pro-active role that state bodies need to assume if there is to be any real progress towards substantive equality. After nearly 50 years of anti-discrimination laws, it is clearer than ever that without enforceable means to secure institutional change, the discrimination, exclusion and prejudice which people experience daily because of race, sex, disability, sexual orientation, religion or belief or age will continue, regardless of the number of individual claims before national and European courts.

Since the mid-1970s UK anti-discrimination laws have required public authorities in carrying out their functions to have due regard to the need to promote equality of opportunity. This short article considers the development of statutory equality duties in the UK, the content of such duties, interpretations by the courts and mechanisms for enforcement; it concludes with the outcome of a recent review of the duty now in force and a brief look towards the future. The box below shows by date how equality duties have developed in Northern Ireland (NI) and Great Britain (GB).

- 1976 - The Race Relations Act 1976 (RRA), s.71 and Race Relations (NI) Order 1977, Art.67: race equality duties on local authorities
- 1994 - Guidance on Policy Appraisal for Fair Treatment (PAFT) in NI
- 1998 - NI Good Friday Agreement
- 1998 - Northern Ireland Act 1998, s.75: equality duty on public authorities carrying out functions in NI
- 1998 - Commission for Racial Equality Third Review of the RRA: proposed race equality duty on public bodies
- 1999 - Report of the Stephen Lawrence Inquiry: defined institutional racism and exposed institutional failures
- 2000 - Race Relations (Amendment) Act 2000 amended RRA s.71: new race equality duty on public authorities
- 2005 - Disability Discrimination Act 1995 amended: disability equality duty on public authorities
- 2006 - Sex Discrimination Act 1975 amended: gender equality duty on public authorities
- 2006 - Equality and Human Rights Commission established: wider powers to enforce equality duties
- 2010 - Equality Act 2010: public sector equality duty (PSED) for eight protected characteristics, providing for English, Welsh and Scottish specific duties
- 2011 - PSED in force from April
- 2012 - 2013 - Review of the PSED

⁴ As Head of Legal Policy at the Commission for Racial Equality, Barbara Cohen played a main role in securing enactment of the race equality duty. In her current capacity as a consultant she works with national equality bodies, NGOs, trade unions and public authorities in the UK, advising on effective compliance with equality duties. Outside of the UK she provides training and guidance on anti-discrimination laws and policies.

⁵ Sir William Macpherson of Cluny, Stephen Lawrence Inquiry Report, February 1999.

⁶ Good Friday Agreement, April 1998.

Northern Ireland

The Agreement which the British and Irish governments and eight Northern Irish political parties or groups signed on Good Friday 1998 provided the blueprint for Northern Ireland devolved government. The Agreement bound the British government to enact a statutory equality duty.

... the British Government intends, as a particular priority, to create a statutory obligation on public authorities in Northern Ireland to carry out all their functions with due regard to the need to promote equality of opportunity in relation to religion and political opinion; gender; race; disability; age; marital status; dependants; and sexual orientation. Public bodies would be required to draw up statutory schemes showing how they would implement this obligation.⁷

That this should be a statutory duty with wide application may have been influenced by the lack of impact of the non-statutory Policy Appraisal for Fair Treatment with which NI departments and agencies had been expected to comply.

The Northern Ireland Act 1998, giving effect to the Agreement, transposed the above paragraph into the detailed provisions of Section 75 and Schedule 9.

Section 75

- (1) A public authority shall in carrying out its functions relating to Northern Ireland have due regard to the need to promote equality of opportunity–
 - (a) between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;
 - (b) between men and women generally;
 - (c) between persons with a disability and persons without; and
 - (d) between persons with dependants and persons without.
- (2) Without prejudice to its obligations under subsection (1), a public authority shall in carrying out its functions relating to Northern Ireland have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group.

Under the Act⁸ public authorities are subject to the s.75 duty by virtue of their being subject to oversight or regulation by either the Parliamentary Commissioner (these are mainly UK-wide public authorities) or the NI Commissioner for Complaints or the NI Ombudsman. Additional public authorities can be designated by the Secretary of State. Currently there are 211 designated public authorities.

The Act in Schedule 9 prescribes the contents of the scheme which each public authority must have.⁹

A scheme, which must conform to guidance by the Equality Commission for Northern Ireland (ECNI),¹⁰ must show how the public authority proposes to fulfil its s.75 duties and must state the authority's arrangements for–

- assessing its compliance with its s.75 duties;
- consulting on matters relevant to these duties;
- ensuring and assessing public access to information and services;
- training staff;

⁷ Good Friday Agreement, April 1998, Rights, Safeguards and Equality of Opportunity, §3.

⁸ S.75(3).

⁹ §2–§8.

¹⁰ <http://www.equalityni.org/archive/pdf/S75GuideforPublicAuthoritiesApril2010.pdf>.

- with regard to the promotion of equality of opportunity: assessing and consulting on the likely impact of policies or proposed policies, monitoring adverse impact of policies, and publishing the results of such assessments and monitoring.¹¹

Before submitting a scheme a public authority must consult representatives of persons likely to be affected by its scheme. The ECNI can approve a scheme or submit it to the Secretary of State who, in turn can approve it, request a revised scheme or make a scheme for the public authority.

An authority must apply to all of their policies the key elements of a scheme:

In making any decision with respect to a policy adopted or proposed to be adopted by it, a public authority shall take into account any such assessment and consultation [on the likely impact] as is mentioned in paragraph 4(2)... carried out in relation to the policy.¹²

Schedule 9 specifies the procedure which any person directly affected by a public authority's failure to comply with its scheme can use to complain:

- A complaint must first be made to the public authority. If the complainant is not satisfied they can complain in writing to the ECNI within 12 months of their becoming aware of the matter.
- The ECNI must investigate the complaint (or give reasons for not investigating).
- The ECNI can investigate on its own initiative where it believes a public authority may have failed to comply with a scheme.¹³
- The ECNI must send a report of any investigation to the public authority, to the Secretary of State and to any complainants. If the ECNI considers that its recommended action is not taken within a reasonable time, it may refer the matter to the Secretary of State who may give directions to the public authority.

The Act does not limit enforcement of s.75 to this procedure. However, the NI Court of Appeal¹⁴ accepted that it was the intention of parliament that any alleged breach of an equality scheme should normally be dealt with under the Schedule 9 procedure, that is, with political rather than legal consequences. That judicial review might be appropriate to challenge a breach of s.75 itself was not ruled out, but in the Appeal Court's view this should be considered on a case by case basis.

In 2008 the ECNI published a comprehensive review of s.75.¹⁵ It found that while s.75 had achieved more informed, evidence based policy which reflected individuals' needs in terms of equality of opportunity and good relations, there was less evidence that the legislation had had the intended impacts and outcomes for individuals. It concluded that there was a need for public authorities to move 'away from concentrating primarily on the process of implementing Section 75, towards achieving outcomes' and set out 24 recommendations towards this end.

Great Britain

History

Going beyond the 1965 and 1968 Race Relations Acts, the Race Relations Act 1976 (RRA)¹⁶ not only prohibited discrimination but also included (s.71) a positive duty on all local authorities:

¹¹ Schedule 9, §4(2).

¹² §9(2).

¹³ Schedule 9 §1(a) and 11.

¹⁴ *In the matter of an application by Peter Neill for Judicial Review* [2006] NICA 5 (08 March 2006) §28 30.

¹⁵ Section 75 – Keeping it Effective, Final Report, 2008.

¹⁶ Identical provision for NI in Art. 67, Race Relations (NI) Order 1977.

Without prejudice to their obligation to comply with any other provision of this Act, it shall be the duty of every local authority to make appropriate arrangements with a view to securing that their various functions are carried out with due regard to the need—

- (a) to eliminate unlawful racial discrimination; and
- (b) to promote equality of opportunity, and good relations, between persons of different racial groups.

Little was ever done to clarify what local authorities were expected to do. Without provisions for reporting, monitoring or enforcement, the impact of this duty was never fully evaluated. Anecdotal evidence indicated wide variation in arrangements, some local authorities simply arranging multi-cultural social events. In the two reported cases the courts held that local authorities could not rely on s.71 to support sport or consumer boycotts of apartheid South Africa.¹⁷

In its Third Review of the RRA in 1998,¹⁸ the Commission for Racial Equality (CRE) recommended that the Act should contain a positive duty on all public bodies to work for the elimination of racial discrimination and to promote equality of opportunity and good relations between persons of different racial groups.

In July 1997 the government announced an inquiry into the failed police investigation of the racist murder of Stephen Lawrence.¹⁹ This inquiry, with its wide media coverage, and the report by its Chair, Sir William Macpherson, changed, at least for some time, how people in Britain understood racism and its impact.

The inquiry accepted the concept of ‘institutional racism’ which it defined as:

...the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness, and racist stereotyping which disadvantage minority ethnic people.²⁰

While the Metropolitan Police were the main focus of the inquiry, the actions or lack of action by other public bodies were also considered. In his conclusions Macpherson stated, as above, ‘It is incumbent upon every institution to examine their policies and the outcome of their policies and practices to guard against disadvantaging any section of our communities.’²¹

The government committed itself to implementing most of the inquiry’s recommendations. They introduced a Bill to extend the scope of the RRA to all functions of all public authorities including the police. Near the end of the parliamentary process, in response to a vigorous campaign, the government agreed to incorporate a race equality duty amending RRA s.71:

Every body or other person specified in Schedule 1A or of a description falling within that Schedule shall, in carrying out its functions, have due regard to the need –

- (a) to eliminate unlawful racial discrimination, and
- (b) to promote equality of opportunity and good relations between persons of different racial groups.

¹⁷ *Wheeler v Leicester City Council* [1985] AC 1054 and *R v Lewisham LBC ex p. Shell UK* [1986] 1 ALLER 938.

¹⁸ Reform of the RRA 1976 – Proposals from the Commission for Racial Equality – Third Review, 1998.

¹⁹ The terms of reference for the Inquiry: ‘To inquire into the matters arising from the death of Stephen Lawrence on 22 April 1993 to date, in order particularly to identify the lessons to be learned for the investigation and prosecution of racially motivated crimes.’

²⁰ The Stephen Lawrence Inquiry, Report of an Inquiry by Sir William Macpherson of Cluny, February 1999 §6.34.

²¹ Report, *op.cit.* §46.27.

The Act gave the Secretary of State power to impose specific duties on named public authorities 'for the purpose of ensuring the better performance' of the above duty.²² The CRE could serve notices to enforce compliance with the specific duties.²³

Without waiting for equivalent exposures of institutional malpractice, Parliament amended the Disability Discrimination Act 1995²⁴ and the Sex Discrimination Act 1975²⁵ to impose parallel duties.

Under each of these duties the executive imposed as specific duties steps which it considered necessary for 'better performance' of the 'general' duty. Common to all three duties were specific duties requiring authorities to have an equality scheme and arrangements for

- assessing and consulting on the likely impact of proposed policies on promotion of equality;
- monitoring policies for any adverse impact on promotion of equality;
- publishing the outcomes of assessments and monitoring; and
- monitoring workforce composition.

Equality Act 2010 – Public Sector Equality Duty

As the number of anti-discrimination laws expanded,²⁶ the call for a single equality law became stronger. In 2008 the government consulted on proposals for a bill containing a single equality duty covering all protected grounds. Despite arguments that the duty should explicitly require authorities to take steps towards the statutory equality goals, the public sector equality duty (PSED) in the Equality Act 2010 (EA2010), remained a duty to 'have due regard' to these goals.

The legal framework for the PSED is in sections 149 to 157 and Schedules 18 and 19 of the EA2010.²⁷

Section 149 defines the duty:

- (1) A public authority must, in the exercise of its functions, have due regard to the need to –
 - a) eliminate discrimination, harassment, victimisation and other conduct prohibited by or under this Act;
 - b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and
 - c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
- (2) A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).

Removing some of the uncertainty of the previous duties, s.149 states:

- (3) Having due regard to the need to advance equality of opportunity... involves, in particular, having due regard to the need to
 - a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
 - b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

²² RRA s.71(2).

²³ *Ibid.* s.71D.

²⁴ Ss.49A-49F inserted by Disability Discrimination Act 2005 (s.3).

²⁵ Ss.76A-76D inserted by Equality Act 2006 (ss.84-5).

²⁶ Mainly to implement EU directives.

²⁷ <http://www.legislation.gov.uk/ukpga/2010/15/contents> For general reference: *Technical Guidance on the Public Sector Equality Duty*, Equality and Human Rights Commission, January 2013.



- c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

These goals are the same as the aims which, under the Act,²⁸ can justify positive action. Section 149(6) affirms a role for lawful positive action, stating that compliance with the duty 'may involve treating some persons more favourably than others' but does not permit differential treatment that would otherwise be prohibited.

The 'relevant protected characteristics' are age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation. (Marriage and civil partnership is relevant only under s.149(1)(a).)

Section 149(4) reflects the different situations of disabled people:

The steps involved in meeting the needs of disabled persons that are different from the needs of non-disabled persons include, in particular, steps to take account of disabled persons' disabilities.

Section 149(5) provides further clarification, stating:

the need to foster good relations...involves, in particular, having due regard to the need to tackle prejudice and to promote understanding.

Who must comply with the duty?

The duty applies to all functions of 'a public authority' which the Act²⁹ defines as 'a person specified in Schedule 19'. Some bodies are specified in respect of certain of their functions and are therefore subject to the duty only in respect of those functions.

Additionally, a person that is 'not a public authority', i.e. not specified in Schedule 19, but who exercises public functions 'must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1).'³⁰ As the Act does not permit delegation of the duty, when a Schedule 19 public authority contracts out certain of its functions, for example, management of a prison, that authority remains liable for meeting the duty and the contractor must also meet the duty for those aspects of the contract which amount to public functions.

The scale of the task to enforce the PSED in respect of the 20,000 or more bodies named or described in Schedule 19 in addition to other persons carrying out public functions should not be underestimated.

Certain public functions are excluded from the scope of the PSED³¹ including:

- a) for age, certain functions involving provision of education, benefits or services to pupils in school; accommodation, benefits and services under certain Children Acts;
- b) for age, race (nationality and ethnic or national origins) and religion or belief, immigration and nationality functions – s.149(1)(b) – the need to advance equality of opportunity – does not apply;
- c) judicial functions;
- d) Parliament, Scottish Parliament, Welsh National Assembly and functions connected with their proceedings, General Synod of the Church of England and the security services.

²⁸ S.158.

²⁹ S.150(1).

³⁰ S.149(2).

³¹ Schedule 18.

Specific duties

A Minister of the Crown, the Scottish Ministers and the Welsh Ministers may³² make regulations imposing duties on all or certain public authorities ‘for the purpose of enabling the better performance ... of the duty imposed by s.149(1).’

In August 2010 the government consulted on proposed specific duties which were far less prescriptive than those that had applied under previous equality duties. In January 2011 draft regulations were published. In March 2011 the government withdrew the draft regulations and opened fresh consultation on only two ‘flexible, proportionate and light touch’ duties. In September 2011 the following duties for central government, national public authorities and English public authorities³³ came into force:

- A duty to publish at least annually information to demonstrate compliance with the duty imposed by s.149(1) including, in particular, information relating to persons who share a relevant protected characteristic who are
 - a) its employees (if the authority has 150 or more employees);
 - b) other persons affected by its policies and practices, for example service users.
- A duty to prepare and publish at least every four years one or more objectives the authority thinks it should achieve to do any of the things mentioned in paragraphs 149(1)(a) to (c). Such objectives must be specific and measurable.
- The authority must publish the information and objectives in a manner that is accessible to the public, which may be within another published document.

The author was aware that many public authorities had perceived compliance with the race, disability and gender duties primarily in terms of compliance with the detailed specific duties, possibly finding it easier to carry out concrete steps than to demonstrate they had had ‘due regard’. Therefore, it was not surprising that many public authorities interpreted the new ‘light touch’ specific duties as an indication that the PSED itself was to be given less weight than the earlier duties.

In stark contrast, Welsh Ministers have imposed on Welsh public authorities 14 detailed, multi-layered, highly prescriptive PSED specific duties;³⁴ and Scottish Ministers, after extended deliberations, imposed on Scottish public authorities nine quite detailed and prescriptive specific duties.³⁵ Ministers in Wales and Scotland incorporated duties relating to public procurement functions which the Act had envisaged.³⁶

Equality Impact Assessment

In cases concerning alleged breach of an equality duty, the question which the courts are often asked to decide is whether the authority had failed to carry out an equality impact assessment (EIA). ‘EIA’ is used to describe a structured process³⁷ in which, if an initial screening indicates potential impact of a policy on particular group(s), this is followed by detailed scrutiny of actual or potential impact using existing data, consultations, surveys, etc. In GB neither primary nor secondary legislation has required the carrying out of an EIA, and the courts have consistently confirmed that compliance with the equality duties is not dependent on conducting an EIA. However the courts have acknowledged that a timely and carefully conducted EIA is one way to give proportionate consideration to relevant equality matters. For example, in a recent

³² Ss.153-155.

³³ Equality Act 2010 (Specific Duties) Regulations 2011 S.I. 2011 No 2260.

³⁴ Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011 S.I. 2011 No 1064.

³⁵ Equality Act 2010 (Statutory Duties) (Scotland) Regulations 2012 S.I. 2012 No 162.

³⁶ S.155.

³⁷ The process had been developed in NI by the ECNI.

case³⁸ in which a decision to reconfigure mental health services was unsuccessfully challenged based on the absence of an adequate EIA, the court ruled:

There is no formal duty to carry out a formal impact assessment... the absence or existence of an EIA in any particular case is not determinative of the issue.

... an EIA is ...not ... a requirement... it is a tool whereby a decision-maker may inform its efforts to comply with section 149.

Enforcement of equality duties

As in NI, the GB legislation imposing equality duties gave the relevant equality bodies specific powers to enforce compliance. The Equality Act 2006 (EA2006) established the Equality and Human Rights Commission (EHRC) and gave it wider enforcement powers to enforce equality duties than its predecessor race, disability and gender equality bodies had had.³⁹ These powers now apply to the PSED:

- If the EHRC thinks a body has failed to comply with the PSED or a specific duty it can serve a notice requiring the body:
 - to comply with the PSED and/or specific duties
 - to give the EHRC, within a specified time, information regarding the steps it has taken or is intending to take to comply with the PSED or specific duties.⁴⁰
- However, before serving a notice requiring compliance with the PSED (s.149) the EHRC must carry out a formal assessment of that body's compliance and the notice must relate to the results of that assessment.⁴¹
- If the EHRC thinks a body has failed to comply with a notice, it may apply to the court for an order requiring compliance.

Little use has been made of these powers. Between October 2007 and October 2013 the EHRC had issued a total of six compliance notices (three under the gender equality duty and three under the race equality duty) and had conducted three formal assessments.⁴²

Since 2005, judicial review⁴³ has become the primary means by which interested parties have challenged an act/decision of a public authority which they believe is non-compliant with its equality duties.

From July 2005 to mid-October 2013 the High Court for England and Wales heard 95 applications for judicial review alleging breach of the previous duties or the PSED; of these 27 were successful or partially successful, and six further cases succeeded on appeal.⁴⁴ In contrast, as at June 2013 there had been only one such case in Scotland.⁴⁵

³⁸ *R (Copson) v Dorset Healthcare University NHS Foundation Trust* [2013] EWHC 732 (Admin) §54. and §57(5).

³⁹ S.32 EA2006 as amended by §19(2), Schedule 26 EA2010.

⁴⁰ *Ibid.*

⁴¹ Ss.31,32, Schedule 2 EA2006 To carry out an assessment the EHRC must publish terms of reference, can require the provision of information or documents or attendance to give oral evidence and must publish a report of its findings.

⁴² Response by EHRC to Freedom of Information Request, 25/10/2013.

⁴³ Judicial review is a procedure in English and Scottish administrative law by which the courts on application by an individual supervise the exercise of power by public authorities or other persons exercising public functions. It is concerned not with the merits of a decision, but whether the person has acted unlawfully, on grounds of illegality, irrationality (unreasonableness) and/or procedural impropriety.

⁴⁴ 'Litigating the PSED: the story so far', Aileen McColgan (work in progress Oct. 2013).

⁴⁵ http://www.murraystable.com/assets/files/articles/The_Public_Sector_Equality_Duty_26_June_2013.pdf.

In practice in England and Wales, the formal letter before claim⁴⁶ often secures the result a claimant is seeking without the need to commence proceedings. Decisions by public bodies in which the courts have upheld claims of breach of equality duties include decisions:

- to change the training regime for international medical students in the UK;⁴⁷
- to amend rules on the use of forceful restraint of children in secure training centres;⁴⁸
- to cut funding of NGOs serving ethnic minority women, Gypsies and Travellers, and disabled people;⁴⁹
- to close local public libraries;⁵⁰
- to introduce exceptions to the right to receive a deportation notice.⁵¹

Judgments of the High Court and appellate courts have provided greater clarity as to what a public authority must do to meet the PSED 'due regard' duty, and this guidance has begun to influence public authority decision-making.

In a case challenging the proposed closure of a local post office as a breach of the disability equality duty, the High Court⁵² established the following principles:

First, those in the public authority who have to take decisions that do or might affect disabled people must be made aware of their duty to have 'due regard' to the identified goals.

Secondly, the 'due regard' duty must be fulfilled before and at the time that a particular policy that will or might affect disabled people is being considered by the public authority in question. It involves a conscious approach and state of mind.

Thirdly, the duty must be exercised in substance, with rigour and with an open mind. The duty has to be integrated within the discharge of the public functions of the authority.

Fourthly, the duty is... non-delegable [and]... will always remain on the public authority charged with it...

Fifthly ...the duty is a continuing one.

Sixthly, it is good practice for those exercising public functions in public authorities to keep an adequate record showing that they had actually considered their ...equality duties and pondered relevant questions.

While recognising that most challenges to public authority decisions arise because of dissatisfaction with the content, the courts are clear that in a claim under the PSED their role relates only to how a decision is made:

...it is important to emphasise that the ...duty is not a duty to achieve a result, namely to eliminate unlawful racial discrimination or to promote equality of opportunity and good relations between persons of different racial groups. It is a duty to *have due regard to the need* to achieve these goals. The distinction is vital.⁵³

⁴⁶ http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_jrv.

⁴⁷ *R (BAPIO Action Ltd.) v Secretary of State for the Home Department* [2007] EWHC 199 (QB).

⁴⁸ *R (C) v Secretary of State for Justice* [2008] EWCA882.

⁴⁹ *R (Chavda) v Harrow LBC* [2007] EWHC 3064 Admin; *R (Kaur & Shah) v LB Ealing* [2008] EWHC 2026 Admin; *R (Barrett) v Lambeth LBC* [2012] EWHC4557 Admin; *R (Harjula) v London Councils* [2011] EWHC448 Admin.

⁵⁰ *R (Williams) v Surrey CC* [2012] EWHC867 QB.

⁵¹ *JM & NT v Isle of Wight Council* [2011] EWHC 2911 Admin.

⁵² *R (Brown) v (1) Secretary of State for Work and Pensions (2) Secretary of State for Business, Enterprise and Regulatory Reform* [2008] EWHC 3158 (Admin) §90-96.

⁵³ *R (Baker) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141.

The public sector equality duty is not a back door by which challenges to the merits of decisions may be made.⁵⁴

The ... court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker.⁵⁵

Review of the PSED

The Equality Act was approved just before the general election in May 2010. While the parties forming the coalition government had not opposed it, the Act was not exempt from the government's campaign to rid the UK of unnecessary bureaucratic burdens. In introducing the Red Tape Challenge, its inter-active on-line scrutiny of laws regulating every area of activity, the government proclaimed, '... this government has set a clear aim: to leave office having reduced the overall burden of regulation.'⁵⁶

In May 2012 the Home Secretary announced,⁵⁷ 'We committed last year to assess the effectiveness of the PSED specific duties. We have decided to bring forward that review and extend it to include both the general and specific duties to establish whether the Duty is operating as intended.'⁵⁸

Terms of reference of the Review were published, an independent Steering Group was appointed, qualitative research by external consultants was commissioned and there was a public call for evidence. Round-table discussions were organised with different groups of stakeholders, including public authorities, NGOs, equality and diversity practitioners and claimants' lawyers. Desk-based research was carried out by the Government Equalities Office.

It was inevitable that the review of the PSED would create added uncertainty for public authorities: would the PSED be repealed wholly, in part or not at all? This uncertainty was heightened by the Prime Minister's remarks in November 2012:⁵⁹

Take the Equality Act. It's not a bad piece of legislation. But in government we have taken the letter of this law and gone way beyond it, with Equality Impact Assessments for every decision we make... We don't need all this extra tick-box stuff. So ...today we are calling time on Equality Impact Assessments. You no longer have to do them... policy-makers are free to use their judgement and do the right thing to meet the equalities duty rather than wasting their own time and taxpayers' money.

The Independent Steering Group reported in September 2013. It concluded that it was too early to evaluate whether the duty is 'working as intended' and recommended that this should take place in 2016. Lacking sufficient data, it had been unable to do a cost/benefit analysis of the PSED, and in relation to other issues within the terms of reference, the evidence it received was either contradictory or inadequate.

⁵⁴ Copson, *op. cit.* §57(4).

⁵⁵ *R (Hurley and Moore) v Secretary of State for Business, Innovation and Skills*, [2012] EWHC 201 Admin §78.

⁵⁶ <http://www.redtapechallenge.cabinetoffice.gov.uk/about/>.

⁵⁷ Written Ministerial Statement, Tuesday 15 May 2012.

⁵⁸ '...the government's aim in introducing the PSED [is]...to build on the previous equality duties, to simplify the previous duties and to extend the duty to other protected characteristics; to be outcome focused; and to reduce the bureaucracy associated with the previous duties.' *Review of the Public Sector Equality Duty: Report of the Independent Steering Group*, Government Equalities Office, 6 September 2013, Executive Summary §10.

⁵⁹ 19 November 2012: <https://www.gov.uk/government/speeches/prime-ministers-speech-to-cbi>.



The qualitative research⁶⁰ found mixed but generally positive views regarding the PSED, using on-line questionnaires and in-depth interviews involving 83 public authorities. The research institute NatCen reported a general view that the PSED either was working well or had the potential to do so, and it would be a backwards step to change it significantly; the legal leverage offered by the [statutory] duty was felt to be a necessary condition to ensure that equalities work gets done. Participants called for improved guidance and more effective enforcement.

The Steering Group made nine recommendations, reflecting its view that authorities should not go beyond minimum compliance:

- The EHRC should produce clearer, shorter, bespoke guidance on minimum requirements;
- Inspectorates and ombudsmen should integrate the PSED in their core functions;
- Public authorities should:
 - adopt a 'proportionate approach' to compliance and not seek to 'gold plate' (to go beyond what is strictly necessary);
 - collect diversity data only 'if it is necessary' to do so;
 - reduce burdens on small employers in procurement;
 - not impose disproportionate burdens on contractors regarding equality data;
- Contractors should refer 'potentially inappropriate equality requirements' to the Cabinet Office;
- Government should:
 - modify specific duties so public bodies publish data proportionately;
 - consider ways other than judicial review for reconciling disputes.

The Minister for Women and Equalities endorsed the Group's recommendations emphasising in particular her wish to see a reduction in 'procurement gold-plating by the public sector' and alternatives to judicial review for the enforcement of the PSED.⁶¹

What does the future hold for the PSED?

Major legislative change to the PSED or specific duties before the general election in May 2015 is unlikely.

What may already be changing, however, is the weight public authorities feel obliged to give to complying with the PSED. In the author's view, as a consequence of the Review and the government's endorsement of the Steering Group's recommendations, many authorities may now feel they can safely do less.

The possibility of legal challenge – if authorities should have done more – may be reduced under separate government proposals to restrict access to – and legal aid funding for – judicial review.⁶²

⁶⁰ *Views and experiences of the Public Sector Equality Duty (PSED), Qualitative research to inform the review*, NatCen Social Research, September 2013.

⁶¹ Ministerial Written Statement, 6 September 2013.

⁶² **England and Wales:** Part 4 of the Criminal Justice and Courts Bill 2014. <http://www.publications.parliament.uk/pa/bills/cbill/2013-2014/0192/14192.pdf> The Bill requires a court to refuse leave to bring proceedings based on its assessment of the effect on the applicant of the decision or action at issue. The Bill also affects the liability for costs of applicants with limited means. The Civil Legal Aid (Remuneration) (Amendment) (No 3) Regulations 2014, <http://www.legislation.gov.uk/uksi/2014/607/made>. The regulations, by restricting payment out of legal aid funds for leave applications, will deter lawyers from taking on such cases and ultimately will exclude persons with limited means from access to judicial review.

Scotland: The Courts Reform (Scotland) Bill 2014, www.scottish.parliament.uk/parliamentarybusiness/Bills/72771.aspx. The Bill, by introducing time limits and a permission stage for judicial review, will inevitably reduce the number of cases the Scottish courts will hear.

Will there be the comprehensive review in 2016? It is too soon to know what steps the next government will take; more fundamentally, it is too soon to know what value the next government will give to the achievement of the equality goals of the PSED.

The concept of discrimination by association and its application in the EU Member States

Constantina Karagiorgi⁶³

Introduction⁶⁴

‘Discrimination by association’ was first introduced into the EU legal order by the Court of Justice of the European Union (CJEU)⁶⁵ with the *Coleman* case.⁶⁶ Its introduction is a positive development for EU non-discrimination law as this concept attaches liability to the discriminatory act, regardless of whether the victim possesses one of the protected (against discrimination) characteristics. Even though *Coleman* concerns disability, the Court’s interpretation of Directive 2000/78/EC⁶⁷ suggests that the concept is applicable to all grounds contained in the Directive, i.e. religion or belief, disability, age or sexual orientation. However, in the absence of clarification by the Court, it remains unclear whether the concept applies to all grounds listed in the Directive, or even to other fields besides employment and occupation. Moreover, other issues arise concerning the definition of the ‘association’ and whether the concept applies to cases of indirect discrimination.

This article examines how the concept is interpreted and applied by the EU Member States through a qualitative analysis of the Country Reports⁶⁸ drafted by the members of the European Network of Legal Experts in the Non-Discrimination Field. It aims to evaluate whether the concept, as introduced in *Coleman*, is applicable in the EU Member States. It starts by analysing the concept and its foreseeable implications. Subsequently, it examines whether and how the EU Member States have implemented the concept in their national legislation and case law. Finally, it assesses the concept’s applicability, whether the foreseeable implications have occurred in practice and how the Member States have dealt with those issues. This provides valuable input on the applicability of the concept and its future development so as to effectively impose liability for acts of discrimination by association.

‘Constructing’ the concept: the *Coleman* case

Discrimination by association occurs when someone is discriminated against by virtue of his/her association with someone who possesses one of the protected characteristics, without having the characteristic him/herself. For example, in the *Coleman* case,⁶⁹ Ms Coleman claimed she was subjected to discrimination

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⁶⁴ This article is based on the LLM thesis written for the Department of EU law of Leiden Law School under the supervision of Prof. Rikki Holtmaat.

⁶⁵ Hereinafter referred to as ‘the Court’.

⁶⁶ Case C-303/06, *S. Coleman v Attridge Law and Steve Law* [2008] ECR I-05603.

⁶⁷ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

⁶⁸ The Country Reports (2012) drafted by the members of the European Network of Legal Experts in the Non-Discrimination Field present the state of affairs up to 1 January 2013. The Reports focus on the transposition and implementation of Directives 2000/78/EC and 2000/43/EC. Therefore the applicability of the concept will be examined especially with respect to the grounds covered in these two directives, i.e. on grounds of religion or belief, disability, age and sexual orientation and racial or ethnic origin. The reports can be found at: <http://www.non-discrimination.net/>.

⁶⁹ Case C-303/06, *S. Coleman v Attridge Law and Steve Law* [2008] ECR I-05603.

because she was the mother of a child with a disability. As such, she suffered discrimination by association with respect to disability.⁷⁰

The case concerned the interpretation of Directive 2000/78/EC and the reference was made in the course of proceedings between Ms Coleman and Attridge Law and Steve Law.⁷¹ Ms Coleman claimed that she was subjected to unfair dismissal and less favourable treatment because she was the primary carer of a child with a disability.⁷² The national court, in its reference to the CJEU, asked in essence whether the Directive protects employees because of their association with a person who has a disability, although they do not have the disability themselves.⁷³

The Advocate General⁷⁴ referred to Article 19 TFEU as the foundation of Directive 2000/78/EC.⁷⁵ The Article assigns competence to the EU to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Advocate General Maduro noted that the Article expresses commitment to the principle of equal treatment and non-discrimination and that the Directive is the practical aspect of this principle.⁷⁶ He also pointed out that when determining what equality entails, one must recall the values underlying equality: human dignity and personal autonomy.⁷⁷ He argued that the dignity and autonomy of the person is equally affected by seeing someone else suffering discrimination because of being associated with him/her and that such situations must also be caught by anti-discrimination legislation.⁷⁸ By pointing out the importance of the words 'on the grounds of', he explained that the Directive excludes these grounds from the range of reasons an employer may use to treat an employee less well than another.⁷⁹ Therefore, including discrimination by association in the scope of direct discrimination 'is the natural consequence' of this exclusionary mechanism.⁸⁰ He noted that what matters is the ground of the discriminatory act. Thus, he concluded, when disability is used as a reason to treat someone less well, then the person is a victim of unlawful discrimination on the ground of disability, even without having the disability him/herself.⁸¹

In its judgment, the Court reaffirmed the Directive's purpose of combatting all forms of discrimination on grounds of, *inter alia*, disability in the field of employment and occupation.⁸² It referred to Article 2(2) (a) of the Directive on direct discrimination and noted that it does not follow from this provision that the principle of equal treatment 'is limited to people who themselves have a disability.'⁸³ The Court reiterated the Advocate General's opinion that the Directive operates by reference to the protected grounds and not with regard to a certain category of people.⁸⁴ It stated that interpreting the Directive in a way that limits its application only to people who have a disability 'is liable to deprive that directive of an important element

⁷⁰ Although the *Coleman* case refers to direct discrimination by association and harassment by association, for the purpose of this research it will be analysed only with regard to direct discrimination.

⁷¹ Case C-303/06, *op. cit.* §§1-2.

⁷² *Ibid.*, §22.

⁷³ *Ibid.*, §§25-27.

⁷⁴ Opinion of Advocate General Poiares Maduro of 31 January 2008, Case C-303/06, *S. Coleman v Attridge Law and Steve Law* [2008] ECR I-05603.

⁷⁵ Previous Article 13 EC.

⁷⁶ AG's Opinion, *op. cit.* §8; for further elaboration on the principle of equal treatment see Tridimas, T. (2007), *The General Principles of EU Law* (2nd ed.), OUP; Ellis, E. and Watson, P. (2012), *EU Anti-Discrimination Law*, OUP.

⁷⁷ *Ibid.*, §9.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*, §18.

⁸⁰ *Ibid.*, §19.

⁸¹ *Ibid.*

⁸² Case C-303/06, *op. cit.* §§34,38.

⁸³ *Ibid.*, §38.

⁸⁴ *Ibid.*, §46.

of its effectiveness and to reduce the protection which it is intended to guarantee.⁸⁵ The Court concluded that the Directive ‘...must be interpreted as meaning that the prohibition of *direct discrimination* laid down by those provisions is *not limited only to people who are themselves disabled*. Where an employer treats an employee who is not himself disabled less favourably than another employee is, has been or would be treated in a comparable situation, and it is established that the less favourable treatment of that employee is *based on the disability of his child*, whose care is provided primarily by that employee, such treatment is contrary to the prohibition of direct discrimination laid down by Article 2(2)(a).’⁸⁶

Analysis: foreseeable implications

Discrimination by association is admittedly a positive development in EU non-discrimination law; however, there are some implications that may derive from the *Coleman* judgment and the concept as such which should not be disregarded. Tracing these implications will assist us in fully understanding the concept, as well as its prospects for future development. There are three main topics that may have implications: referred grounds, establishing the association and indirect discrimination.

Referred grounds

Although the *Coleman* judgment was delivered with respect to disability, from an initial reading of the case one may conclude that discrimination by association applies to all grounds referred to in Directive 2000/78/EC, namely: religion or belief, disability, age and sexual orientation.⁸⁷ This is because the underlying rationale of the judgment is applicable to all prohibited grounds contained in the Directive.⁸⁸

Another question that arises is whether discrimination by association applies to other grounds and in other fields besides employment and occupation that are provided for in the anti-discrimination directives.⁸⁹ It is argued that due to the identical wording of the anti-discrimination directives relating to racial equality (Directive 2000/43/EC), sex equality (Directive 2006/54/EC) and access to goods and services (Directive 2004/113/EC) with respect to the prohibition of direct discrimination, discrimination by association can apply to all anti-discrimination directives.⁹⁰ For Pilgerstorfer and Forshaw (2008) ‘it is absolutely clear that the judgment is applicable [...] due to the parity of language in the relevant Directives...’⁹¹ Nevertheless, such a conclusion is not absolutely clear. Waddington (2009) notes ‘it may be premature to conclude from the judgment that discrimination by association is prohibited in all situations, on all grounds, and

⁸⁵ *Ibid.*, §51.

⁸⁶ *Ibid.*, §§56, 64, emphasis added.

⁸⁷ Eriksson, A. (2009), ‘European Court of Justice: Broadening the Scope of European non Discrimination Law’, *International Journal of Constitutional Law*, Vol. 7, No 4, p. 751.

⁸⁸ *Ibid.*; Pilgerstorfer, M. and Forshaw, S. (2008), ‘Transferred Discrimination in European Law’, *Industrial Law Journal*, Vol. 37, No 4, p. 389; Toggenburg, G. N. (2008), ‘Discrimination by association: A notion covered by EU equality law?’ *European Law Reporter*, No 3, p. 87; O’Meara, N. and Baade, B. (2008), ‘Discrimination by association in EC law – Case C-303/06, *Coleman v Attridge Law*’, *Bulletin of International Legal Developments*, Vol. 19, p. 220.

⁸⁹ Waddington, L. (2007) ‘Protection for Family and Friends: Addressing Discrimination by Association’, *European Anti-Discrimination Law Review*, No 5, p. 14; Connor, T. (2010) ‘Case C-303/06 *Coleman v. Attridge Law and Steve Law* Judgment of the ECJ 17 July 2008; Discrimination by Association: A Step in the Right Direction’, *Journal of Social Welfare and Family Law*, Vol. 32, No 1, p. 64; Brottes, J. (2013) ‘The protection from discrimination and harassment by association in EU law: ECJ judgment of 17 July 2008, *Coleman*’, *International Journal of Human Rights and Constitutional Studies*, Vol. 1, No 1, p. 88.

⁹⁰ Connor (2010), *op. cit.* pp. 64, 68; Waddington (2007), *op. cit.* p. 14; Brottes (2013), *op. cit.* p. 88; Eriksson (2009), *op. cit.* p. 751; Pilgerstorfer, M. and Forshaw, S. (2008), *op. cit.* p. 389; Honeyball, S. (2007) ‘Discrimination by Association’, *Web Journal of Current Legal Issues*, No 4, p. 3; Waddington, L. (2009) ‘Case C-303/06, *S. Coleman v. Attridge Law and Steve Law*, Judgment of the Grand Chamber of the Court of Justice of 17 July 2008’, *Common Market Law Review*, Vol. 46, p. 674.

⁹¹ Pilgerstorfer, M. and Forshaw, S. (2008), *op. cit.* p. 389, emphasis added.

Lucas | 1992



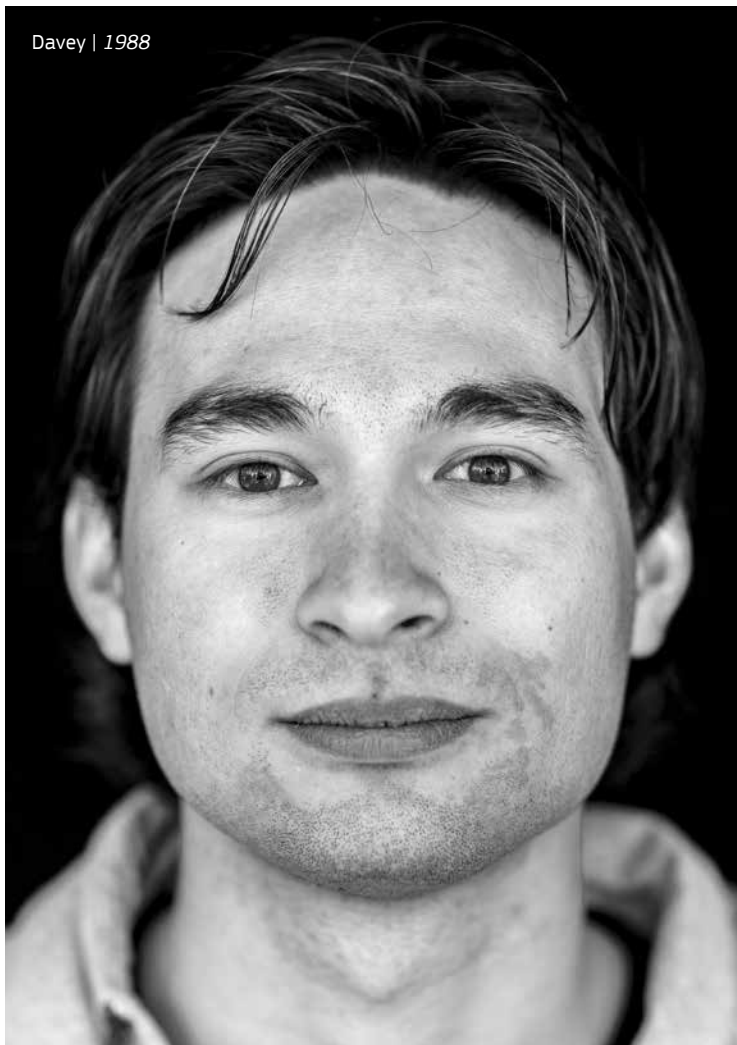
Judith | 1993



Inez | 1962



Davey | 1988



for all forms of discrimination.⁹² In this respect, Ellis and Watson (2012) point out that even though the reasoning of the Court ‘clearly suggests’ that discrimination by association ‘applies to all the types of discrimination proscribed by EU law’, this needs to be confirmed by the Court.⁹³ It is therefore interesting to examine whether the Member States interpret the concept as applicable to all grounds mentioned in Directive 2000/78/EC as well as Directive 2000/43/EC.⁹⁴

Establishing the association

The establishment of the association or relationship with the person having the particular characteristic may also have implications. If, for instance, we are to accept that discrimination by association applies to all grounds listed in Article 19 TFEU, how is the relationship between the person having the characteristic and the person facing direct discrimination because of his/her association with the latter defined and what are the boundaries of this relationship? Is it enough if they just happened to enter a bar together and they were denied entry because one had certain characteristics?⁹⁵ Even though such a treatment falls within the Advocate General’s reasoning regarding the dignity and personal autonomy of the person, we cannot answer these questions confidently due to the lack of indication from the Court.

If we focus on the exact phrasing of the Court ‘...based on the disability of his child, *whose care is provided primarily by that employee*’,⁹⁶ the question arises as to the proximity of the relation between the carer and the person who has a disability.⁹⁷ It is argued that the Court has ‘inadvertently established a concept of “primary” and “secondary” carer with respect to disability discrimination law’.⁹⁸ It is debatable, however, if this was accidental or if the Court wanted to establish a certain legal test. Waddington (2009) indicates that ‘[w]hilst the Court certainly did not hold that the closeness of the relationship, and the level of dependency of the child, were determinant for finding that protection existed from discrimination by association, a very narrow reading of the judgment could lead one to conclude that not all levels of association would merit equal protection’.⁹⁹ Although the employee would still be a victim of a discriminatory act irrespective of him/her being the primary or secondary carer, as Connor (2010) demonstrates, an indication by the Court of the employer’s liability in such circumstances would provide certainty regarding the concept’s application.¹⁰⁰ Examining the country reports will illustrate whether the Member States have any provisions in this regard.

Indirect discrimination

Since *Coleman* refers to direct discrimination and harassment,¹⁰¹ it is uncertain whether discrimination by association can also apply to cases of indirect discrimination. Article 2(2)(b) of Directive 2000/78/EC specifies that indirect discrimination is ‘where an apparently neutral provision [...] would put *persons*

⁹² Waddington (2009), *op. cit.* p. 672.

⁹³ Ellis, E. and Watson, P. (2012), *EU Anti-Discrimination Law*, OUP, p. 147.

⁹⁴ The focus is solely in those two Directives, as the research is based on Member States’ reports on ‘Measures to Combat Discrimination under Directive 2000/43/EC and Directive 2000/78/EC.’

⁹⁵ See Irish case *Six Complainants v a Public House*, Country Report for Ireland (2012), p. 25.

⁹⁶ Case C-303/06, *op. cit.* §§56, 64, emphasis added.

⁹⁷ Hervey, T. *et al* (2008) ‘Case C-303/06 *Coleman v. Attridge Law and Steve Law* Judgment of the ECJ 17 July 2008; Judgment of the Employment Tribunal, London, 30 September 2008’, *Journal of Social Welfare and Family Law*, Vol. 31, No 3, p. 314.

⁹⁸ Connor (2010), *op. cit.* p. 64.

⁹⁹ Waddington (2009), *op. cit.* p. 672.

¹⁰⁰ Connor (2010), *op. cit.* p. 64.

¹⁰¹ The Court reasoned based on direct discrimination and harassment, but, as stated above, for the purpose of this research the issue of harassment by association will not be addressed.

having a particular [...] *disability* at a particular disadvantage compared with other persons.’¹⁰² The Court made no reference to indirect discrimination whatsoever and it is questionable whether it was deliberately excluded.¹⁰³ Unlike the Court, the Advocate General made a reference to it when he mentioned that the prohibition of indirect discrimination operates as an inclusionary mechanism ‘by obliging employers to take into account and accommodate the needs of *individuals with certain characteristics*.’¹⁰⁴ He further noted that ‘even if we were to accept [...] that discrimination by association is clearly outside the scope of the prohibition of indirect discrimination that does not mean in any way that it also falls outside the scope of the prohibition of direct discrimination.’¹⁰⁵ A literal interpretation of the wording of Article 2(2)(b),¹⁰⁶ alongside the Advocate General’s comments, leads us to infer that discrimination by association cannot be applied to instances of indirect discrimination.¹⁰⁷

Indirect discrimination by association may occur where an employer’s neutral policy or practice puts an employee in a disadvantaged position because of his/her association with someone who possesses one of the protected characteristics. For example, an employer’s policy not to allow anyone to work part time, although it applies equally to all employees, may disadvantage an employee who has a relative with a disability and needs to work part time to care for him/her. Another example can be when an employer does not allow any employee to take annual leave during a very busy working period. This policy, although neutral, may disadvantage an employee asking for leave to celebrate a Jewish holiday with his/her Jewish partner.

In this respect Connor (2010) suggests there is a ‘flaw in the system of protection’ offered by the Directive; hence, the CJEU should define this in the future.¹⁰⁸ Waddington (2009) proposes that the Court should interpret the Directive to include indirect discrimination by association on the basis that this would be in accordance with the broad purpose of the Directives.¹⁰⁹ However, she further notes that this would probably be an ‘ambitious’ interpretation by the Court.¹¹⁰ Eriksson (2009) points out that since ‘the limit of interpretation lies in the wording of a legal rule [...] it is not for the Court but for the legislative bodies of the EU to adjust the wording of the directives so as to include indirect discrimination by association.’¹¹¹ It is, therefore, up to the EU legislator, not the Court, to extend legislation to cover discrimination by association because of the wording of the legal rule. It is worth examining if the Member States have addressed this issue either in legislation or case law.

Applying the concept: discrepancies and similarities between the EU Member States

In most of the Member States, discrimination by association is not explicitly covered in national legislation. According to the data provided by the European Network of Legal Experts in the Non-discrimination Field, the countries explicitly prohibiting discrimination by association are: Austria, Bulgaria, Croatia, Denmark, Slovakia and Spain. Nevertheless, this prohibition does not always extend to all grounds covered by the national non-discrimination legislation. For example, Denmark explicitly prohibits discrimination by association only on the ground of ethnic origin, whereas Slovakia covers several grounds, but not explicitly

¹⁰² Directive 2000/78/EC, emphasis added.

¹⁰³ O’Brien, C (2011) ‘Equality’s False Summits: New Varieties of Disability Discrimination, ‘Excessive’ Equal Treatment and Economically Constructed Horizons’, *European Law Review*, Vol. 36, No 1, p. 26.

¹⁰⁴ AG Opinion, *op. cit.* §19, emphasis added.

¹⁰⁵ *Ibid.*

¹⁰⁶ Waddington (2007), *op. cit.* p. 15; Waddington (2009), *op. cit.* p. 675.

¹⁰⁷ *Ibid.*

¹⁰⁸ Connor (2010), *op. cit.* p. 64.

¹⁰⁹ Waddington (2009), *op. cit.* p. 676.

¹¹⁰ *Ibid.*

¹¹¹ Eriksson (2009), *op. cit.* p. 752.

disability. By contrast, in Spain discrimination based on association is only explicitly prohibited concerning disability.

It is worth mentioning that in Belgium such a prohibition exists at the local level, but not at the national level: discrimination by association is explicitly covered in the Flemish Framework Decree of 10 July 2008, but not in the Racial Equality Federal Act or the General Anti-discrimination Federal Act.¹¹² This can be explained by the fact that the Flemish Framework Decree was adopted at the time of the *Coleman* judgment, and the inclusion of discrimination by association in the definition of direct discrimination proves the local legislator's intention to comply with the judgment.

Even though quite a few Member States have such an explicit prohibition, most Member States' legislation has no explicit provision on discrimination by association. However, it is generally understood that such discrimination is implicitly covered under national legislation due to the wording of the provisions on direct discrimination, which focus on the ground of the discriminatory act and not on whether the person who suffers discrimination possesses the protected characteristic him/herself. Such is the case for Cyprus, the Czech Republic, Finland, Germany, Hungary, Italy, Lithuania, Malta, the Netherlands, Portugal, Romania, Slovenia, Spain, Sweden and the UK. This can be explained by the fact that most national legislation transposing the Directives¹¹³ mirrors the Directives' wording. Therefore, like Directive 2000/78/EC in the *Coleman* judgment, the national legislation could be interpreted to cover cases of discrimination by association. Still, there are some countries, such as Greece, Luxembourg, Latvia and Poland, which have not dealt with the concept and, according to the national legal experts, their national legislation is not considered to implicitly allow the prohibition of such discrimination.

In some countries, discrimination by association can also be implicitly covered by national legislation under a certain category. For instance, in Cyprus discrimination by association can be indirectly covered under the category 'any other ground'¹¹⁴ and in Latvia 'other circumstances'.¹¹⁵ The same applies for Hungary, as its national legislation prohibits discrimination, *inter alia*, on the basis of 'other situation, attribution or condition'.¹¹⁶ In Finland it prohibits discrimination for 'any other reason related to a person'.¹¹⁷ Although national legislation in these cases can be read in a way to implicitly prohibit discrimination by association, such prohibition is neither certain nor clear. In the absence of an explicit provision, it is up to the national court to interpret national legislation in such a way to include discrimination by association, and the national courts might not always be willing to do so.¹¹⁸

A positive development for EU non-discrimination law is that in many Member States the courts have interpreted national law to cover discrimination by association. Nevertheless, such developments are on a case-by-case basis and, hence, refer solely to the grounds mentioned in the case at hand. Such an example is the Netherlands, where the Equal Treatment Commission first acknowledged in its case law that national legislation, namely the Disability Discrimination Act, covers discrimination by association on grounds of disability and chronic illness,¹¹⁹ while it found such discrimination on the ground of race in a later case.¹²⁰

¹¹² Country Report for Belgium (2012), p. 50.

¹¹³ Directive 2000/78/EC and Directive 2000/43/EC, as the national reports focus on the implementation of these two directives.

¹¹⁴ Country Report for Cyprus (2012), p. 64, Country Report for Cyprus (2011), pp. 66-67.

¹¹⁵ Country Report for Latvia (2011), p. 25.

¹¹⁶ Country Report for Hungary (2012), p. 25.

¹¹⁷ Country Report for Finland (2012), p. 30.

¹¹⁸ See for example the Country Report for Romania (2012), p. 31, explaining how two courts' judgments were not consistent.

¹¹⁹ Country Report for the Netherlands (2012), p. 30.

¹²⁰ Chopin, Isabelle and Thien Uyen Do (eds.) (2012), 'News from the EU Member States', *European Anti-Discrimination Law Review*, No 15, European Network of Legal Experts in the Non-Discrimination Field, p. 70.

National courts have dealt with cases of discrimination by association in several other countries as well, such as Cyprus, Denmark, France, Hungary, Ireland and Romania. Most of these cases refer to discrimination by association on grounds of disability. Other grounds were: affiliation with a certain group (Romania),¹²¹ race or ethnic origin (Hungary),¹²² membership of the Traveller community (Ireland)¹²³ and trade union activities (France).

Another important question is whether national courts have defined the nature of the association. One can infer from the facts of the different reported cases and their positive final outcome that the nature of this association does not necessarily have to be a close one. For example, while in one case in the Netherlands discrimination by association was found on grounds of the race of the employee's wife,¹²⁴ in Ireland entering a public house together with a disabled person was enough to establish discrimination by association on grounds of disability when the entire group were denied access.¹²⁵

Based on the reports drafted by the European Network of Legal Experts, where discrimination by association is explicitly covered in national legislation, the nature of the association appears to not be defined. The provisions covering discrimination by association use, for instance, the wording 'relationship with a person', 'affiliation with' or 'association with', without further elaborating on the nature of this relationship or affiliation, but rather focusing on the protected grounds. Therefore, it is up to the national courts' discretion to assess the association. This is not necessarily negative; not defining the nature of the association allows the flexibility to include cases where the nature of the relationship is not close, thus avoiding complex legal tests to define the relationship.

Finally, it is interesting to note that in a few Member States discrimination by association can also apply to indirect discrimination. This is the case for Denmark and Slovenia. The difference between the two is that in Denmark indirect discrimination by association is explicitly prohibited in national legislation,¹²⁶ whereas in Slovenia it is only implicitly covered: Slovenian provisions on indirect discrimination use the phrase 'on the grounds of' instead of the possessive pronoun 'his/her', hence allowing for an interpretation that covers situations of indirect discrimination by association. There was also a recent case in the Netherlands where the Equal Treatment Commission recognised indirect discrimination by association on grounds of race.¹²⁷ This constitutes a positive example to other Member States, showing that they should not hesitate to address cases of indirect discrimination by association.

From the above analysis of the state of affairs in the EU Member States, one can conclude that in the majority of the Member States discrimination by association is implicitly covered in national legislation because of the wording of the provisions, which reflects the wording of the Directives. There is also the positive example of quite a few Member States that expressly prohibit discrimination by association in their legislation.

Although this article focuses on the application of the concept in the EU Member States, the Reports from the European Network of Legal Experts also cover the FYR of Macedonia, Iceland, Lichtenstein,

¹²¹ Case *D.Z. v Distrigaz Sud*, Decision 4222 dated 01.08.2007, in Country Report for Romania (2012), p. 31.

¹²² Case No 72/2008 of the Equal Treatment Authority in Country Report for Hungary (2012), p. 25.

¹²³ DEC-S2004-009-014 *Kieman v The Newbury Hotel* and DEC-S2006-058 *McDonnell v Dolan's Bar*, in Country Report for Ireland (2012), p. 25-26.

¹²⁴ Equal Treatment Commission Opinion 2012-47 of 6 March 2012, in Chopin, Isabelle and Thien Uyen Do (eds.), *op. cit.* p. 70. Also see: <http://www.mensenrechten.nl/publicaties/oordeelen/2012-47>.

¹²⁵ DEC-S2004-009-014 *Six Complainants v A Public House*, Country Report for Ireland (2012), p. 25.

¹²⁶ Indirect discrimination by association is covered only regarding race and ethnic origin; section 3(1) of the Act on Ethnic Equal Treatment.

¹²⁷ Chopin, Isabelle and Thien Uyen Do (eds.) (2012), *op. cit.* p. 70.

Norway and Turkey, and it is worth mentioning the situation in these countries. In the FYR of Macedonia, Iceland, Lichtenstein and Turkey the anti-discrimination legislation has no provisions that may explicitly or implicitly cover discrimination by association. Nevertheless, in Lichtenstein the anti-discrimination law prohibits discrimination ‘against persons who assist people with a disability [...] or who take care of them.’¹²⁸ Hence, this provision may include discrimination by association on grounds of disability when the person facing discrimination is the carer of a person with a disability. In Norway, discrimination by association is explicitly covered with regard to disability but not with reference to other grounds such as race, age and sexual orientation. The Norwegian national legislation uses the words ‘discrimination of a person due to their relationship with a person with a disability’.¹²⁹ There is no definition, nonetheless, as to what this relationship entails.

The concept’s applicability

As analysed above, some implications of the Court’s delineation of the concept may be foreseen. It is interesting to observe from the reports drafted by the European Network of Legal Experts in the Non-discrimination Field whether these implications have occurred in practice and how the Member States have dealt with those issues.

Referred grounds

From the information provided by the country reports, one may deduce that the concept is generally understood to be applicable to all protected grounds contained in Directive 2000/78/EC as well as the grounds contained in Directive 2000/43/EC. The national legal experts agree that due to the identical wording of the provisions on direct discrimination in the two Directives, the concept is equally applicable with regard to racial and ethnic origin. Therefore, it may likewise cover situations outside the field of employment and occupation.¹³⁰

In countries where discrimination by association is explicitly covered in the national legislation, such protection is provided for the grounds listed in the Anti-Discrimination Act in question, which may or may not include disability. In fact, in the case of Denmark discrimination by association is explicitly prohibited on the grounds of race or ethnic origin, but not on grounds of disability. Nonetheless, discrimination by association on the ground of disability is covered according to national case law.¹³¹ In Slovakia, while discrimination by association is explicitly covered in the Anti-Discrimination Act on the grounds of racial and ethnic origin and religion or belief, the Act does not explicitly mention ‘association with a person with a disability’.¹³² Once such a case is presented, the national courts are expected to follow the *Coleman* judgment.¹³³

From the cases presented in the EU Member States and the judgments of the national courts, it is evident that there are countries where the concept of discrimination by association is applied to other grounds apart from disability. These are: ethnic origin (Hungary), trade union affiliation (France) and membership of the Traveller community (Ireland). From the above it can be inferred that some of the Member States have understood the concept to be potentially applicable to all grounds covered by the anti-discrimination

¹²⁸ Country Report for Lichtenstein (2012), p. 18.

¹²⁹ Country Report for Norway (2012), p. 26.

¹³⁰ Directive 2000/78/EC combats discrimination on the grounds of religion or belief, disability, age or sexual orientation in the field of employment and occupation, whereas Directive 2000/43/EC lays down the framework for combating discrimination on the grounds of racial and ethnic origin in general.

¹³¹ Country Report for Denmark (2012), p. 32.

¹³² Country Report for Slovakia (2011), pp. 36-37.

¹³³ *Ibid.*



legislation. As such, this form of ‘discrimination on the ground of a third party’s protected characteristic’¹³⁴ is now seen as a general principle that ‘discrimination should also be prohibited when it results in view of the association of a person with other persons to whom a prohibited discrimination ground applies.’¹³⁵

Establishing the association

As previously discussed, the Court seems to have emphasised the nature of the relationship between Ms Coleman and her son and her position as his primary carer, whereas a question remains as to whether all levels of association merit equal protection. The Member States do not appear to have addressed this issue. The provisions of the Member States that explicitly address discrimination by association use the wording ‘relationship with a person’, ‘affiliation with’ or ‘association with’, without further elaborating on what the nature of this relationship/affiliation entails. Member States that implicitly or explicitly prohibit discrimination by association appear to focus on the discriminatory act with regard to one of the protected grounds and not on how close the relationship is between the person suffering the act and the person possessing the protected characteristic. This can be deduced from case law, since there are cases where the national authority found discrimination by association against someone who was refused entrance to a public house because he was accompanied by a person with a disability,¹³⁶ or a customer who was charged a higher price at a bar because she had a Roma flatmate.¹³⁷ In both cases the national authorities focused on the discriminatory act instead of questioning the nature of the relationship.

Indirect discrimination

The Court was also criticised for not addressing the issue of indirect discrimination by association, leaving it uncertain whether the concept can be applied in that context. The phrasing of the provision on indirect discrimination in the Directive, referring to ‘persons having’ a particular characteristic, does not allow for a purposive interpretation so as to offer protection against indirect discrimination by association.¹³⁸ This is also the case for Member States that have transposed the Directives in their national legislation by reproducing the Directives’ wording. Hence, for the majority of the Member States indirect discrimination by association cannot be implicitly covered. However, there are two Member States that explicitly¹³⁹ or implicitly¹⁴⁰ cover indirect discrimination by association in their legislation. It is also worth mentioning that the Dutch Equal Treatment Commission has recognised the existence of indirect discrimination by association on grounds of race in one case.¹⁴¹ The fact that these Member States have understood the concept as potentially applicable to cases of indirect discrimination is an indication that the concept can actually apply in such cases. Nonetheless, in order to create absolute clarity, it would be useful if the EU legislator explicitly regulated this issue in an amendment to all existing equal treatment directives.

Conclusion

Discrimination by association has some foreseeable implications with regard to its applicability. Questions that arise include whether it can be applied to all grounds protected by Directive 2000/78/EC as well as

¹³⁴ Connolly, M.J. (2010) ‘Victimising Third Parties: The Equality Directives, the European Convention on Human Rights, and EU General Principles’, *European Law Review*, Vol. 35, No 6, p. 825.

¹³⁵ Chopin, Isabelle and Thien Uyen Do (eds) (2012) *Developing Anti-Discrimination Law in Europe. The 27 EU Member States Compared*, European Network of Legal Experts in the Non-Discrimination Field, p. 36.

¹³⁶ Country Report for Ireland (2012), p. 25.

¹³⁷ Country Report for Hungary (2012), p. 25.

¹³⁸ See Article 2(2)(b) of Directive 2000/78/EC.

¹³⁹ This is the case for Denmark; see Report for Denmark (2012), p. 32.

¹⁴⁰ This is the case for Slovenia due to the wording of the provision; see Report for Slovenia (2012), p. 24.

¹⁴¹ Equal Treatment Commission Opinion 2012-47 of 6 March 2012, *op. cit.*

whether it could apply in reference to the other anti-discrimination directives, such as Directive 2000/43/EC combating discrimination on grounds of race and ethnic origin. Another issue is whether it also applies in cases of indirect discrimination, as the Court made no reference to this and the wording of the provision implies that it does not. The nature of the association is also unclear, as it was not addressed by the Court.

The analysis indicated that quite a few Member States have understood the concept to be applicable to other grounds besides disability and there is national case law where discrimination by association was found on other grounds. Moreover, there are countries that explicitly cover discrimination by association on the grounds of race or ethnic origin and not on the ground of disability. Nevertheless, in those cases such discrimination is implicitly covered. Concerning the degree of the association, it is not evident that the Member States' courts consider the CJEU to have established a legal test to define the relationship, that of whether the alleged victim is the primary carer. For example, some national courts have found discrimination by association in cases where the person suffering discrimination only became involved with the person possessing the particular characteristic at the time when discrimination took place. This demonstrates that the concept is interpreted as applying to the discriminatory act, regardless of the closeness of the relationship.

Even though most countries have welcomed the concept by explicitly covering it in their legislation or by interpreting their legislation to include it, there are still some countries that have not yet addressed the concept and their legislation does not allow for such a purposive interpretation. It is therefore imperative to further develop the concept in EU law. In this respect, the EU legislator should amend the Directives to include the concept of discrimination by association and the Court should use any given opportunity to clarify the concept. Private litigation by individuals and human rights NGOs can also prove useful in drawing the Court's attention to the concept and creating opportunities for its further development. It is important to note that after the *Coleman* judgement, the European Commission amended its proposal for a Horizontal Directive based on Article 19 TFEU¹⁴² to include discrimination by association. Nevertheless, during the last round of discussions in the Council's working group under the Lithuanian presidency, all Member States' delegations maintained general scrutiny reservations on the proposal.¹⁴³

The concept of discrimination by association shows that the Court is willing to make an expansive interpretation of the Directives to include situations where the person being discriminated against does not him/herself possess the protected characteristic. This is a positive development for EU non-discrimination law, which is to be applauded. The fact that some Member States have applied discrimination by association in relation to other grounds besides disability indicates that they have taken the concept a step further. However, as shown above, there are discrepancies between the Member States, leading to asymmetric protection against such discrimination in the EU. For this reason, the EU legislator needs to clarify the concept so as to effectively impose liability for acts of discrimination by association.

¹⁴² Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation.

¹⁴³ For more information see the result of the last round of discussions in the Council's working group under the Lithuanian presidency: Council of the European Union, Document No 16684/13 SOC 976 EGC 28 JAI 1043 MI 1069 FREMP 193, 27 November 2013.

European Legal Policy Update¹⁴⁴

European Commission adopts progress report on the implementation of National Roma integration strategies

On 26 June 2013 the European Commission released a progress report entitled *Steps forward in implementing national Roma integration strategies*, accompanied by a proposal for a Recommendation addressed to the Member States. The report finds that although some policy measures have been taken on national level, the necessary effective change is still lacking. In this regard, the Commission focuses its report on the 'structural pre-conditions' which are necessary for effective implementation of the national Roma integration strategies, including fighting discrimination convincingly. In addition, the Commission highlights that Roma still face racism and discrimination, including segregation in schools, in many EU Member States, in spite of national anti-discrimination legislation transposing the Racial Equality Directive.

The report was adopted in relation to the eighth annual European Platform for Roma Inclusion, which was held in Brussels on 27 June and this year focused on the need to bring about change for Roma children and youth.

Internet sources:

http://ec.europa.eu/justice/events/roma-platform-2013/index_en.htm

http://ec.europa.eu/justice/newsroom/discrimination/news/130626_en.htm

Council of the EU adopts Recommendation on effective Roma integration measures in the Member States

The employment, social policy, health and consumer affairs ministers of the EU Member States adopted a Recommendation on 10 December 2013 providing guidance to the Member States on the adoption and implementation of more effective measures to achieve Roma integration. The Council recommends that Member States adopt an extensive set of substantive, horizontal and structural measures to close any gaps between Roma and the general population.

Internet source:

http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/lsa/139979.pdf

FRA Opinion on the Framework Decision on Racism and Xenophobia – with special attention to the rights of victims of crime

On 15 October 2013 the EU Fundamental Rights Agency adopted an Opinion on the Framework Decision on Racism and Xenophobia, focusing in particular on the rights of victims of crime. The Opinion assesses the impact of the Framework Decision, and illustrates how hate crime can vary from individual incidents committed on the street or over the Internet to large-scale crimes carried out by extremist groups.

Internet source:

http://fra.europa.eu/en/opinion/2013/fra-opinion-framework-decision-racism-and-xenophobia-special-attention-rights-victims?_cldee=aW5mb0BtaWdwb2xncm91cC5jb20%3d

¹⁴⁴ This section provides as far as possible an overview of the main latest developments in European anti-discrimination law and policy reflecting the state of affairs from 15 June 2013 to 15 January 2014.

European Commission infringement proceedings

Hungary: Case closed after retirement age legislation is amended

The infringement proceedings against Hungary regarding the discriminatory retirement age for judges, public prosecutors and notaries were dropped on 20 November 2013. Following the Court of Justice of the EU's condemnation of Hungary on 6 November 2012,¹⁴⁵ national legislation has been satisfactorily amended to ensure compliance with the CJEU ruling.¹⁴⁶

Czech Republic: Letter of formal notice regarding insufficient protection from discrimination on grounds of disability in employment

The decision was taken on 20 November 2013 to send a letter of formal notice to the Czech Republic for non-conformity with the Employment Equality Directive as regards protection against discrimination on grounds of disability. The case concerns the prohibition on employment agencies from assigning people with disabilities to temporary work, which constitutes direct discrimination on grounds of disability.

Finland: Reasoned opinion regarding competences of national equality body

The decision was taken on 20 November 2013 to send a reasoned opinion to Finland regarding the lack of a national equality body mandated with the competences required by Article 13 of the Employment Equality Directive.

Greece: Complementary letter of formal notice regarding insufficient protection from age discrimination

The European Commission sent a complementary letter of formal notice to Greece on 26 September 2013 regarding non-conformity with the Employment Equality Directive due to age discrimination in the diplomatic services.

¹⁴⁵ See *European Anti-Discrimination Law Review*, issue 16 (2013), p. 40.

¹⁴⁶ See *ibid*, p. 66.

Court of Justice of the European Union Case Law Update¹⁴⁷

Infringement proceedings

Case C-312/11, European Commission v Italian Republic, Judgment of 4 July 2013, not yet reported

Following infringement proceedings initiated by the Commission against Italy in 2006, the Court has found that Italy has failed to correctly and fully transpose Article 5 of Directive 2000/78/EC imposing on employers an obligation to adopt measures of reasonable accommodation in favour of persons with disabilities. The Court's ruling determines that, contrary to the Directive, Italian law does not require *all* employers to adopt practical and effective reasonable accommodation measures for the benefit of *all* persons with disabilities.

Italian law includes a number of legislative measures on assistance for persons with disabilities and their social integration and other rights, including Law 68/1999 transposing Article 5 of the Employment Equality Directive. However, this act only applies to employers employing more than 15 people and its provisions are limited to persons with certain specific types of disabilities and certain degrees of impairment. Italy argued that the limited application of the relevant act to certain persons with disabilities only, was in compliance with the lack of a specific definition in the Directive of the concept of 'disability'. In addition, the defendant considered that other legislative measures complemented Law 68/1999 and therefore held that the Italian legislation as a whole correctly transposed the relevant provisions of the Directive.

Referring to its recent ruling in *HK Danmark (Ring and Skouboe Werge)*,¹⁴⁸ the Court held that although the Directive does not provide a definition of the concept of 'disability', it should be understood as a limitation, resulting *inter alia* from a long-term physical, mental or psychological impairment which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers. Thus, measures adopted in accordance with Article 5 should apply to all individuals who fall under that definition. In addition, national measures of encouragement and assistance for employers to adopt measures of accommodation are not sufficient as they do not impose an obligation on all employers to adopt such measures, as required by the Directive.

References for preliminary rulings – Judgments

Case C-546/11, Dansk Jurist- og Økonomforbund, acting on behalf of Erik Toftgaard, v Indenrigs- og Sundhedsministeriet; Judgment of 26 September 2013, not yet reported

Following a reference for a preliminary ruling made by the Højesteret (Danish Supreme Court), the EU Court of Justice has adopted a judgment finding that the age limit for admission to an occupational social security scheme available to Danish civil servants constitutes unjustified discrimination on grounds of age. This scheme provided civil servants who were made redundant with the possibility of benefiting from 'availability pay'. This scheme was, however, not available to civil servants who had reached the age of 65 and who, therefore, had the right but not the obligation to receive pension benefits.

¹⁴⁷ This section provides as far as possible an overview of the main latest developments in European anti-discrimination law and policy reflecting the state of affairs from 15 June 2013 to 15 January 2014.

¹⁴⁸ Joined cases C-335/11 and C-227/11, Judgment of 11 April 2013. See also Waddington L., 'HK Danmark (Ring and Skouboe Werge): Interpreting EU Equality Law in Light of the UN Convention on the Rights of Persons with Disabilities', in *European Anti-Discrimination Law Review*, issue 17 (2013), p.11.

In its judgment, the Court followed the same reasoning as that of Advocate General Kokott in her Opinion¹⁴⁹ to find that the occupational pension scheme provided less favourable treatment to employees aged over 65, and that this difference in treatment could not be justified by any of the exceptions provided at Articles 6(1) and 6(2) of the Employment Equality Directive. Indeed, the national provisions in question did not fall under the scope of Article 6(2) as this provision only applied to occupational social security schemes covering the risks of old age and invalidity, which was not the case of the 'availability pay' scheme. With regard to the exception provided at Article 6(1), the Court found that the aims pursued by the State in its capacity as employer were legitimate and that availability pay was an appropriate means to achieve those aims. Nevertheless, the national scheme was found to go beyond what was necessary to achieve the aims pursued, as the same objectives could have been achieved by less restrictive but equally appropriate measures. The Court therefore found that the national scheme was discriminatory on the ground of age.

Case C-476/11, HK Danmark, acting on behalf of Glennie Kristensen, v. Experian AS, Judgment of 26 September 2013, not yet reported

Delivered on the same day as the verdict in case C-546/11 reported above and similarly relating to occupational pension schemes, the ruling in *HK Danmark v Experian* repeats almost to the letter important parts of this other ruling and directly refers to certain of its findings.

The case referred concerns an employee of a private company who challenged an occupational pension scheme provided for in her employment contract. The scheme concerned implied that the employer paid, as an element of the employees' wages, pension contributions which increased with age. The contributions were not paid directly to the employee himself, but into his personal retirement savings account. Each employee had access to his own retirement savings account and decided, with a specialised pensions adviser, how the amount saved should be invested with a view to drawing a pension in due course. Having determined that younger employees received lower overall monthly pay and therefore were treated less favourably than their older colleagues, the Court went on to examine whether this difference in treatment could be justified under any of the provisions of the Directive.

The Court went against the position of the intervening governments¹⁵⁰ as well as the European Commission, in finding that the national provision in question did not fall under the scope of the exception provided at Article 6(2) of the Employment Equality Directive. Indeed, the Court found that the exception outlined by this provision must be interpreted in a restrictive manner and therefore only covered measures 'fixing [...] ages for admission or entitlement to retirement [...] benefits', and did not extend to other aspects of occupational social security schemes such as the age-related increases in pension contributions concerned by the case at hand. Regarding Article 6.1 of the Employment Equality Directive (justification of a difference of treatment on the ground of age), the Court first looked at whether the occupational scheme in question reflected a legitimate aim and then at whether the age-related increases in the contributions were appropriate and necessary to pursue this aim. The Court found that 'it does not appear unreasonable to regard the age-related increases in contributions as enabling the aims [...] to be achieved.' The Court then stated that it is for the national court to establish whether the age-related increases met the requirement of appropriateness and to ensure that these increases did not exceed what is necessary in order to achieve the aims in question.

¹⁴⁹ For a summary of the Opinion of Advocate General Kokott, see *European Anti-Discrimination Law Review*, issue 17, p. 40.

¹⁵⁰ The governments of Belgium, Denmark, Germany, the Netherlands and Spain submitted observations.

Case C-267/12, Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres, Judgment of 12 December 2013, not yet reported

Following a reference for a preliminary ruling made by the Cour de Cassation (French Supreme Court), the Court of Justice of the EU has found that the Employment Equality Directive precludes national provisions which reserve employment related benefits to employees who get married. Such benefits constitute direct discrimination on grounds of sexual orientation when they are not available to employees who enter into a same-sex registered partnership, in as much as a registered partnership is comparable to marriage where marriage is reserved for opposite-sex couples. The Court particularly noted that the fact that the French registered partnership (PACS) is not restricted only to same-sex couples is irrelevant and does not change the nature of the discrimination against homosexual couples who, unlike heterosexual couples, did not at the date of the facts have the possibility of entering into marriage. As homosexual employees are, based on their sexual orientation, unable to meet the condition required for obtaining the benefit claimed, the difference in treatment constitutes direct discrimination.



European Committee of Social Rights Update¹⁵¹

Decision on the merits of Complaint No 75/2011, International Federation for Human Rights (FIDH) v Belgium

The complaint, registered on 13 December 2011, concerned the situation of highly dependent disabled adults in need of care and accommodation facilities and their relatives. The complainant organisation alleged that Belgium had not taken adequate measures to comply with Articles 13 (right to social and medical assistance), 14 (right to benefit from social welfare services), 15 (right of persons with disabilities, 16 (right to appropriate social, legal and economic protection for the family) of the Revised European Social Charter, taken alone or in conjunction with the non-discrimination clause (Article E).

The Committee found two violations of Article E. Firstly, the Committee observed that Belgium had not created sufficient day and night care facilities to prevent the exclusion of many highly dependent persons with disabilities from this form of social welfare service appropriate to their specific, tangible needs, in violation of Article 14§1 of the revised Charter. In this regard it is noteworthy that the Committee referred the persons concerned by individual refusals of access to the existing care and accommodation facilities to the Belgian national courts and national anti-discrimination legislation transposing EU law. To this end, the Committee separated the responsibility of the Belgian state to provide social welfare services appropriate to the needs of the persons concerned on the one hand from the private law relationship between these persons and those legally responsible for the care facilities on the other. Secondly, Belgium was declared to be in breach of Article 16 on the right to appropriate social, legal and economic protection of the family, due to the particularly precarious situation in which the families of many highly dependent persons with disabilities are placed owing to the lack of care solutions and social services suited to their needs, obliging them to live with their families. The Committee awarded the sum of €2,000 to the FIDH for expenses incurred by the procedure.

Decision on the merits of Complaint No 74/2011, Fellesforbundet for Sjøfolk (FFFS) v Norway

The complaint concerned the Norwegian Seamen's Act of 1975 which provided for possible termination of the employment contracts of seamen based solely upon their age when they turned 62. The complainant trade union alleged that the relevant provision of the Seamen's Act constituted an unjustified prohibition of employment and a discriminatory denial of seamen's right to work as such, in breach of Article 1§2 (right to work) and 24 (right to protection in case of termination of employment) read alone or in conjunction with Article E (non-discrimination) of the European Social Charter.

The Committee found a violation of Article 1§2 and of Article 24, without combining these provisions with Article E. The finding of a violation of Article 1§2, however, implies a finding of discrimination on the ground of age in relation to the right to work. The Committee held that the age-limit was founded on legitimate aims, including the aim of ensuring the health and safety of those at sea, but that it was not necessary to achieve those aims.

After the adoption of the decision on the merits by the European Committee of Social Rights but before the adoption by the Committee of Ministers of the Resolution on the decision, national law was amended by the Maritime Labour Act, which came into force on 20 August 2013. The age-limit was modified from 62 to 70 years, and in its Resolution the Committee of Ministers took account of this fact and did not impose any sanction on Norway, considering that national law had been brought into line with the Revised Charter.¹⁵²

¹⁵¹ This section provides as far as possible an overview of the main latest developments in European anti-discrimination law and policy reflecting the state of affairs from 15 June 2013 to 15 January 2014.

¹⁵² Resolution CM/ResChS(2013)17, adopted by the Committee of Ministers on 16 October 2013.

European Court of Human Rights Case Law Update¹⁵³

I.B. v Greece, (Application No 552/10), Judgment of 3 October 2013

The applicant challenged his dismissal from a jewellery manufacturing company where he had been employed for several years. When the applicant contracted the human immunodeficiency virus (HIV), information about his state of health began to circulate throughout the company and his colleagues put pressure on the employer to dismiss him. Having failed to restore good working relations within the company, the employer finally dismissed the applicant, who brought proceedings before the national courts for wrongful dismissal.

The Court noted that the applicant had clearly been treated less favourably than another would have been, based on his state of health and the scientifically unfounded reactions of his colleagues to his illness. The Court also underlined that it was clear from the national proceedings that the applicant's HIV-positive status had no effect on his ability to carry out his work and there was no evidence that it would lead to an adverse impact on his contract, justifying its termination. The Court held that the Supreme Court had failed to strike a correct balance between the interest of the employer in the smooth functioning of the company on the one hand and the interests of the applicant on the other. Thus, the Court found that the applicant had been victim of discrimination based on his health status, in breach of Article 8 taken together with Article 14. Greece was ordered to pay the applicant €6,339.18 in respect of pecuniary damage and €8,000 in respect of non-pecuniary damage.

Winterstein and Others v France (Application No 27013/07), Fifth Section Judgment of 17 October 2013

Twenty-five French citizens who had been living for a considerable amount of time on sites designated as 'protected natural zones' were ordered by the national courts to leave the sites within three months, and to pay a penalty (*astreinte*) of €70 per day if they stayed after that deadline. The authorities did not seek to enforce the eviction or the penalty; instead, some attempts were made to relocate the applicants. A few families received social housing, while some remained on the sites, and others left the region.

Joined by the NGO *Mouvement ATD Quart Monde*, the applicants brought a complaint to the Court, claiming a violation of Article 8 (right to respect for private and family life) in combination with Article 14 (non-discrimination). The Court found a violation of the former provision, underlining that although the national judgments had never been enforced, the applicants could still claim to be victims of a violation of their rights as the penalty payments were still running, several years having passed before they were re-housed and the authorities having never recognised that a violation had occurred. With regard to a possible justification of the violation, the Court found that the interference with the rights of the applicants was in accordance with the law and that it did pursue the legitimate aim of protecting third party rights. However, this interference was disproportionate to the aim pursued and was therefore not necessary in a democratic society, as is required by the Convention. Specifically, the Court underlined that the national courts had failed to examine the proportionality of the interference as they had not considered the rights of the applicants under the Convention when ordering the evictions. The Court

¹⁵³ This section provides as far as possible an overview of the main latest developments in European anti-discrimination law and policy reflecting the state of affairs from 15 June 2013 to 15 January 2014.

did not find it necessary to examine Article 14 separately, and concluded only that Article 8 had been violated.



News from the EU Member States, the FYR of Macedonia, Iceland, Liechtenstein, Norway and Turkey¹⁵⁴

More information can be found at <http://www.non-discrimination.net>

¹⁵⁴ This section provides as far as possible a selection of the main latest developments in European anti-discrimination law and policy reflecting the state of affairs from 15 June 2013 to 15 January 2014.

*Case law***Supreme Court decides on age discrimination – exception for economic reasons**

The Supreme Court decided on an appeal by the Austrian Broadcasting Company (ORF) against a decision by the Viennese Superior Court regarding the dismissal of a radio journalist when he reached the age of 62 in 2011, according to their usual practice. The employee was entitled to an early pension at a reduced rate until the retirement age of 65 and had received an ordinary severance payment of about €330,000. The employee contested his dismissal in court as he claimed discrimination on the ground of age. The two lower instance courts had found discrimination and declared the dismissal unlawful.

The company argued that the exceptions applicable under Article 6(1) of Directive 2000/78 which is reflected in § 20/3 Equal Treatment Act were applicable as the company was forced to reduce staff due to a very sizeable deficit. It was also legally required to use its budget more cost-effectively and therefore to take structural measures.

The Supreme Court reasoned that, although age was one of the decisive factors leading to the dismissal of the plaintiff, there was probably no age discrimination.¹⁵⁵ The Court cited the CJEU judgements *Palacios de la Villa*, *Fuchs/Köhler*, *Prigge*, and *Hörnfeld* to argue that it was, in principle, possible that the case could be subsumed under the exception provided at Article 6(1) of the Directive as economic reasons can constitute a legitimate aim. The Court found that the right to a pension can be taken into account when a company endeavours to reduce the hardship caused by structural reductions of staff by identifying those employees who are less affected by a dismissal than others. In such a case the dismissal can be justified even if age is a decisive factor. The case was referred back to the court of first instance.

Internet source:

http://www.ris.bka.gv.at/JustizEntscheidung.wxe?Abfrage=Justiz&Dokumentnummer=JJT_20130625_OGH0002_0090BA00113_12A0000_000&IncludeSelf=True

*Political development***Presentation of the first ‘socio-economic monitoring’ report**

‘Socio-economic monitoring’ is a long-term measuring instrument to identify the position of workers on the labour market according to their Belgian, European or non-European origin. It was set up in 2006 by the Centre for Equal Opportunities and Opposition to Racism and the Federal Public Service (ministry) for Employment, Labour and Social Dialogue, and is based on exhaustive data from population registers and the Crossroads Bank for Social Security (the motor and coordinator of e-government in the social sector). For the first time in Belgium, this study took into account not only the nationality but also the origin (i.e. the country of birth and the migratory history) of the workers and of their parents.

¹⁵⁵ Austrian Supreme Court, 90bA113/12a, 25.06.2013.

In September 2013, the first ‘socio-economic monitoring’ report was presented and revealed the existence of some employment discrimination in Belgium. The report confirms that non-European people encounter more difficulties in accessing the Belgian labour market than Belgians or Europeans, caused by both the structure of the labour market and direct or indirect discrimination.

Internet source:

www.diversite.be

Case law

First conviction for discrimination by association in Belgium

The claimant had been an employee at a Fitness Centre for seven years when in 2010 he became father of a third child affected by a serious disability requiring specific care. When the child reached the age of four months, the father informed his employer by email of this situation, and the following day he was dismissed because his employer considered that his child’s disability could affect his enthusiasm for his work and cause days off work. The claimant filed a complaint for discriminatory dismissal, supported by the Centre for Equal Opportunities and Opposition to Racism (the national equality body), which acted as an intervening party.



On 10 December 2013, the Labour Court of Leuven (Flanders) held that the employer was guilty of direct discrimination against the claimant based on the disability of his child.¹⁵⁶ The Court underlined that the parents of children requiring specific care could not be discriminated against on the basis of assumptions and bias. As a consequence, the Court sentenced the employer to pay the equivalent of six months’ salary as compensation and additional damages to the dismissed employee. This is the first conviction handed down by a Belgian court for discrimination by association. As discrimination by association is not explicitly prohibited in Belgian law, the Court referred directly to the CJEU’s decision in *Coleman* (Case C-303/06), and held that such discrimination is implicitly prohibited under federal law and constitutes direct discrimination.

Internet source:

www.diversite.be

Teachers of religion or moral education authorised to wear political, ideological or religious symbols within all public school premises of the Wallonia-Brussels Federation

The claimant was a teacher of Islam in two public primary schools who wore her Muslim headscarf at work. The schools’ internal regulations specified that any political, ideological or religious signs were prohibited within the schools, but the claimant considered that it was generally accepted that this prohibition did not apply to teachers of religion. Consequently, throughout the school year 2010-2011, the claimant received several warnings from the City Council.



The claimant was appointed again the following school year, but was informed that the schools’ new internal regulations stated that religious symbols were prohibited in the schools, except for teachers of philosophical classes (i.e. teachers of religion or moral education), but this exception only applied within the classroom where they taught the religious or moral course. On this basis, she was refused entry to the schools while she was wearing her headscarf. The claimant lodged an action for annulment of the new internal regulations before the Council of State (the supreme administrative court).

¹⁵⁶ Labour Court of Leuven, Judgment No 12/1064/A of 10 December 2013.

On 17 April 2013, the Council of State delivered its ruling on the merits of the case, finding that the Decree of the Wallonia-Brussels Federation of 17 December 2003, which implements the neutrality inherent to subsidised public schools, does not prohibit teachers of religion or moral education from wearing any political, ideological or religious signs, as this kind of manifestation is inherent to their functions.¹⁵⁷ Furthermore, the Council of State pointed out that the exercise of these teachers' functions is not limited to the time and place of the philosophical courses, and annulled, in the schools' internal regulations, the words 'when they are in the premises where they give their courses'. Although it was decided in a specific case, it is worth noting that this ruling has legal implications for all public schools of the Wallonia-Brussels Federation.

In a subsequent decision, the Council of State also annulled the decision of the City Council deciding not to appoint the claimant for the school year 2011-2012.¹⁵⁸

Internet sources:

<http://www.raadvst-consetat.be/Arrets/223000/200/223201dep.pdf>.

http://www.conseil-etat.be/Arrets/225000/000/225011Dep.pdf#xml=http://www.conseil-etat.be/apps/dtsearch/getpdf.asp?DocId=24579&Index=c%3a\software\dtsearch\index\arrets_fr\&HitCount=34&hits=3d+3e+52+53+7b+a6+e9+126+218+219+221+2b2+2bc+468+4cb+5b3+5fe+646+669+66a+6b5+851+890+8e0+c6d+c6e+c77+d40+d41+d5f+d60+dc2+dc3+dcc+&2128720132612

Council of State maintains the decision of the Flemish Education Council prohibiting conspicuous philosophical signs



On 1 February 2013, the Flemish Education Council approved an Administrative Circular of the Board of Flemish Community Schools, prohibiting the wearing of any conspicuous philosophical signs at school – except during philosophical courses within the classroom – and enjoined the Flemish Community schools to include this prohibition in their internal regulations. Two professors of Islamic religion, wishing to wear a headscarf not only within the classroom where they taught their religious courses, introduced an action for suspension and annulment of the Flemish Education Council decision (and of the Administrative Circular) before the Council of State.

On 27 June 2013, the Council of State refused to suspend the effect of the challenged decision while examining the request for annulment.¹⁵⁹ Firstly, because the decision of the Flemish Education Council has still to be included in the schools' internal regulations, the Council of State judged that it did not create a risk of serious irrevocable prejudice. Secondly, it considered that, if the applicants were to be subjected to disciplinary measures if they did not comply with the prohibition – a risk which was currently very theoretical – they still had the right to an appeal, with suspensory effects, to an appeal chamber. Since the applicants did not justify the reasons why they could not await a ruling on the action for annulment, the Council of State rejected the action for suspension while examining it.

Direct discrimination based on congenital hand deformities



The complainant, who has syndactyly, a congenital hand malformation, was employed under a short term contract as a salesman in a computer hardware shop. The shop manager promised that he would be hired under a permanent contract on the condition that he immediately terminated his parallel employment as a parking guard, which he did. However, the shop manager did not keep her promise. The complainant's parents visited the shop and recorded their discussion with the manager, who then revealed that the decision not to employ the complainant was based on his congenital hand deformities, as the manager was

¹⁵⁷ Council of State Decision No 223.201 of 17 April 2013.

¹⁵⁸ Council of State Decision No 225.011 of 8 October 2013.

¹⁵⁹ Council of State Decision No 224.158 of 27 June 2013.

afraid of customers' reactions. As a consequence, the complainant and the Centre for Equal Opportunities and Opposition to Racism each brought a case before the Labour Tribunal of Bruges in order to obtain an injunction imposing the cessation of the discriminatory practice, the publication of the judicial decision in several newspapers and its display on the premises where the discrimination occurred, as well as an award of damages.

On 10 December 2013, the President of the Labour Tribunal of Bruges ruled on both cases in emergency proceedings.¹⁶⁰ Firstly, the injunction actions were declared inadmissible because there was no danger that the discriminatory practice would be repeated against the complainant. Secondly, the Tribunal held that the recording provided was admissible as a way to prove a *prima facie* case of discrimination, as there had been no violation of the manager's rights. Finally, the Labour Tribunal held that an employer cannot directly distinguish an employee based on a physical or genetic characteristic and/or an alleged disability in order to respond to the needs and preferences of colleagues and/or customers. This kind of direct distinction can neither be considered as a genuine and determining occupational requirement nor as a difference in treatment imposed by, or by virtue of, legislation. Furthermore, no reasonable accommodation was provided to make the function possible. Consequently, the President of the Labour Tribunal of Bruges ruled that the computer hardware shop manager was guilty of direct discrimination and sentenced her to pay the equivalent of six months of salary as compensation, but did not order the publication and display of the judicial decision.

Internet source:

www.diversite.be

Bulgaria

BG

Case law

Equality body should *ex officio* establish grounds of discrimination

The Supreme Administrative Court has remanded a case back to the Commission for Protection against Discrimination (the national equality body), as the equality body had dismissed the complaint solely because it found that the discrimination established was not on the ground alleged by the complainant. In a case of access to promotion, the complainant alleged discrimination on grounds of her Turkish origin, but based on the evidence gathered, the equality body reasoned that the different treatment was instead possibly based on the complainant's sex. The body considered that it could not declare the discrimination it found since the applicant had only alleged ethnicity, and not sex. The Court disagreed and found that the equality body should have *ex officio* identified the proper ground and declared that discrimination had taken place.¹⁶¹

This ruling facilitates justice by allowing the equality body to take a proactive approach on the basis of the evidence, rather than abstaining from a finding of discrimination on formal grounds.

¹⁶⁰ President of the Labour Tribunal of Bruges, Judgments No 12/2552/A and No 12/2596/A of 10 December 2013.

¹⁶¹ Supreme Administrative Court decision: Ruling No 1177 of 24.01.2013 in case No 12871/2010.

*Political development***Annual Report of the Equality Authority for the year 2012**

The national equality body has published its Annual Report for 2012, including an introductory note from the Ombudsman, who is also the head of the equality body, regarding the impact of austerity measures on vulnerable and excluded groups. The report includes a section covering the mediation activities of the Equality Authority that sets out a series of successful mediation cases, all of which concerned the public sector. It also includes a statistical section, which shows a drop in the number of complaints received annually, from 144 in 2011 to 106 in 2012. The complaints received were mainly on the ground of gender (43%), as well as disability (25%) and national origin (21%), and the vast majority were related to the field of employment/vocational training/education (85%).¹⁶² Very few complaints were received on other grounds or in relation to other fields. Almost three out of four complaints were directed against the public sector. No data is provided on the number of complaints investigated or on the outcome of these complaints.

The final section contains summaries of 'significant reports' issued by the Authority during 2012 on specific cases regarding issues such as accessibility to sports grounds for wheelchair users; age discrimination in access to employment with the police; discrimination against students whose parents have a disability in receiving a student grant; reasonable accommodation for a person with a disability in order to attend vocational training; and an unfavourable transfer of a teacher with a disability.

Internet source:

http://www.no-discrimination.ombudsman.gov.cy/sites/default/files/book_arxi_isotitas_2012_gr.pdf

*Case law***Equality Authority report on age discrimination in access to employment**

The complainant was a 56-year-old woman who alleged discrimination on grounds of age in access to employment, as she had not been recruited when applying for a position as receptionist at a spa centre. From the investigation conducted by the equality body it emerged that the employer was looking to hire a 'younger' receptionist as the job required at least ten hours a day of standing and a poll conducted by the centre showed that its customers expected to see a young woman at reception.

The Equality Authority concluded that the aim pursued by the spa centre – that the receptionist must be in a position to respond to the demands of the job – was legitimate.¹⁶³ However, the age criterion as a means of achieving the legitimate aim was neither necessary nor proportionate and therefore could not be objectively justified, as a person's age was not necessarily indicative of his or her health or physical condition. The equality body reiterated that according to EU and national legislation, age limits must not put in a less favourable position those persons who, like the complainant, possess the requisite qualifications. As such, the refusal of the spa centre to hire the complainant amounted to unlawful age discrimination. However, the Equality Authority refrained from issuing any sanctions to eliminate the unequal treatment,

¹⁶² The mandate of the Equality Authority is restricted to the fields of employment and occupation. Complaints in fields beyond employment and occupation are handled by another department in the equality body. The fields referred to in the statistical record are thus employment/occupation related, i.e. 'education' means vocational education, access to goods and services also relates to employment, accessibility refers to access to the workplace, etc.

¹⁶³ Equality Body Report File No A.K.I. 94/2011, dated 29 August 2013.

given that the spa centre had meanwhile hired another person who had acquired employment rights that the Equality Authority could not reverse.

Internet source:

www.no-discrimination.ombudsman.gov.cy/ektheseis-aki

Czech Republic

CZ

Political development

Segregation of Roma children in special schools

On 27 September 2013, the Czech Deputy for Human Rights, Monika Šimůnková, announced on the official governmental web site a new initiative by the Czech school inspectorate, which asked schools where in the last school year at least five pupils had been educated according to the reduced curriculum for mentally disabled children, to provide a qualified estimation of numbers of Roma children enrolled.



This initiative is connected to previous steps to reduce the high numbers of Roma pupils in 'practical elementary schools'¹⁶⁴ and to reintegrate them into mainstream education. In April 2010, the Czech School Inspectorate asked the former Czech Ombudsman in his competence as an equality body whether the inspectorate's conclusions from its work – that one third of the pupils in practical elementary schools are Roma – could be perceived as evidence of a discriminatory practice. In 2012, the equality body conducted its own research, based on information gathered simultaneously by employees of the equality body who observed children in classrooms, and by class teachers. The research indicated that Roma children made up between 32 and 35% of children in practical elementary schools. As a conclusion, the equality body addressed several recommendations to the Ministry of Education in order to bring to an end the discriminatory practice resulting in overrepresentation of Roma pupils in such schools.

Such steps by the equality body and the Czech school inspectorate are regularly criticised by the Association of Special Teachers, which wants to maintain the current system, believing that children transferred from 'practical schools' would inevitably fail in mainstream education.

Internet source:

<http://www.vlada.cz/cz/ppov/zmocnenec-vlady-pro-lidska-prava/aktuality/monika-simunkova-potrebujeme-znat-pocty-romskych-zaku-vzdelavanych-podle-programu-pro-zaky-s-lehkym-mentalnim-postizenim-111477/>

Testing of the accessibility of financial services for the elderly

The Public Defender of Rights (the national equality body) published the results of research on accessibility of financial services for elderly people. It consisted of two phases. During the first phase, questionnaires were sent to all banking institutions, insurance companies and other types of financial institutions. During the second phase, situation testing was conducted in 13 banking institutions, nine insurance companies and four non-banking financial institutions. The selected companies were contacted personally or on the phone by the testers and asked to provide credit cards or short term consumer credit. The insurance companies were requested to provide travel insurance. The testing was conducted in the branches of selected companies throughout the country.



¹⁶⁴ 'Special schools' for children with mild disabilities were officially abolished in 2005 but continue to function in practice under the name of 'practical elementary schools'.

The results showed that two out of 13 tested institutions (15%) impose restrictions on credit cards, making the provision of a credit card dependent on the age of the applying client only, without checking any other criteria. Out of fifteen tested institutions providing customer credit, two refused an applicant only because of his/her more advanced age (13%). On the other hand, all insurance companies tested were ready to provide travel insurance to all testers, although insurance cost twice as much for people aged above 70. Two insurance companies out of the nine tested do not provide travel insurance online for people older than 80.

The decision to conduct research was based on complaints by elderly people registered in past years, who repeatedly reported discrimination when applying for financial products. However, its aim was not to identify discriminating institutions but rather to systematically map the access of the elderly to financial services without discrimination on grounds of age. The concluding report provided a basis to extend discussion on the quality of the offer of financial services.

Internet source:

http://www.ochrance.cz/fileadmin/user_upload/DISKRIMINACE/Vyzkum/Vyzkum_financni-sluzby-pro-seniory.pdf

Report on the situation of the Roma minority: increase in unemployment, racism and social exclusion

On 27 November 2013, the Czech government unanimously approved the Report on the Situation of the Roma Community prepared by the Department of Human Rights, the Roma Affairs Section of the Office of the Governmental Council and the Office of the Governmental Council for National Minorities.

The report states that the situation of Roma in the areas of housing and employment worsened alarmingly in 2012, as many Roma face long-term, repeated periods of unemployment. According to the data provided by the regional coordinators for Roma affairs, the level of unemployment in some areas is as high as 70-100%.

The negative developments in employment were intensified by some of the social reforms implemented by the previous government, such as changes to conditions for accessing public services and housing subsidies. The Roma are gradually moving to and concentrating in accommodation facilities not appropriate for permanent housing, especially with respect to families with children. The decreasing access of Roma to rental housing provided by municipalities or private providers is also alarming.

In 2012 the negative trend of hostility towards the Roma minority continued, including propaganda by right-wing extremist groups.

Internet source:

<http://www.vlada.cz/cz/ppov/zalezitosti-romske-komunity/dokumenty/zprava-o-stavu-romske-mensiny-v-ceske-republice-za-rok-2012-113913/>

Case law

Supreme Administrative Court condemns discrimination against Roma in an advertisement

On 15 October 2013, the Supreme Administrative Court ruled on an advertising campaign for an internet site which contains databases of schools and other educational institutions (www.skoly.cz). The private advertising agency that produced this campaign created yellow shirts with the slogan 'I should have studied better!' together with the internet site address. Subsequently, on the basis of a contract between

racial
or ethnic
origin

racial
or ethnic
origin

the advertising agency and a construction company, the employees of the construction company conducting digging work in central Prague were told by their employer to wear the shirts to work.

This provoked a lot of controversial attention in the most busy parts of Prague, where the labourers, who were of Roma origin, appeared wearing the shirts. People took videos and photographs of them, and so the next day the labourers refused to wear the shirts again.

The Prague Magistrate in administrative proceedings decided that the advertising agency was in breach of the Law on the Regulation of Advertising, as the campaign discriminated on the ground of Roma ethnicity, violated human dignity and denigrated the importance of manual work. The agency was ordered to pay an administrative fine of CZK 100,000 (approx. €4,000). After several appeals, the Supreme Administrative Court held that any stigmatisation of Roma because of their generally low level of education is to be considered very strictly, given the situation and position of Roma in the Czech Republic. Thus, the Court found it unlikely that discrimination on the ground of ethnic origin had not taken place, and send the case back to the Prague Municipal court.

Internet source:

http://www.nssoud.cz/NSS-posuzoval-reklamu-Mel-jsem-se-lip-ucit-/art/1019?tre_id=196

Denmark

DK

Case law

Only an illness entailing impairment in full and effective participation in professional life constitutes a disability

The complainant was a 58-year-old woman who was responsible for customer service in an insurance company. She suffered from rheumatoid arthritis, chronic obstructive lung disease as well as deafness in one ear. In August 2011 she was dismissed due to the company's financial situation.



The complainant argued that the dismissal was discriminatory on the grounds of disability and age. The employer rejected the claim as the dismissal was based on the company's financial situation and its need for restructuring. The employer further argued that the complainant's illness did not constitute a disability, as there had been no need for reasonable accommodation for the woman to function in her job on an equal footing with other colleagues.

In its argument, the Board of Equal Treatment referred to CJEU C-335/2011 (Ring) and C-377/2011 (Skouboe Werge) and decided that the complainant's health condition did not constitute a disability encompassed by the Act on Prohibition of Discrimination in the Labour Market etc., as it had not entailed a limitation which had hindered her full and effective participation in professional life on an equal basis with other workers.¹⁶⁵ Thus, the Board found that discrimination because of disability had not taken place.

The Board also concluded that discrimination because of age had not taken place, considering that the age of the employee at the time of her dismissal (58) and the fact that she was the oldest of the dismissed persons were not sufficient evidence to establish a *prima facie* case of age discrimination.

Internet source:

<http://www.ligebehandlingsnaevnet.dk/naevnsdatabase/afgoerelse.aspx?aid=1268&type=Afgoerelse>

¹⁶⁵ Board of Equal Treatment Decision No 192/2013 of 11 September 2013.



Supreme Court on mandatory retirement age in collective agreement

The complainant was an employee at a telecommunications company whose employment was covered by a collective agreement containing a provision for retirement without notice at the end of the month in which the employee reached the age of 67.



The employee claimed that the provision constituted age discrimination and filed a complaint against the employer. The employer argued that the provision was covered by the exception in section 5a (3) of the Act on Prohibition of Discrimination on the Labour Market etc. and claimed that the forced retirement age was objectively and reasonably justified by a legitimate aim.

The complaint reached the Supreme Court, which initially stated that the main objective of the mandatory retirement age of 67 years was to bring about a lower average age in the workforce and thus a more appropriate age distribution among employees. Where possible the aim also was to achieve a necessary reduction of the workforce through age-related departures rather than dismissals.

The Supreme Court concluded that a forced retirement age of 67 years constituted appropriate and necessary means to achieve these purposes.¹⁶⁶ Thus, the age limit could be maintained.

Internet source:

<http://www.domstol.dk/hojesteret/nyheder/Afgorelser/Documents/183-11.pdf>

Estonia

EE

Case law

Estonian court found victimisation of a school teacher

According to the Equal Treatment Act, 'discrimination also includes a situation where one person is treated less favourably than others or negative consequences follow because he or she has filed a complaint regarding discrimination...' (Article 6 (3)).



The applicant is of Russian ethnicity and had been working as a teacher of Russian as a foreign language in an Estonian-language school. In 2009 the applicant was allocated fewer classes than previously, and alleged that this (negative) redistribution was motivated by ethnic preferences. The applicant submitted a complaint to the Commissioner for Gender Equality and Equal Treatment (the equality body), which found discrimination on grounds of ethnic origin.¹⁶⁷ Subsequently, the applicant cancelled the employment contract extraordinarily with reference to a fundamental breach of the employer's obligations.¹⁶⁸ Indeed, in November 2010 the Labour Disputes Committee confirmed that the employer had violated the applicant's individual rights following his submission of the complaint to the Commissioner for Gender Equality and Equal Treatment.

¹⁶⁶ Supreme Court 27 August 2013, Case 183/2011.

¹⁶⁷ Decision No 16 of 25 August 2010.

¹⁶⁸ In Estonia the Employment Contracts Act permits the extraordinary cancellation of an employment contract by an employee. For instance, an employee may cancel the employment contract extraordinarily due to a fundamental breach of the employer's obligations, in particular if the employer has demoted the employee, threatened to do so or allowed the employee's colleagues or third parties to do so (Article 91 (2)1).

France

Legislative development

Creation of a ground of discrimination based on place of residence

The French Parliament has extended national protection against discrimination to the ground of place of residence, following the first reading of the Programme Law for the City and Urban Cohesion by the National Assembly on 27 November 2013 and second reading by the Senate on 15 January 2014.¹⁷⁰

The bill inserts this prohibited ground of discrimination into the grounds protected by Article L1132-1 of the Labour Code, Article 225-1 of the Penal Code and the civil protection afforded by Law 2008-496 of 28 May 2008 prohibiting discrimination in private and public employment and in self-employment. It also specifies that favourable measures taken for the benefit of residents of a territory do not constitute discrimination, creating an exception for positive action.

This extension of protection aims to combat unequal access to public services throughout the country by increasing the resources of local authorities, investment and effectiveness of public services, as well as by countering stereotyping based on a person's address, which can influence access to employment as underprivileged populations can be identified by their neighbourhood.

The Bill has been transferred to a Joint Parliamentary Commission, which will meet to negotiate the final version of the text.

Internet source:

<http://www.senat.fr/dossier-legislatif/pjl13-178.html>

Political developments

Three reports on the situation of Roma in France

Three separate reports were published in 2013 examining the implementation by local authorities of the Ministerial Instruction issued in August 2012 on preparing for the dismantlement of illegal camps and respecting the humanitarian duties to provide access to housing, education and social rights in the context of each eviction of Travellers and Roma from illegally occupied land. The reports were drafted by the national equality body (Defender of Rights), the NGO Romeurope and a group of government inspectorates respectively.



¹⁶⁹ Decision of the Tartu Circuit Court of 6 May 2013 in Civil Case 2-10-43528.

¹⁷⁰ *Projet de loi no. 246 pour la ville et cohésion urbaine.*

The three reports unanimously point to the necessity to improve implementation of the Ministerial Instruction and to revisit government strategy by preparing for evictions and supporting the true integration of the Roma communities present on French territory. Social support and/or housing solutions have not been made available and no real integration policy has been pursued. The situation reported accords with the facts which gave rise to two European Social Rights Committee decisions rendered in 2012 finding massive discrimination resulting from violations of social rights, housing rights and rights to personal security, access to health care, education and dignity.

However, each report has a different outlook. Romeurope's report has been produced by an NGO observatory and is based on actual accounts of each eviction provided by organisations that support the Roma throughout the country. The Defender of Rights' report presents an account of its investigation into claims and the answers provided by prefects (the State's representatives in regions or *départements*) to its requests for information and describes the measures that were in fact put in place, or not, in all the documented cases at the time of eviction. It further presents in detail the legal provision applicable to each aspect of the questions raised by the dismantlement of camps, and makes recommendations regarding the humanitarian standards to be implemented in access to rights. The report by the government inspectorates evaluates integration policies in terms of the measures actually put in place at time of evictions in order to ensure access to housing and other rights. In addition, it examines specific projects put in place in order to provide long term housing in 'inclusion villages'. The report reviews the various programmes which have been implemented by local authorities and identifies those which should provide a basis for further government action and implementation.

Internet sources:

Report by the Defender of Rights:

<http://www.defenseurdesdroits.fr/sinformer-sur-le-defenseur-des-droits/linstitution/actualites/bilan-dapplication-de-la-circulaire>

Report by Romeurope:

http://www.romeurope.org/IMG/pdf/rapport_observatoire_cndh_romeurope_juin_2013.pdf

Report by the government inspectorates:

http://www.romeurope.org/IMG/pdf/rapport_inspections_24_05_2013_.pdf

Racist statements against Minister of Justice

In October 2013, a public television magazine programme presented a feature on the right wing party the Front national, in preparation for the municipal elections of March 2014. One of the party's candidates was featured showing her campaign's Facebook page where a picture of a young chimpanzee was compared to Ms Taubira, the French Minister of Justice. The candidate further stated that Ms Taubira was a savage who would be better in a tree than in government. The party subsequently strongly denounced the statements and expelled the candidate.



Since criminal complaints by members of government must be filed by the Minister of Justice, a rule which put Ms Taubira in an awkward position, the Defender of Rights (the national equality body) used its legal prerogatives to alert the public prosecutor of the situation and request a criminal enquiry pursuant to the Law of 29 July 1881 on the liberty of the press. Such statements would not constitute discrimination under French law, but would rather constitute racist defamation or insult. The complaint filed by the Defender of Rights is currently under investigation.

The press and politicians generally have denounced the candidate's statements and her Facebook page, apart from some extreme right-wing media and political groups.

Case law

Compulsory retirement age of civil servants



The petitioner was a music teacher in a public school, a profession for which French law imposes a mandatory retirement age of 65. The petitioner challenged his forced retirement, claiming that it constituted discrimination on grounds of age.

The State argued that this mandatory retirement age conformed with the exception to the prohibition of discrimination on the ground of age provided at Article 6(1) of Directive 2000/78, which allows the State to fix objectively and reasonably justified differences of treatment on grounds of age, which pursue a legitimate aim, including legitimate employment policy, labour market and vocational training objectives.

The Council of State (the supreme administrative court) confirmed that it considered the national policy of promoting better distribution of employment among the generations to pursue a legitimate objective and the compulsory retirement age of 65 to be proportionate, explicitly referring to the case-law of the Court of Justice of the EU.¹⁷¹

Internet source:

<http://www.juricaf.org/arret/FRANCE-CONSEILDETAT-20130522-351183>

Employers' power to impose religious neutrality at work



In March 2013, the *Baby Loup* case before the Supreme Court attracted a great deal of media attention as the Court found that private sector employers may not restrict employees' freedom to express their religious beliefs – for instance by wearing the Islamic veil to work – as the principle of secularity does not apply to private sector employees who are not operating a public service.¹⁷² The case concerned the association Baby Loup which ran a day-care centre for underprivileged children. The association dismissed an employee for wearing the veil at work in violation of internal regulations.

The case was sent back to the Court of Appeal of Paris. However, the Court did not follow the ruling of the Supreme Court, but rather based its ruling on the exception from the prohibition of discrimination for organisations with an ethos based on religion or belief.¹⁷³ The Court held that the intention to provide the children with a neutral environment free from politics and religion constitutes a legitimate mission in the public interest often carried out by public services. Given its duty to protect the children's freedom of belief and religion, the day care centre could be considered as an organisation with an ethos based on a belief in secularity. In addition, the Court found that the employer's in-house regulations respected the fundamental right to non-discrimination and that they were appropriate and proportionate to the legitimate purpose of providing a neutral environment for the children.

However, the Court of Appeal did not address the fact that the French Parliament has not transposed into French law the possibility given by Article 4(2) of Directive 2000/78 to adopt legislation exempting organisations the ethos of which is based on religion or belief from the prohibition of discrimination on

¹⁷¹ Conseil d'Etat No 351183, 22 May 2013.

¹⁷² Court of Cassation, Association Baby Loup, No 536, Case No 11-28.845 of 19 March 2013. See also *European Anti-Discrimination Law Review*, issue 17, p.57.

¹⁷³ Court of Appeal of Paris, Decision No S 13/02981 of 27.10.2013.

grounds of religion or belief. In contrast, the Supreme Court had held that there can be no ethos based on secularity as it is a principle of organisation of the State and not a belief.

The Case will now be sent back before the Supreme Court, where, as it is a case of jurisprudential conflict, it is to be adjudicated before a plenary session of the Court including all its chambers.

Meanwhile, in December 2013 the Council of State adopted an opinion on the principle of secularity beyond the public sphere, which will be likely to influence the Supreme Court when it rules on the *Baby Loup* case.¹⁷⁴ In its opinion, the Council of State expressly reiterates that in private employment, restrictions on the expression of religious freedom cannot be justified by the secularity of the State or by the principle of neutrality of the public service, but only by the task to be accomplished provided these restrictions are proportionate. In addition, although public servants are strictly bound by the duty of neutrality of the public service in the exercise of their functions, beneficiaries of the public service are not subject to same principle. Meanwhile certain restrictions on the freedom to express one's religion may result from explicit legal provisions, such as the Law of 15 March 2004 on pupils in public elementary and secondary schools, or considerations related to the enforcement of public order or the proper functioning of the public service. However, the Council does not impose religious neutrality on mothers accompanying their children during out-of-school activities, but it states that the competent authority can recommend that they abstain from manifesting their beliefs and religion.

Internet sources:

<http://combatsdroitshomme.blog.lemonde.fr/files/2013/11/CA-Paris-27-novembre-2013-13-02981-c-A-Babyloup1.pdf>

FYR of Macedonia

MK

Political development

Group of NGOs file disability discrimination complaint against banks

Ten civil society organisations filed a case to the national equality body claiming that 11 banks discriminate on grounds of disability. Following a case reported by a person with a visual (sensory) impairment in January 2013, the CSOs filed requests for information to all banks in the country, asking for data on the conditions, services and assistive technology provided by them for access to their services for persons with a visual impairment. They found that a person with this type of sensory impairment cannot use any of the services, including withdrawals from bank accounts and ATMs.



The case is pending before the equality body. However, one of the banks has amended its procedures facilitating access to services for persons with a visual impairment, following the complaint. For now, these amendments relate only to the services offered at bank counters and/or branches. The CSOs have withdrawn their claim with regard to this bank.

Internet source:

http://www.mhc.org.mk/system/uploads/redactor_assets/documents/516/Pretstavka.doc

¹⁷⁴ Opinion of the General Assembly of the Conseil d'Etat, 19 December 2013.



Absence of reaction to series of attacks on the LGBTI Support Centre

An LGBTI Support Centre was opened in October 2012 by the Macedonian Helsinki Committee for Human Rights. This centre is to provide legal assistance and other forms of support to both LGBTI persons and their family and friends. Since its opening, the centre has been subjected to several attacks, targeting both its staff and its offices.



One year after the first attack, despite several calls by both CSOs and the international community for the perpetrators to be prosecuted, the attacks have not yet been fully investigated. This is in spite of strong grounds to believe that the perpetrators can be easily identified (from security camera footage). Only one of the attacks was dealt with by a court, which found the accused guilty of taking part in a crowd-perpetrating violence. The Macedonian Helsinki Committee for Human Rights and several other CSOs recently filed a motion to the competent public prosecutor's office for criminal charges to be brought against unknown perpetrators for several criminal offences including discrimination.

The LGBTI Support Centre continues to operate, most recently publishing a *Guide to Strategic Litigation in Discrimination Cases on Grounds of Sexual Orientation and Gender Identity*, which was released in December 2013.

Internet source:

http://www.lgbti.mk/Reports_j4

Germany

DE

Case law

Waiting period provision in occupational pension scheme does not discriminate on grounds of age

The plaintiff (born in 1942, working for the defendant from 1997 until 2008) received no occupational age-related pension based on a condition of the defendant's pension scheme that a pension may only be claimed if 15 years of service have been completed before reaching the normal retirement age in the public pension system. The plaintiff's lawsuit was unsuccessful at all three instances.



The Federal Labour Court decided that a provision in an occupational pension scheme established by the employer, according to which a claim arising from the occupational pension scheme only exists if the employee has already completed 15 years of service before reaching the normal retirement age in the public scheme, is lawful and therefore effective since it does not violate the prohibition of discrimination on the ground of age.¹⁷⁵

Internet source:

<http://juris.bundesarbeitsgericht.de/cgi-bin/rechtsprechung/document.py?Gericht=bag&Art=en&Datum=2013-2-12&nr=16672&linked=urt>

Reasonable accommodation for religion in physical education

A Muslim girl asked for a dispensation from coeducational swimming lessons where boys and girls train together, despite the fact that she was allowed to wear a special swim suit covering her body (a 'burkini').



¹⁷⁵ Federal Labour Court (Bundesarbeitsgericht), 12.02.2013, 3 AZR 100/11.

She argued that she was still exposed to seeing naked chests of boys and may have some kind of contact with them.

The Federal Administrative Court held that the requirement to participate in coeducational swimming lessons interfered with the applicant's right to freedom of religion (Art. 4 of the Basic Law) given her religious beliefs.¹⁷⁶ It argued that the right to freedom of religion as guaranteed under Article 4 of the Basic Law encompasses the right to measures by public authorities to accommodate religious beliefs. The limits of this duty are determined – in the view of the Court – by the constitutional duty stemming from Article 7 of the Basic Law to provide and organise public education. This duty demands neutrality in religious terms but allows for limits on freedom of religion that are necessary to fulfil this duty and do not impose an undue burden on individuals. The Court decided that no dispensation must be granted to accommodate the applicant's religious beliefs in this specific case. It regarded the special swimsuit as a sufficient means for reasonable accommodation of the girl's religious beliefs. It argued that there is no right not to be exposed to naked male chests during swimming lessons. A public school's duties, on the contrary, include the proper preparation of pupils for a pluralist society and teaching them to deal tolerantly with behaviour that may be contrary to an individual's own beliefs. Any physical contact, it argued, can and must be prevented by the organisation of the swimming lessons. The interference with the right to freedom of religion was therefore justified.

The decision indicates a limit to measures of reasonable accommodation in a contentious area across Europe. It endorses the use of such measures in the form of the swimsuit, but underlines that the public school system can require a certain level of exposure to other standards of behaviour, in this case the other children's practice of swimming without such suits.

Legally, the case was constructed as a matter of freedom of religion and its limits, not as a matter of anti-discrimination law. In fact, this dimension of the case was not discussed and the concepts of this body of law were not applied. This is not surprising, as courts in Germany often frame requests for religious accommodation in terms of constitutional guarantees of liberty and their limits and not in terms of equal treatment.

Internet source:
www.bverwg.de

Dispensation from school on religious grounds



A pupil's parents demanded dispensation from school for a lesson where a film was shown based on a popular children's novel because it contained scenes where magic was practised. The parents regarded that as irreconcilable with their freedom of belief as Jehovah's Witnesses. Their faith prohibited any contact with magic. The school did not grant this exemption.

The Federal Administrative Court held that asking the pupil to watch the film constituted interference with the parents' right to determine the content of religious education (Articles 4 and 6 of the Basic Law).¹⁷⁷ It argued that the right to freedom of religion as guaranteed under Article 4 of the Basic Law encompasses the right to measures by public authorities to accommodate religious beliefs. The limits of this duty are determined – in the view of the Court – by the constitutional duty to provide and organise public education. This duty demands neutrality in religious terms but allows for limits on freedom of religion that are necessary to fulfil this duty and do not impose an undue burden on individuals. The Court decided that no dispensation must be granted to accommodate the complainants' religious beliefs in the circumstances of the specific case. It held that the duty to watch the film in the course of school lessons did not create a

¹⁷⁶ Federal Administrative Court (6 C 25.12), 12 September 2013.

¹⁷⁷ Federal Administrative Court (6 C 12.12), 12 September 2013.

disproportionate burden for the plaintiffs in the sense that it violated core aspects of their system of belief. It argued that it is indispensable for a pluralist society that minorities are respected and that members of minorities learn to deal with views that are not their own. The interference with the right to freedom of religion was therefore justified. The Court argued that the legislator is free to create wider possibilities for dispensation than demanded by fundamental rights if it regards this necessary pragmatically to resolve actual cases.

Legally, the case, like the similar case reported above, was constructed as a matter of the parents' right to determine the content of religious education and its limits, not as a matter of anti-discrimination law.

Internet source:

www.bverwg.de

Greece

EL

Legislative development

Introduction of a new anti-racism bill in Greece

On 28 November 2013, the Greek Minister of Justice submitted to Parliament a bill amending the current anti-racist legislation (Act 927/1979) and foreseeing tough sanctions for racist behaviour and crimes. The bill's aim is to combat racism and xenophobia and to promote the harmonisation of Greek legislation with Council Framework Decision 2008/913 on combating certain forms and expressions of racism and xenophobia by means of criminal law.



According to the bill, up to three years' imprisonment and financial penalties of up to €20,000 will be imposed for provocation of discrimination, hatred or violence based on racial or ethnic origin, religion or sexual orientation; participation in organisations seeking to provoke any form of racial discrimination; insults on the basis of race or ethnic origin; and discrimination in the provision of goods and services on the basis of racial or ethnic origin, religion or sexual orientation provided that the perpetrator's behaviour gives grounds to suppose a racist/discriminatory motive/intention to provoke hatred or violence against individuals or groups.

The bill also specifically targets racist behaviour and acts perpetrated by members of political parties, unions and organisations as well as members of Parliament. Unfortunately, the bill requires victims to pay a €100 fee to file their complaint, which is likely to deter many of them from doing so.

Internet source:

http://www.hellenicparliament.gr/Nomothetiko-Ergo/Epexergasia-stis-Epitropes?law_id=1fddd6cf-874b-4b4a-b01d-05f37f9c598d

Case law

Constitutional Court denies recognition of *actio popularis* for constitutional complaints

An NGO initiated an *actio popularis*¹⁷⁸ claim against a local school where Roma pupils were educated in a segregated manner. After a series of appeals the case reached the Curia (Hungary's supreme court), which established that although segregation had indeed taken place, it was not in the courts' power to order an end to the segregation, as that might make it impossible for the school to continue to operate, and it was not justifiable to issue a judicial order in a civil lawsuit which effectively meant closing a school. The NGO filed a complaint with the Constitutional Court, claiming that the Curia's decision had violated the pupils' constitutional rights to human dignity, non-discrimination and adequate moral and intellectual development, as well as their right to an effective remedy and access to justice.

The Constitutional Court declared the complaint inadmissible on the basis that only natural and legal persons *concerned* by the actual individual case may file a constitutional complaint against a court decision.¹⁷⁹ Since it is not the NGO that is actually concerned by the segregation, it does not have standing before the Constitutional Court. Two (out of the 15 judges) issued a dissenting opinion, emphasising that the possibility to bring *actio popularis* claims has been introduced into the Hungarian legal system precisely because members of the most marginalised groups are usually not in the position to take action against widespread discriminatory practices. If the rules guiding the submission of constitutional complaints are interpreted in a way that excludes NGOs from turning to the Constitutional Court after an *actio popularis* case has been decided by the ordinary courts, it renders the constitutional protection against discriminatory practices void. Therefore, the term 'concerned' should in their view be interpreted as to enable associations, organisations or other legal entities which have a legitimate interest in ensuring respect for the principle of non-discrimination to file constitutional complaints.

Internet source:

<http://public.mkab.hu/dev/dontesek.nsf/0/BA380DEF33986232C1257ADA0052495E?OpenDocument>

Reopening of proceedings into racists speech by Mayor

In 2009, the mayor of Kiskunlacháza made several statements in relation to the murder of a young girl giving the impression that in his view the murder had been committed by Roma. Based on an *actio popularis* claim by the Hungarian Helsinki Committee, the Equal Treatment Authority established that harassment had been committed, but this finding was subsequently quashed by the Metropolitan Court. After several instances and procedures, including a request for review before the Supreme Court,¹⁸⁰ the Equality Authority requested a review by the Curia (successor of the Supreme Court), where the Helsinki Committee intervened.

In its decision of 15 October 2013, the Curia quashed the Metropolitan Court's decision, and ordered that court proceedings be restarted. The Curia based its decision on the fact that the reasoning provided by the Court was so insufficient that it was not possible for the Curia to properly assess the case.

¹⁷⁸ In Hungary, NGOs are allowed by law to initiate legal proceedings in their own name if not all the victims of discrimination are individually identifiable.

¹⁷⁹ Constitutional Court, Decision No IV/03311/2012 delivered on 17 June 2013.

¹⁸⁰ See *European Anti-Discrimination Law Review*, issue 15, pp. 63-64.

Harassment of teacher in school based on sexual orientation



The complainant was employed by the defendant school as a part time teacher of Hungarian language and literature. As a result of his high-pitched voice, he became the target of constant mockery by his students, some of whom regularly called him a 'fag'. After he tried in vain to discuss the matter with the students, he notified the class head teacher and the school headmaster of the problem. No steps were taken however, and the students received good 'attitude grades' at the end of the school year, while the complainant's contract was not extended for the following year. He claimed discrimination on the basis of his – assumed – sexual orientation by the school. In response, the headmaster claimed that he had been informed about the harassment only at the very end of the year, that the complainant did not indicate in a timely manner that he did not agree with the students' grading, and that he did not ask for disciplinary measures to be taken against the students when the problems occurred but only at the very end of the school year when it would not have made sense to launch such proceedings. Finally, the headmaster stated that the non-renewal of the complainant's contract had nothing to do with his complaints.

The Equality Authority rejected the school's defence. It was established during the proceedings that the problems faced by the complainant had been widely known in the school, and even if the complainant had made his grievances known to the employer only at the end of the school year, he would still have been required to take measures to investigate the case. Finally, the Authority found that the non-renewal of the complainant's contract was directly linked to his complaint. The Authority established that the complainant had suffered both direct discrimination (due to his dismissal) and harassment (due to the employer's failure to address harassment). The defendant was ordered not to repeat the violations and to publish the decision on its website. The Authority decided not to impose a fine on the respondent due to the fact that during the proceedings, the school sought a friendly settlement involving an offer to reemploy the complainant (who refused to settle).

Internet source:

<http://www.egyenlobanasmod.hu/jogesetek/hu/165-2013.pdf>

Italy

IT

Legislative developments

Reasonable accommodation for people with disabilities

In August 2013, Legislative Decree No 216/2003, which implements Directive 2000/78 in Italian law, was amended,¹⁸¹ introducing new provisions on the duty to provide reasonable accommodation. The amendment followed the CJEU infringement judgment of 4 July 2013, where the Court found that Italy had failed to correctly transpose Article 5 of the Directive.¹⁸²



The new Article 3, paragraph 3-*bis*, reads as follows: 'in order to apply the principle of equal treatment of persons with disabilities, private and public employers shall provide for reasonable accommodations in accordance with the UN Convention on the Rights of Persons with Disabilities, ratified by Law No 18/2009, in workplaces, to guarantee to persons with disabilities full equality with other workers. Public employers

¹⁸¹ Legislative Decree of 28 June 2013 No 76 (in Official Journal No 150 of 28 June 2013), then converted into the Law of 9 August 2013, No 99 (in Official Journal No 196 of 22 August 2013, p. 1), on 'preliminary urgent Measures for the promotion of employment, in particular of youngsters, and of social cohesion and other urgent financial measures'.

¹⁸² See p. 39 of this present publication.



shall apply this provision without any additional burden and with the human, financial and instrumental resources already available’.

This final requirement of the provision addressed to public employers who are bound to respect the duty ‘without any additional burden and with the human, financial and instrumental resources already available’ is very common in Italian laws in an era of economic crisis and financial constraints, but it is problematic as it would seem unlikely that an employer would be able to afford reasonable accommodation without any additional financial or human resources.

Internet source:

<http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2003-07-09;216>

Criminal sanctions against homophobia and transphobia

On 19 September 2013 a disputed bill on criminal sanctions for homophobic acts was approved by the Italian Chamber of Deputies. The bill amends national law on the ratification and enforcement of the UN Convention on the Elimination of All Forms of Racial Discrimination (CERD).¹⁸³ The words ‘based on grounds of homophobia and transphobia’ have been added to the provision creating the offences of incitement and promotion of discrimination and of violence or incitement of violence (as required by the CERD for the grounds covered therein), so that these offences will also expressly include those grounds.



In addition, the most disputed provision is a compromise with the MPs who were openly against the law’s approval. This added provision places freedom of expression above the prohibition of discrimination, so that the former prevails over the latter unless there is incitement to hate or violence. Expressions and manifestation of beliefs or opinions related to the pluralism of ideas are thus protected provided that they do not incite hatred or violence. The same applies to conduct that takes place within organisations carrying out activities of a political, cultural, educational, health, religious character or that relates to the activities of trade unions or religious denominations in implementation of principles and values of constitutional importance that characterise these organisations.

This provision is phrased in quite unclear terms so that its meaning is likely to be ambiguous. Although it applies only to ‘discrimination’ as enshrined in the law ratifying the CERD, there is a risk that the provision will influence the interpretation of the notion of discrimination in general.

Internet source:

<http://www.camera.it/leg17/126?leg=17&idDocumento=245>

Political development

Racist offences against Minister for Integration

Cécile Kyenge, an Italian citizen of Congolese origin, is the first person of African origin to be appointed as a government minister in the history of the Republic. Since her very first days in office, several right wing politicians have delivered public statements with a clear racist content. The public prosecutor has started an investigation into one such statement for hate speech (technically the crime is defamation aggravated by racial discrimination).



These offences were disseminated through the most popular social networks, such as Facebook and Twitter, as well as on several neo-Nazi websites. The racist offences targeting Ms Kyenge have created a hostile environment. Most of the public statements have been made by leaders or members of right wing

¹⁸³ Act 654/1975, last amended by Act 85/2006.

parties such as Lega Nord. In two cases, an investigation has been started, one of which has already ended with the conviction of the author, who was subsequently expelled from Lega Nord. However, the party has not clearly condemned the racist offences committed by its members or expelled any of its leaders who made such statements.

Case law

Court applies concepts of disability and reasonable accommodation



The complainant was a male nurse who was selected for employment by a health service through an open competition. During the selection procedure the nurse was diagnosed with night epilepsy, and the health service subsequently refused to conclude an employment contract with him as he was unable to do night shifts due to his diagnosis. He filed a complaint for discriminatory dismissal on the ground of disability.

Firstly, the Court of Bologna found that an illness such as night epilepsy amounts to a disability as interpreted by the CJEU in *HK Danmark* (11 April 2013, C-335/11).¹⁸⁴ Secondly the vacancy was found to require a healthy worker with full capacity but as the illness was diagnosed after the complainant applied for the open competition, he had acted in good faith, believing he had all the skills required. Finally the Court found that the refusal to sign the contract amounted to discrimination on grounds of disability. Moreover, the health service failed to provide reasonable accommodation as required by Article 5 of the Employment Equality Directive, such as hiring the applicant without rostering him for night shifts. At the time of the ruling, the duty of providing reasonable accommodation had not yet been implemented in Italy¹⁸⁵ but the Court applied the Directive's provision directly, with reference also to the UN Convention on the Rights of Persons with Disabilities, which in turn specifies a duty of reasonable accommodation. The Court ordered the health service to pay compensation amounting to an estimated six months' salary, which is what the claimant would have gained had he been hired.

This is the first case in Italy of application of the concepts of disability and reasonable accommodation under Directive 2000/78/EC as interpreted by the CJEU, with explicit reference to the CJEU case *HK Danmark*. Moreover, the Court referred directly to the UN CRPD and its ratification both by Italy and the European Union.

Internet source:

www.asgi.it/public/parser_download/save/tr_bologna_ord_18062013.pdf

LV

Latvia

Legislative development

Latvia ratifies revised European Social Charter

On 14 February 2013 Latvia ratified the Revised European Social Charter (apart from some provisions of Part II of the Charter), which came into force on 26 February. Latvia did not sign (or ratify) the Additional Protocol providing for the collective complaints procedure.

¹⁸⁴ Court of Bologna, Labour Section, 18 June 2013.

¹⁸⁵ See p. pp. 67-69 of this present publication for a short summary of the transposition, and p. 39 for a summary of the CJEU infringement judgment of 4 July 2013.

Among the articles not ratified is Article 12, paragraph 4 which obliges State Parties to remove all forms of discrimination against foreigners from their social security legislation provided they are nationals of other State Parties. The evaluation report on the compliance of Latvia's legislation with the Revised Social Charter concluded that current Latvian legislation makes different provision for Latvian citizens, foreign (third-country) citizens, and stateless persons in terms of social security benefits.

Internet sources:

www.vestnesis.lv/?menu=doc&id=255022

http://www.lm.gov.lv/upload/sociala_aizsardziba/pesh_gala_izvertejums_190908_2.doc

The Netherlands

NL

Legislative developments

Measures affecting the position of older employees in the Dutch labour market

In April 2013, a Social Accord between trade unions, employers' organisations and the Dutch Coalition Government postponed and amended a number of austerity measures previously announced by the Government, and presented the country's social policy for the next decade.¹⁸⁶ This Accord included measures addressing some developments on the Dutch labour market that disproportionately threatened more vulnerable groups, including older workers.



Many of the measures that were agreed upon in the Accord have now been incorporated into legislative proposals, such as the simplification of dismissal procedures and the shortening of the duration of unemployment benefits. Such measures will affect particularly older workers, as it is generally more difficult for them to find new employment, and due to the larger share of older people who are currently unemployed.

Particularly relevant for older workers is the proposal to prohibit 'automatic dismissal clauses' (*pensioenontslagbeding*), which the Minister of Social Affairs and Employment is expected to submit. Many employment agreements currently contain such a clause, which stipulates that the agreement ends automatically upon the employee reaching the age of 65. In July 2012 the Dutch Supreme Court held that such a clause is valid, even if it concerns a permanent employment contract.¹⁸⁷ The Dutch Government, however, aims to raise the retirement age progressively to 67 by 2023 and wants to encourage workers to continue working after the retirement age, which is quite rare in the Netherlands, partly due to the prevalence of these 'automatic dismissal clauses'. All three proposals will be debated in the Lower House (Tweede Kamer) in 2014.

Internet source:

<http://www.tweedekamer.nl/kamerstukken/wetsvoorstellen/detail.jsp?id=2013Z23566&dossier=33818>

Case law

Indirect discrimination on grounds of age in job advertising

In September 2013 a website operating as an intermediary between employers and job seekers was found by the Dutch equality body, the Netherlands Institute for Human Rights (NIHR), to be indirectly discriminating on the grounds of age.¹⁸⁸ The complaint concerned the option offered to employers by the



¹⁸⁶ See *European Anti-Discrimination Law Review*, issue 17, p. 72.

¹⁸⁷ Hoge Raad, 13 July 2012, ECLI: NL:HR:2012:BW3367.

¹⁸⁸ Netherlands Institute for Human Rights, Opinion 2013 116 of 18 September 2013.

defendant company to select a maximum number of years' work experience as one of the search criteria offered, although such a criterion can work to the detriment of older workers.

The defendant claimed before the NIHR that they offer this option because experience is an important criterion for many jobs. Although the NIHR considered this to be a legitimate aim, it still found indirect discrimination, as it was not necessary to use this (indirectly discriminating) measure. The defendant could also have used other tools, such as a blank comment field, which would enable employers to indicate their requirements as regards experience.

Internet source:

www.mensenrechten.nl

NO

Norway

Legislative developments

Ratification of the UN Convention on the Rights of Persons with Disabilities



The UN Convention of 13 December 2006 on the Rights of Persons with Disabilities was ratified by Norway on 3 June 2013 and has been in force as of 1 July 2013. The Norwegian ratification contains substantive interpretative declarations to Articles 12, 14 and 25, thus limiting the scope of the Convention for people with mental illnesses.

As of the same date, the Equality and Discrimination Ombudsman is designated as the body responsible for the supervision of the national implementation of the Convention, as it was already for the UN Convention on the Elimination of All Forms of Racial Discrimination and the UN Convention on the Elimination of All Forms of Discrimination against Women.

Internet source:

<http://www.stortinget.no/no/Saker-og-publikasjoner/Saker/Sak/?p=52670>

Regulations on information and communication technology enacted



On 21 June 2013, the government issued regulations under the Anti-discrimination and Accessibility Act (AAA), containing more detailed provisions on the scope and content of the obligation to implement universal design regarding information and communication technology (ICT) solutions that support an undertaking's normal functions and which are the main solution aimed at or made available to the general public.

The regulations entered into force on 1 July 2013 and require that all new ICT solutions/standard web content be accessible for all as of 1 July 2014. Existing solutions are to be universally designed at the latest as of 1 January 2021. These requirements apply to both public and private sectors.

The Agency for Public Management and e-Government will supervise the implementation of the regulations, whereas the Equality and Anti-discrimination Ombud will continue to handle individual complaints. Lack of universal design constitutes discrimination, and the Ombud may order such discrimination to cease. This sanction has not yet been used in relation to ICT, however.

Internet source:

<http://www.regjeringen.no/nb/dep/fad/dok/lover-og-regler/forskrifter/2013/forskrift-om-universell-utforming-av-inf.html?id=731520>

Extension of protection to all fields for sexual orientation and transgender

A new Act on sexual orientation and transgender which covers all areas in society, only excluding family life and purely personal matters, was adopted by Parliament on 21 June 2013, and has been in force as of 1 January 2014. Previously, protection against discrimination on the ground of sexual orientation was limited to the field of employment, and has now been extended to fields such as goods and services, health care and social benefits.



A number of amendments were also made to the Gender Equality Act, the Discrimination Act and the Accessibility Act as well as to the Working Environment Act, Chapter 13 to restructure and re-systematise these acts so that anti-discrimination legislation follows a similar structure and definitions, although it is still kept in separate acts.

Internet source:

<http://www.stortinget.no/Global/pdf/Innstillinger/Stortinget/2012-2013/Inns-201213-441.pdf>

Case law

Sexual orientation harassment of church employee

The complainant was a female employee of a parish of the Church of Norway, teaching the catechumenal programme/religious leader programme. The complainant was married to another woman and her sexual orientation was known when she was hired. After she was recruited, concerns about her sexual orientation were raised, and the parish decided to host an open meeting where her sexual orientation was one of the agenda points. Although the complainant asked the employer that her private life should not be discussed in this meeting, the meeting was still arranged.



The Anti-discrimination Tribunal noted that there are different views within the Norwegian Church on sexual orientation and cohabitation, and a church meeting may thus discuss the fundamental principles in relation to such issues.¹⁸⁹ However, the Anti-discrimination Tribunal pointed out that a distinction has to be drawn between a fundamental debate about such an issue and a discussion directly or indirectly related to a specific person. In this case, the discussion at the parish meeting was related to a specific hiring process, and thus the question of harassment of the individual was relevant. The Tribunal pointed to the fact that sexual orientation is very closely related to a person's identity and dignity. It did not assess every statement that was put forward during the church meeting, as it found that the discussion itself must be seen as humiliating and degrading. The Tribunal found harassment on grounds of sexual orientation.

The Anti-discrimination Tribunal does not have the power to issue sanctions, and at the time of writing, it is unclear if the complainant has taken the case to court or not, in order to claim compensation. This is the first case in which the Tribunal has assessed harassment in relation to sexual orientation in an employment relationship, and is all the more important as this employer is a religious institution.

Internet source:

<http://diskrimineringsnemnda.no/wips/2094117726/module/articles/smlId/387624528/smTemplate/2013-fullvisning/>

¹⁸⁹ Equality Tribunal Decision in Case No 29/2013 of 29 November 2013.

Bastiaan | 1992



Jerone | 1992



Simon | 1985



Lindsey | 1987



*Political development***Council of Ministers adopts first National Programme of Activities for Equal Treatment**

According to the 2010 Act on Equal Treatment and the 2008 Ordinance of the Council of Ministers, the Government Plenipotentiary for Equal Treatment should execute government policy with regard to equal treatment and counteracting discrimination. Among other duties, the Plenipotentiary should prepare and present to the Council of Ministers a National Programme of Activities for Equal Treatment (*Krajowy Program Działań na rzecz Równego Traktowania*) and then an annual report on its execution. The first report was due on 31 March 2013. But since a programme was not presented, there was no report on its execution either.

However the National Programme was eventually drafted and in February 2013 it was sent for government and public consultations.¹⁹⁰ As a result of a long process of consultations, consecutive versions of the Programme were prepared. The final Programme was presented to and adopted by the Council of Ministers on 10 December 2013, and covers the years 2013-2016.

The Programme is the first government document that tackles the problem of discrimination generally across all grounds, and it focuses on six areas: anti-discrimination policy; the labour market and social security system; counteracting violence and increasing protection for victims of violence; education; health care; and access to goods and services. Within each area, the Programme formulates main objectives and a number of specific objectives regarding equal treatment and anti-discrimination policies that are addressed to particular ministries, public agencies and NGOs for implementation within a given period of time.

Doubts were expressed on many aspects of the Programme during the consultation process – mostly with regard to the lack of funds for the Programme's implementation, but also the absence of regulatory impact assessments and gender mainstreaming. A special inter-ministerial team will be established to monitor the implementation of the Programme, and the Government Plenipotentiary will report on it annually.

Internet source:

<http://bip.kprm.gov.pl/kpr/bip-kancelarii-prezesa/projekty-aktow-prawnych/2311,Krajowy-Program-Dzialan-na-rzecz-Rownego-Traktowania-na-lata-2013-2015.html>

*Case law***Chronic disease cannot automatically justify dismissal from police or fire service**

On the motion of the Ombudsperson (*in abstracto* review of a legislative act), the Constitutional Tribunal held that the automatic assumption that a police or fire officer is incapable of service because of a diagnosis of chronic hepatitis, HIV or acquired immunodeficiency syndrome (AIDS), regardless of their state of health, is inconsistent with Article 60 of the Polish Constitution, in conjunction with Articles 30 and 31, paragraph 3. The Tribunal stated that if an individual suffers from one of these illnesses, his/her capabilities should be evaluated using individual health tests.



¹⁹⁰ Report on activities of the Government Plenipotentiary for Equal Treatment for the period 1 January 2012–31 December 2012, Warsaw 2013, pp. 37–38 and 85–86 (*Sprawozdanie z działalności Pełnomocnika Rządu do spraw Równego Traktowania za okres od 1 stycznia 2012 r. do 31 grudnia 2012 r.*, Warszawa 2013).

The Tribunal based its decision on the protection of the right to equal access to participate in public service and held that the provisions challenged violated personal dignity. It found that the pursued aim of protecting the health, rights and freedoms of third parties could have been achieved by less invasive measures, for instance by assigning the person concerned to a position where there would be a low risk of injuries and/or infecting others.

In its verdict, the Tribunal also pointed out that the Minister of the Interior has not yet implemented a judgment of the Constitutional Tribunal issued on 23 November 2009 which concerned police officers who were HIV carriers, and underlined the necessity of amending the challenged regulations.

Internet source:

<http://isap.sejm.gov.pl/DetailsServlet?id=WDU20130001612>

Portugal

Legislative development

Status of NGOs representing people with disabilities



In July 2013 a Decree-law was adopted, defining the status of NGOs of people with disabilities (*organizações não governamentais das pessoas com deficiência* – ONGPD) and determining State support to those organisations.¹⁹¹

These organisations are to pursue the following objectives:

- a) The defence and promotion of the rights and interests of people with disabilities and their families, with a view to their integration at social and family level, their advancement and personal and professional fulfilment;
- b) The elimination of all forms of discrimination against people with disabilities;
- c) The promotion of equal treatment of people with disabilities.

In addition, article 5(2) of this Decree-law foresees that when a crime is allegedly committed against a person with a disability because of that disability, the ONGPD are entitled to assist and support victims in criminal proceedings. As assistants, the ONGPD have the right to lodge a complaint, appeal in criminal cases and claim compensation for losses.

The ONGPD which represent people with disabilities in general are entitled to financial support through the National Institute for Rehabilitation (INR). The INR is a public institution providing funding from the State budget according to criteria of equality and equity fixed in cooperation protocols adopted by the ONGPD and INR. These organisations can be active on the national, regional or local level, and are represented through unions, federations and confederations. They enjoy certain particular rights, such as the status of social partner in consultation or conciliation bodies with competence in the field of prevention of disability, rehabilitation and equalisation of opportunities for people with disabilities; representation in the National Council for Solidarity, Volunteering, Family, and Rehabilitation Social Security Policies; representation in the Economic and Social Council, etc.

Internet source:

<http://dre.pt/pdf1sdip/2013/07/14500/0448904493.pdf>

¹⁹¹ Decree-law 106/2013 of 30 July 2013.

Political development

Annual survey on perceptions and attitudes regarding discrimination

In December 2013 the National Council for Combating Discrimination (NCCD – the national equality body), published its annual survey on perceptions and attitudes regarding discrimination in Romania. The research institute IRES (Institutul Român pentru Evaluare și Strategie) was commissioned to carry out the survey, which included 1,415 face-to-face interviews with respondents aged over 18.

The survey shows that only about two out of 10 respondents reported that they had ever felt discriminated against. The most common reasons identified for being discriminated against were age (30%), social status (28%), income (26%), coming from a rural area (18%) and ethnicity (18%).

Compared to previous years' surveys, there has been a decrease in tolerance levels in relation to groups experiencing discrimination. The lowest tolerance level is manifested towards LGBT individuals, who would only be accepted in the family by 25% of the interviewees, while persons of Roma ethnicity would be accepted by 31% of respondents. At the same time, most respondents consider that Roma, persons with disabilities and those infected with HIV/AIDS as well as LGBT people are discriminated against in school, the workplace and hospitals.

Regarding the perceptions of legal remedies in cases of discrimination, 48% of respondents believed that discrimination was not punished legally, while 28% thought it was punished by fines and 5% by prison sentences. 15% did not know. 54% of the respondents had heard of the National Council for Combating Discrimination (NCCD) and 23% stated that they had high or moderate trust in the NCCD. Less than a third of respondents stated that they were aware of what they legally had to do if they were discriminated against. The answers they provided in this respect were, however, quite vague.

Internet source:

<http://www.cncd.org.ro/files/file/Sondaj%20de%20opinie%20CNCD%202013.pdf>

Case law

National equality body sanctions Facebook incitement of sterilisation of Roma women by local politician

The National Council for Combating Discrimination (NCCD) found that a statement posted on the personal Facebook page of a local counsellor stating that Roma women who are not in the right social conditions to raise children should be sterilised amounts to discrimination. The NCCD ordered the defendant to pay a fine of RON 8,000 (approx. €1,800). The decision of the NCCD followed the decision of the local prosecutor's office to decline competency and not to start criminal investigation. The NCCD decision can be challenged by the defendant, who has already announced in the media his intention to do so.

Internet source:

<http://www.cncd.org.ro/noutati/Comunicate-de-presa/Comunicat-de-presa-referitor-la-adoptarea-deciziei-CNCD-in-cazul-declaratiilor-dlui-consilier-Rares-Buglea-179/>





High Court final decision on the Roma segregation wall

In July 2011, the mayor of the northern Romanian city of Baia Mare ordered a concrete wall to be built between a Roma neighbourhood and the main road. In November 2011 the National Council for Combating Discrimination (NCCD) found that the segregation caused by the wall constituted harassment of the Roma community, imposed a fine and recommended the wall's demolition.¹⁹² The Court of Appeal of Cluj subsequently quashed the NCCD decision and the NCCD then challenged the Court of Appeal's decision before the High Court of Cassation and Justice as the last venue.

In September 2013, the High Court of Cassation and Justice accepted the NCCD's appeal and upheld its initial decision.¹⁹³ The High Court decision is final, and constitutes both a victory for the NCCD, which had been heavily attacked in the media by the defendant, and an important precedent as to the High Court's position on Roma segregation. The decision is also particularly important as the segregating wall still stands and, in a different legal action, the Court of Bucharest denied the request of a Roma NGO to have the wall destroyed based on the lack of legal authorisation as well as its discriminatory impact.¹⁹⁴ While the defendant has already paid the initial fine, the NCCD can now issue new financial sanctions against him or seek a court order for the demolition of the wall.

Internet source:

<http://www.scj.ro/dosare.asp?view=detalii&id=3300000000052477&pg=1&cauta=1741/33/2011>

High Court and Court of Appeal order NCCD to issue an adequate sanction in case of discriminatory statements



Following allegedly racist statements made by the then Minister of Foreign Affairs, the National Council for Combating Discrimination (NCCD) found in November 2010 that the statements amounted to discrimination on grounds of ethnic origin.¹⁹⁵ However, instead of issuing a sanction such as a written warning or an administrative fine, the NCCD issued a recommendation that the defendant should not repeat the violations. The NCCD's recurrent practice of issuing recommendations instead of sanctions has been increasingly challenged by victims of discrimination and NGOs.

The NCCD decision was challenged by the complainant NGO coalition before the Bucharest Court of Appeal, which upheld the NCCD Decision. However, following an appeal brought by the NGOs, the High Court of Cassation and Justice decided in April 2013 to quash the decision of the Court of Appeal and send the case back.¹⁹⁶

In its new decision, the Bucharest Court of Appeal decided in June 2013 to follow the High Court and accepted in part the requests of the NGO Coalition.¹⁹⁷ Most importantly, the Court of Appeal ordered the NCCD to issue a decision containing an administrative sanction against the defendant. This is the first time a court has ordered the NCCD to issue a truly dissuasive, effective and proportionate sanction in a case of discrimination. In light of the judgment of the Court of Justice of the EU in the *Accept* case (see below), this development could bring the NCCD to change its practice of issuing recommendations rather than sanctions.

¹⁹² NCCD Decision 439 of 15 November 2011. See also *European Anti-Discrimination Law Review*, issue 15, pp. 73-75.

¹⁹³ High Court of Cassation and Justice, File 1741/33/2011, Decision 640 of 27 September 2013.

¹⁹⁴ Bucharest Court (*Tribunalul Bucuresti*), Decision No 4506 of 13 November 2012. See also *European Anti-Discrimination Law Review*, issue 16, p. 79.

¹⁹⁵ National Council for Combating Discrimination, Decision 366 of 24 November 2010.

¹⁹⁶ High Court of Cassation and Justice, Decision 5026 of 17 April 2013.

¹⁹⁷ Bucharest Court of Appeal Decision of 20 June 2013 in file 1490/2/2011.

Internet source:

<http://lege5.ro/dosar/gm3daoigrzpte/1490-2-2011-curtea-de-apel-bucuresti>

Court of Appeal rejects Accept's action despite CJEU judgment

In its preliminary ruling of 25 April 2013 following a reference from the Bucharest Court of Appeal, the Court of Justice of the EU provided guidance as to the resolution of the *Becali* case (brought by the NGO Accept) concerning public statements made by the 'patron' of a local football club excluding the possibility of the club employing homosexual football players.¹⁹⁸ The CJEU guidance related to the scope of employment matters as covered by the protection provided by the Framework Equality Directive, the burden of proof and the adequacy of sanctions in cases where a finding of discrimination has been made.



In its decision issued on 23 December 2013, however, the Bucharest Court of Appeal did not recognise the value of the CJEU's preliminary ruling and, more specifically, did not follow its ruling. The Court of Appeal found that the NCCD was correct in defining the facts of the case as falling outside the scope of employment relations, although the CJEU had made the opposite interpretation. With regard to the adequacy of the administrative warning as a remedy, the Court of Appeal wrongly paraphrased the CJEU judgment as 'confirming the legal value of the warning as [a] sanction which is effective, proportionate and dissuasive' and decided that the NCCD warning was an adequate sanction given the factual context. To this effect, the Court took into account the fact that the statements had been made during an interview in response to a journalist's questions and noted that the statements had no subsequent effects, as no effective refusal to hire on discriminatory grounds had been substantiated.

The decision is not final and the complainant NGO has expressed its intention to challenge it before the High Court of Cassation and Justice.

Internet source:

<http://lege5.ro/Dosar/gi4ddebug5pte/12562-2-2010-curtea-de-apel-bucuresti>

Civil court issues sanctions for forced eviction of Roma families and relocation in inadequate conditions

In December 2010, the local authorities in Cluj Napoca forcibly evicted 350 Roma (76 families) from Coastei Street, without providing sufficient notice or consultation with the affected families. In addition, 40 of the 76 families were relocated in the outskirts of the city (Pata Rat) on the city's garbage dump and a former chemical waste dump, in inadequate housing conditions. The remaining families were reportedly left without any alternative housing.



A support group filed petitions on behalf of the forcibly evicted families before both the national equality body and the civil courts. The NCCD issued sanctions against the local authorities in November 2011 consisting of different fines amounting to RON 8,000 (approx. €1,800) and a recommendation to identify a proper housing solution for those evicted. The Mayor paid the fines but there was no measure taken in regard to the NCCD recommendation to improve living conditions.

Following the parallel action against the local authorities before the civil courts, the Cluj Court delivered its decision on 30 December 2013.¹⁹⁹ The Court ordered the local authorities to pay compensation for moral (non-pecuniary) damage amounting to €2,000 for each plaintiff. The Court also ordered the defendants to provide housing for the plaintiffs which would comply with the minimum conditions as established by

¹⁹⁸ CJEU, C-81/12, Judgment of 25 April 2013. See also *European Anti-Discrimination Law Review*, issue 17, p. 41.

¹⁹⁹ Cluj Court, File No 8721/117/2011, Decision of 30 December 2013.



law. Thus the NCCD recommendation that was not followed has now been now phrased by the Court as a legal obligation.

Internet source:

http://www.curteadeapelcluj.ro/Detalii_Dosar.aspx?id=8721%2f117%2f2011&idinstanta=117

Slovenia

SI

Legislative development

New Employment Relationship Act

In 2013 a New Employment Relationship Act was passed by the National Assembly. The Act, which entered into force on 12 April 2013, contains identical provisions on the prohibition of discrimination as the 2007 Employment Relationship Act that it replaced: it prohibits direct and indirect discrimination, instructions to discriminate and victimisation as well as harassment in the field of employment.²⁰⁰

The only novelty in the new law with respect to the prohibition of discrimination is the provision more clearly defining the factors in determining the amount of compensation for which an employer who acts in a discriminatory way is liable. Namely, the new Article 8 of the 2013 Employment Relationship Act states that 'Non-pecuniary damage caused to a candidate or worker shall cover the mental pain suffered due to unequal treatment of a worker, or discriminatory treatment carried out by an employer, or the lack of protection from sexual or other harassment or mobbing at the workplace suffered by the candidate or worker. The amount of monetary compensation for non-pecuniary damages has to be defined in such way that compensation is effective and proportionate to the harm suffered by the candidate or worker and that it dissuades the employer from repeating the violations.'

Internet source:

http://zakonodaja.gov.si/rpsi/r04/predpis_ZAK05944.html

Case law

Insufficient information provided on right to vote for persons with disabilities

The Advocate of the Principle of Equality (the national equality body) received a complaint from a voter who claimed unequal treatment on the ground of disability in the election process. She claimed that she was treated unequally because of the practices of the State Election Commission in relation to access to information about how to exercise the right to vote. She stated that the information on the Commission's website is limited; that the information on the possibilities for persons with disabilities to exercise their right to vote is not transparent or made available in the same place; that there was no information on how to claim the right to vote at an accessible voting station and that no form for claiming this right was available; that the information available on the website was not accessible to persons with a visual impairment; and that it was not possible for persons with visual impairments to file their claim by phone for adapted voting possibilities, which had been possible in the past.

The Advocate of the Principle of Equality found that for the 2011 parliamentary elections the State Election Commission had not ensured, and partly still does not ensure, sufficient, timely, transparent and easily



²⁰⁰ Employment Relationship Act, Official Journal of the Republic of Slovenia, No 21/2013.

understandable information on all possible adapted ways in which people with disabilities may exercise the right to vote. Such lack of information constitutes indirect discrimination on the grounds of disability.²⁰¹

The Advocate made a number of recommendations to the State Election Commission, including that all forms and necessary information be published in adapted formats, that full information be included, and that the Commission's websites be made accessible to users with severe disabilities as well. Finally, the Advocate asked the State Election Commission to report in 60 days on whether and how the recommendations had been taken into account, and to make sure that all adaptations are ensured and all obstacles for exercising the right to vote are removed one month before the next election on the state level.

Internet source:

http://www.zagovornik.net/uploads/media/mnenje_volilno_informiranje.docx

<http://www.dvk-rs.si/index.php/si/kje-in-kako-volim/glasovanje-na-voliscih-ki-so-dostopna-invalidom>

ES

Spain

Legislative development

General Law on rights of persons with disabilities and their social inclusion



To date, Spanish legislation on the protection of persons with disabilities has been scattered throughout various laws.²⁰² In addition, Law 26/2011 on Regulatory Adaptation to the International Convention on the Rights of Persons with Disabilities introduced many changes to this legislative framework, adapting it to the Convention. Law 26/2011 also specified that the Government should publish a consolidated text of the three specific laws on disability, including the changes introduced in 2011. This new unified law was finally approved by Royal Legislative Decree on 29 November 2013.²⁰³

The new General Law on the Rights of Persons with Disabilities and their Social Inclusion recognises the rights of persons with disabilities that existed previously either in specific disability laws or in general laws relevant to fields of application such as education or health care. In addition, it consolidates provisions on positive action in the field of disability and includes, for the first time, a definition of discrimination by association. The law states that there is discrimination by association 'when a person or group to which they belong is subjected to discriminatory treatment because of their relationship to each other by reason of disability'. Special consideration is also given to multiple discrimination, a concept which existed previously only in gender equality legislation. Finally, the new law includes an explicit recognition of the principle of freedom in decision-making which affects the rights of all persons with disabilities.

The General Law on Rights of Persons with Disabilities and their Social Inclusion entered into force on 4 December 2013.

Internet source:

<http://www.boe.es/boe/dias/2013/12/03/pdfs/BOE-A-2013-12632.pdf>

²⁰¹ Opinion of the Advocate of the Principle of Equality No 0700-2/2013/1 of 12 March 2013.

²⁰² In particular Law No 13/1982 on the Social Integration of Disabled People, Law No 51/2003 on Equal Opportunities, Non-discrimination and Universal Accessibility for Persons with Disabilities, and Law No 49/2007 on Offences and Sanctions in the Field of Equality for Persons with Disabilities.

²⁰³ Royal Legislative Decree 1/2013 of 29 November 2013, approving the Consolidated Text of the 'General Law on the Rights of Persons with Disabilities and their Social Inclusion' (BOE, 3 December 2013).

Political development

Police registration of Swedish persons of Roma ethnic origin

On 23 September 2013 Sweden's biggest morning newspaper (*Dagens Nyheter*) revealed that the regional police authority of Skåne (southern Sweden) was keeping a register entitled 'travellers' which listed 4,029 people, who were all of Roma origin or had a relationship with a person of Roma origin. The file included 1,000 children (of whom some were infants when they were registered) and 200 deceased persons, and many of the people registered had never been suspected of any crime.



Three investigations are currently taking place into the police register: one by the Swedish Commission on Security and Integrity Protection, one by the Public Prosecutor and one by the Equality Ombudsman. As the Discrimination Act does not apply to police work, the Equality Ombudsman is limited to raising issues of concern with regard to discrimination. The Equality Ombudsman's report is still pending.

On 15 November the Swedish Commission on Security and Integrity Protection announced publicly²⁰⁴ that its investigation had led to the conclusion that the register was not in accordance with the Police Data Act.²⁰⁵ The police had not registered people based *solely* on their ethnic origin, but they had made a clear misjudgement regarding the requirement that sensitive data such as ethnic origin be registered only when it is 'absolutely necessary' for a criminal investigation. Complementary requirements related to the data available to police officers consulting the register and information on persons who are not suspected of any crime had not been respected. The Commission therefore found that the register was excessive and went beyond what was 'absolutely necessary'.

The police have announced that they will comply with the decision, and the Commission is due to follow-up on compliance with the requirements of the Police Data Act.

With regard to the second main investigation, on 20 December the Public Prosecutor dropped the charges against two police officers in Lund responsible for the Roma register.²⁰⁶ The prosecutor stated that it could not be proved that the two individuals prosecuted were responsible as they believed that they had acted according to a routine accepted by the leadership of the national police authority. Rather than charging the individual police officers, the prosecutor therefore underlined systemic errors within the national police organisation.

Internet source:

<http://www.sakint.se/Uttalande-Skanepolisens-personuppgiftsbehandling.pdf>

²⁰⁴ Säkerhets- och Integritetsnämnden (Commission on Security and Integrity Protection), Opinion No Dnr 173-2013.

²⁰⁵ The Police Data Act (1998:622) and its subsequent version (2010:361).

²⁰⁶ Åklagarmyndigheten (Public Prosecutor's office), file No AM 139971-13.

*Legislative development***Adoption of military discipline law authorising dismissals from the army based on homosexual conduct**sexual
orientation

Article 20 of the newly adopted Turkish Armed Discipline Law introduces homosexuality among the violations of disciplinary rules which justify immediate dismissal from the armed forces.²⁰⁷ There have been several cases where homosexual men have been dismissed from public service or the military on verbal evidence of their engagement in 'unnatural intercourse' with other men.

Internet source:

<http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2013/02/20130216.htm&main=http://www.resmigazete.gov.tr/eskiler/2013/02/20130216.htm>

*Political developments***Disclosure of secret racial registration by Turkish government**racial
or ethnic
origin

According to a news report published on 1 August 2013, Turkish population registry records contain a confidential 'racial code'. The existence of this practice was revealed when a person's 'confidential racial code' was mentioned in an official letter sent by the provincial representation of the Ministry of Education in Istanbul to its district branch. The person concerned had been refused the right to enrol her child in an Armenian kindergarten, as the right to attend a specific minority school to receive mother tongue education is only granted to students and pupils belonging to the minority group which is affiliated with the school. Following this disclosure, an administrative court in Istanbul issued an injunction for the Ministry of Education to enrol the child in the Armenian kindergarten, as the refusal was found to be an infringement of the right to education.²⁰⁸

No official source has confirmed the existence of racial registration, although an official reply from the Ministry of Education stated that the eligibility for minority language education is determined based on information contained in old population registry records dating back to the Ottoman era, used to identify the racial background of minority citizens.

Internet source:

<http://www.agos.com.tr/haber.php?seo=90-yildir-soy-kodu-ile-fislemisler&haberid=5479>

Turkey's newly established Ombudsman's Office releases first activity report

Turkey's newly established Ombudsman's Office released its first activity report in late June 2013, covering its activities from the date when it started operation, 2 December 2012, to 27 June 2013. The report states that during this time the Ombudsman's Office received 2,964 complaints, about half of which have already been processed. Discrimination does not constitute a separate category of complaints in reporting by the Ombudsman's Office. However, it is reported, for instance, that 132 complaints were in the field of 'human rights', 46 in the field of 'rights of the disabled', 412 in the field of 'education, youth and sports', 49 in the field of 'health' and 24 in the field of 'social services'. Most complaints were found to be either outside of the scope of the Ombudsman's mandate or invalid as the complainant had not exhausted all

²⁰⁷ Official Gazette of 16 February 2013, No 28561.

²⁰⁸ Seventh Administrative Court of Istanbul, Judgment of 15 November 2013.

the available administrative remedies. As of the time of writing, the Ombudsman's Office had not yet issued any decisions on the merits.

The Ombudsman's Office was established pursuant to the Law on the Ombudsman Institution of 14 June 2012. It is tasked with reviewing the acts and operations of the administration and making suggestions to ensure the administration's compliance with the principles of human rights, justice and rule of law. The Institution can do so only upon complaints and lacks the mandate to make inquiries on its own initiative. The following fall outside the Institution's mandate: 1) decisions, actions and orders taken, adopted or given by the Turkish President on his own initiative; 2) actions concerning the use of legislative power; 3) decisions based on the use of judicial power; and 4) the activities of the Turkish Armed Forces which are of military nature.

Internet source:

http://www.kamudeneticiligi.gov.tr/content_detail-322-683-faaliyet-raporu.html

Government announces 'democratisation package'

On 30 September 2013 the Turkish Prime Minister announced the adoption of a new 'democratisation package', containing a number of legislative and executive measures. The Prime Minister specified that part of this package will be the establishment of an administrative anti-discrimination body and the definition of hate motivation as an aggravating circumstance for 'certain' crimes. Other measures included an amendment of the Regulation on the Dress Code of Staff Working at Public Institutions, removing the ban on public servants wearing the headscarf. Following this announcement the government also removed the 'student oath' which all elementary school pupils were required to take every school day and which was perceived as nationalist and discriminatory by Turkey's ethnic minorities. The package also provides for authorisation to use minority languages in political campaigns, the establishment of a university institution on the Roma, and the ability to receive private education in Kurdish. The package received mixed reviews in Turkey. While some welcomed the changes as limited yet important steps in the right direction, others criticised the government for falling well below expectations and not granting the rights that have long been claimed by minorities and other disadvantaged groups.

Internet source:

<http://www.mevzuat.gov.tr/MevzuatMetin/3.5.85105.pdf>

<http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2013/10/20131008.htm&main=http://www.resmigazete.gov.tr/eskiler/2013/10/20131008.htm>

Amnesty warns Turkey against forced eviction of displaced Roma living in extreme poverty

In December 2013, Amnesty International launched an urgent action on behalf of about 120 Roma, including 37 children, 'living in shacks in precarious conditions' who are under the threat of forced eviction by municipal authorities who want to make way for road construction. Some of the Roma families' shacks had been demolished in the summer of 2013 for road construction.



The group has been living in conditions of extreme poverty since their forced eviction in 2006 from their homes as part of a municipal urban regeneration project. They have been living on a vacant piece of land since early 2008 without access to basic municipal services such as electricity, clean water and basic sanitation, or health care, education and employment. According to Amnesty, the group's requests to the municipality for access to clean water and alternative housing were left unanswered. In response to Amnesty's call for action and news reports, the authorities informed the Roma families that they will receive some assistance during the winter.

Internet source:

<http://ua.amnesty.ch/urgent-actions/2013/12/331-13>



Monitoring mechanism for accessibility of goods and services by persons with disabilities

Eight years after the adoption of the Law on Persons with Disabilities (No 5378), the Turkish Government adopted on 20 July 2013 an executive regulation to monitor and audit the enforcement of the law's provisions on the accessibility of public goods and services for persons with disabilities. The regulation adopted by the Ministry of Family and Social Policies foresees the establishment of provincial commissions which will be chaired by the governor and composed of six members. In addition to public servants who must be architects, engineers, urban planners, landscape architects or construction technicians, there will be two representatives of disability NGOs, who preferably have disabilities themselves.²⁰⁹

The commissions will have the mission to enforce provisional Articles 2 and 3 of the law, which require the physical accessibility of all public buildings and infrastructures. Effective immediately, the regulation tasks the commissions to issue administrative fines in cases of non-compliance. The fines are set to be in the range of NTL 1,000-5,000 (approx. €375-1,875) for each non-complying private facility (not to exceed a total of NTL 50,000 (approx. €18,750) per year for each natural or legal person), and NTL 5,000-25,000 (approx. €1,875-9,375) where the facility belongs to a public institution (not to exceed a total of NTL 500,000 (approx. €187,500) per year for each institution). The commission may decide to give the non-complying facility an additional grace period of two years until 7 July 2015 instead of issuing a fine. The funds to be collected will be used for accessibility projects by the Ministry of Family and Social Policies.

The original grace period of seven years for the implementation of the accessibility requirements of the Law on Persons with Disabilities was extended from 7 July 2012 until 7 July 2015, just a few days before the expiration of the original deadline. In response to protests from disability organisations when the implementation period was extended, the Minister for Family and Social Policies expressed the political will to monitor the implementation process and to punish those who fail to implement the law.

Internet source:

<http://www.resmigazete.gov.tr/eskiler/2013/07/20130720-9.htm>

UK

United Kingdom

Case law

Supreme Court decides sexual orientation discrimination case



On 27 November 2013, the Supreme Court handed down its decision in a case regarding the refusal of the defendants, based on their religious beliefs as Christians, to rent out a double bedded room to a (homosexual) unmarried couple.²¹⁰ The defendants argued that to find them in breach of the relevant legislation would breach their right to manifest their religious beliefs under Article 9 ECHR. The Supreme Court ruled, by a majority, that the refusal constituted direct discrimination because the respondents would not have been willing to allow the appellants to share a room even if they had been married. Lady Hale, who delivered the majority judgment, accepted that discrimination between married (opposite sex) couples and unmarried couples amounted to indirect, rather than direct, discrimination on grounds of sexual orientation. But where, as here, the discrimination was between married (opposite sex) couples and civilly partnered (same sex) couples, it amounted to direct, rather than indirect, discrimination on grounds

²⁰⁹ Regulation on the Monitoring and Auditing of Accessibility, Official Gazette No 28713, 20 July 2013.

²¹⁰ See also *European Anti-Discrimination Law Review*, issue 15, p. 82.

of sexual orientation (relying on the decision of the CJEU in *Maruko*, Case C-276/06). This being the case, the discrimination could not be justified and was unlawful under the Equality Act 2010.²¹¹

A minority of the Supreme Court regarded the discrimination as indirect rather than direct but agreed with Lady Hale that it breached the Equality Act 2010 because in their view it was unjustified.

Internet source:

http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2012_0065_Judgment.pdf

Defendant in criminal trial not permitted to give evidence in niqab

On 16 September 2013 an important ruling was given by Judge Peter Murphy in the criminal trial of a defendant who is to be tried on a charge of witness intimidation. The defendant wished to wear a niqab in court, which would have had the effect of leaving only her eyes visible. The judge initially ruled that she could attend court in the niqab for a preliminary hearing, but then had to rule on whether she could wear the niqab while giving evidence. He ruled that, while the defendant's manifestation of her religious beliefs was entitled to respect, it was trumped in this case by the public interest in the courts conducting criminal proceedings 'in accordance with the rule of law, open justice, and the adversarial trial process ... [t]he ability of the jury to see the defendant for the purposes of evaluating her evidence is crucial ... The right to give evidence involves a corresponding duty to submit that evidence to the scrutiny of the jury'.²¹²



The order regarding the requirement for the defendant to remove the niqab while actually testifying left unaltered the previous order permitting her to cover her face at all other times. Judge Murphy went on to order that, while giving evidence, she would be screened from all but the judge, lawyers and jury and that no-one would be permitted to sketch her face. The National Secular Society is reported to have announced its intention to launch an official complaint against the decision, insisting that defendants' faces should be visible at all times, while the Muslim Council of Britain stated that women should be allowed to wear the niqab if they wish. The human rights organisation Liberty, however, welcomed the ruling as an attempt to balance the defendant's freedom of conscience with the effective administration of justice.

²¹¹ Supreme Court ruling, *Bull & Anor v Hall & Anor* [2012] UKSC 73 of 27 November 2013.

²¹² Preliminary rulings of this kind are not formally reported.

