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European Anti-discrimination Law Review

No. 11 - 2010



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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. This network is composed of one national expert per EU Member State, as well as senior researchers and ground coordinators. In addition to the EU Member States, the candidate countries, Croatia, the Former Yugoslav Republic of Macedonia and Turkey have been part of the Network since December 2009. The aim of the Network is to monitor the 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 the European Anti-discrimination Law Review and various Thematic Reports, which are all available in English, French and German. Full information about the Network, its reports, publications and activities can be found on its website: www.non-discrimination.net.

This is the eleventh issue of the *European Anti-discrimination Law Review* produced by the European Network of Legal Experts in the non-discrimination field. The Law Review provides an overview of the latest developments in European anti-discrimination law and policy (the information reflects, as far as possible, the state of affairs as of 15 June 2010). It includes an article on the "*Recognition of the rights of minorities and the equal opportunities agenda of the EU*" written by Olivier De Schutter, Professor at the University of Louvain-la-Neuve, Law Faculty, and at the College of Europe, European Interdisciplinary Studies Department. Anna Lawson, Senior Lecturer at the University of Leeds, School of Law, provides her view on the issue of "*Reasonable accommodation and accessibility obligations*". In addition, there are updates on legal policy developments at the European level and updates from the case law of the European Court of Justice and the European Court of Human Rights. At the national level, the latest developments in non-discrimination law in the EU Member States and the three accession candidate countries can be found in the section on News from the Member States, Croatia, FYR of Macedonia and Turkey. These four sections have been prepared and written by the Migration Policy Group (Isabelle Chopin and Thien Uyen Do) on the basis of the information provided by the national experts and their own research in the European sections.

In 2010 one thematic report, *Towards a balance between the right to equality and other fundamental rights*, written by Isabelle Rorive and Emmanuelle Bribosia and the fourth edition of the comparative analysis, *Developing anti-discrimination law in Europe - The 27 Member States compared*, were published. In addition, a thematic report on age authored by Declan O' Dempsey and Anna Beale, a handbook on how to bring a case to court written by Lilla Farkas, the update of the comparative analysis and a report on transgender are also in preparation.

In November 2010 the Network together with the European Network of Legal Experts in the field of gender equality, is organising a legal seminar in Brussels for representatives of the Member States, Equality bodies and its own members. The legal seminar will deal with the six grounds of discrimination and involve approximately 200 participants.

Isabelle Chopin
Piet Leunis

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

Meet ordinary people in this Review,
facing discrimination

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David | 1991



Erin | 1994



Frits | 1994



Corina | 1965



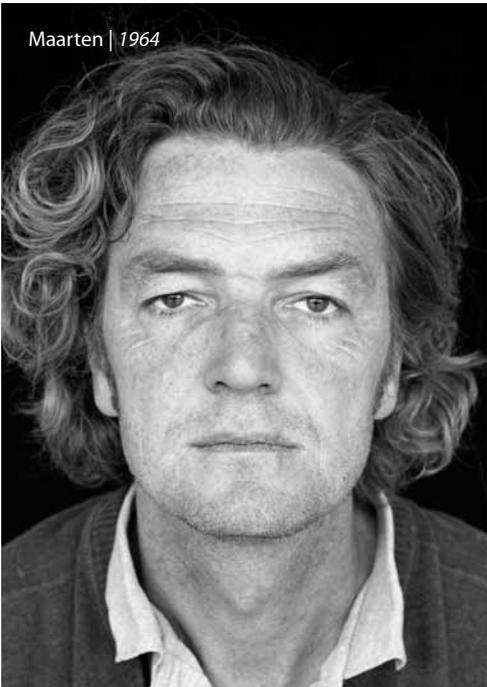
Louise | 2007



Nick | 1989



Maarten | 1964



Jort | 1998



Ruth | 1987



Reasonable Accommodation and Accessibility Obligations: Towards a More Unified European Approach?

Anna Lawson

Introduction

Neither the obligation to provide reasonable accommodation to disabled people,² nor the obligation to ensure that goods, services and structures are accessible to them, is unfamiliar to EU law. Through Article 5 of the Employment Equality Directive,³ Member States are required to impose reasonable accommodation duties on employers as regards disabled applicants, trainees and employees. Through a range of instruments dealing with transport and with telecommunications in particular, Member States are required to ensure compliance with specified access standards.⁴ Nevertheless, the reach of both types of obligation under EU law remains limited – the former to employment and occupation and the latter to a range of fairly narrowly defined contexts. Further, the two concepts of reasonable accommodation and accessibility continue to be given a wide variety of interpretations – a factor which inevitably generates confusion.

Two recent legal developments operate to raise the profile of the concepts of reasonable accommodation and accessibility on the European stage and to demand that every attempt be made to grapple with the linguistic, conceptual, legal and practical challenges they pose. First, there is the European Commission's proposal for a new Equal Treatment Directive⁵ – discussions about which are on-going⁶ – and second there is the EU's decision to conclude and thereby become a party to the United Nations Convention on the Rights of Persons with Disabilities (CRPD).⁷

² Except where direct quotations or sensitivity to context require, the term 'disabled people' will be used in preference to that of 'people with disabilities'. This choice of terminology is consistent with the social model of disability which stresses the disabling effect of social barriers on people who have or who are labelled as having impairments – see further M. Oliver, *Understanding Disability: From Theory to Practice* (Basingstoke, Macmillan, 1996).

³ Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L 303/16.

⁴ For further discussion see L. Waddington, 'Breaking New Ground: The Implications of the UN Convention on the Rights of Persons with Disabilities for the European Community' in O. Arnardottir and G. Quinn (eds.) *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives* (Leiden, Martinus Nijhoff, 2009). For more information on the numerous pieces of EC legislation which have an impact on the life of persons with disabilities outside employment, see also annex II of the Proposal for a Council Decision concerning the conclusion, by the European Community, of the Optional Protocol to the United Nations Convention on the Rights of Persons with Disabilities, COM(/2008)530 final, available at: <http://eur-lex.europa.eu/Notice.do?val=479558:cs&lang=en&list=479558:cs,479552:cs,479582:cs,479581:cs,&pos=1&page=1&nbl=4&pgs=10&hwords=&checktexte=checkbox&visu=#texte>.

⁵ European Commission, Proposal for a Council Directive on Implementing the Principle of Equal Treatment Between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation, COM (2008) 426.

⁶ See further L. Waddington, 'The Proposed Directive on Equal Treatment and its Significance for the Future Development of Disability Non-Discrimination Law' paper delivered at the Copenhagen Business School on 23 August 2010, available at: http://www.cbs.dk/forskning/konferencer/disabled_discrimination_2010/menu/papers.

⁷ Council Decision on the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, 2010/48/CE. See generally G. De Burca, 'The European Union in the Negotiation of the UN Disability Convention' (2010) 35 *European Law Review*, 174-96.

The proposed Equal Treatment Directive would extend protection on grounds of disability, age, sexual orientation and religion and belief to areas falling within EU legislative competence outside employment. Like the Employment Equality Directive, it contains a reasonable accommodation duty in relation to disabled people. In addition, and unlike the Employment Equality Directive, it contains a duty to provide effective access by anticipation – a form of generalised accessibility duty.

The CRPD will necessarily play a powerful role for decades to come in the shaping of disability law and policy both at the EU and the national level. As will be discussed in detail below, it imposes a clear obligation on States Parties to ensure that reasonable accommodation obligations form part of their prohibition of disability discrimination. It also imposes an explicit and separate obligation on States Parties to ensure accessibility.

Against the backdrop of these two important legal developments, this article aims to explore the meaning of reasonable accommodation and accessibility and to consider the extent to which they are currently manifested in the laws of EU Member States in non-employment spheres. In the next section, the meaning of the two concepts will be considered, particular attention being given to such guidance as is provided by the CRPD. The focus will then turn to the situation within EU Member States.

Nature of the Obligations

Reasonable Accommodation

Before turning to the definition of reasonable accommodation in the CRPD and to a more detailed consideration of its content, it is useful to note the relationship between reasonable accommodation and discrimination. This is an important issue which has a significant bearing on the way in which reasonable accommodation duties should be understood and developed at the national level.

As has already been mentioned, Article 5 of the Employment Equality Directive requires States to impose reasonable accommodation obligations on employers. It does not, however, explicitly state that a failure to comply with such a duty should be regarded as a form of discrimination against disabled people. Any ambiguity on this point has now been dispelled by the CRPD, Article 2 of which defines ‘discrimination on the basis of disability’ as ‘any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms’ and as ‘including denial of reasonable accommodation’. The obligation imposed on States Parties by Article 5(2) of the CRPD to ‘prohibit all discrimination on the basis of disability’ thus carries with it a requirement to impose reasonable accommodation duties on employers, educators, transport providers, prisons, police, and all other social actors whose behaviour affects access to any of the substantive rights protected by the Convention.

Reasonable accommodation is thus unequivocally incorporated into the non-discrimination requirement by the CRPD. It is thereby acknowledged to be an essential element in the effort to ensure that human rights are enjoyed by disabled people ‘on an equal basis’ with others. Its purpose is thus affirmed as being the removal of the specific disadvantage to which a particular disabled individual would otherwise be exposed so as to ensure equality. As well as differentiating it from more generic target-driven positive action measures, which are purely permissive rather than mandatory in nature⁸, this approach also confines reasonable accommodation duties to situations in which meaningful comparisons can be made with the position of people who are not disabled or who are not disabled in the same way. Thus, in relation to health services, reasonable accommodation duties might well require adjustments to be made to a

⁸ See e.g. CRPD, Article 5(4).

medical practitioner's communication methods or timetabling procedures and practices so as to enable a disabled person to have access to the same general health services as everybody else. Reasonable accommodation, however, could not provide the basis of an argument that such a person should be entitled to additional health services not otherwise provided. Neither could it be used as the basis of an argument that a fee payable for general health services should be waived because of their impairment. Such arguments might usefully be bolstered by substantive rights in the Convention (e.g. the right to health in Article 25 or the right to an adequate standard of living and social protection in Article 28) but treating them as claims to reasonable accommodation risks an over-extension of that concept that is likely to prove damaging to its long-term strength and vitality.

Turning now to the CRPD's definition of reasonable accommodation, Article 2 provides that it means:

necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

There is perhaps an apparent tension in this definition between the reference to 'a particular case' and the subsequent more generic references to 'disabled persons' and to 'all human rights and fundamental freedoms'. It is suggested, however, that the latter references should not be regarded as diluting the requirement to identify adjustments which are 'necessary and appropriate' in the 'particular case'. The generic references to 'disabled persons' and 'all human rights and fundamental freedoms' might instead helpfully be understood as indicating the breadth of application of the reasonable accommodation duty – i.e. that it arises in favour of all such people in connection with all such rights and freedoms. The focus of reasonable accommodation on the particularity of each individual case requires attention to be given by those discharging the duty to two key concerns – the effectiveness of the steps for the particular disabled person and the potential burden they might impose on the particular duty-bearer.

Turning first to the issue of effectiveness, reasonable accommodation duties demand that consideration be given to identifying the most effective means of removing the relevant disadvantage for the particular disabled person in question. This is likely to necessitate some dialogue between that person and the duty-bearer. Impairments vary enormously in nature and severity and so too do the characters, experiences and preferences of people with similar impairments. This variety inevitably results in differences in the levels of effectiveness of the various steps that might be taken by the duty-bearer. The individual-orientated nature of reasonable accommodation should thus encourage duty-bearers to resist making assumptions as to what might be most appropriate for a particular disabled individual and instead to engage in a dialogue with such a person about how the relevant disadvantages might most effectively be tackled.⁹

The second issue of relevance in any assessment of what steps a reasonable accommodation duty might demand is that of the potential burden of a proposed step on the particular duty-bearer. A 'burden', for these purposes, would not be confined to financial cost and might, for instance, include factors such as disruptiveness to working arrangements or deterioration in the quality or nature of core services. It is important to remember, however, that many proposed steps will carry net benefits rather than burdens for duty-bearers¹⁰ – in addition to the benefit of securing the custom or employment of the particular individual, benefits might flow from measures such as the introduction of a system or structure that will improve access and thereby increase the organisation's potential customer base. Reasonable accom-

⁹ This is termed the 'procedural' component of reasonable accommodation duties by S.J. Schwab and S.L. Willborn, 'Reasonable Accommodation of Workplace Disabilities' (2003) 44 *William and Mary Law Review* 1197 at 1258–64.

¹⁰ R. Kayess and P. French, 'Out of Darkness into Light' (2008) *Human Rights Law Review* 1, section 5d.

modation requires assessments of the level of any potential burden to be conducted in a manner that is sensitive to the circumstances of the particular duty-bearer. Thus, a financial cost that represents a small fraction of the annual budget of a large, wealthy organisation might nevertheless represent so large a sum as to threaten the financial health of a small and poorly resourced organisation. Clearly, a step that might represent an undue burden for the latter might well not do so for the former.

Accessibility

'Accessibility' is listed as one of the general principles of the CRPD.¹¹ It is dealt with most comprehensively in Article 9 which indeed is entitled 'Accessibility'. This is an intriguing and somewhat bewildering provision, the exact scope and implications of which are not yet settled. This has been acknowledged by the Committee on the Rights of Persons with Disabilities which has selected the topic as the subject of its Day of General Discussion on 7 October 2010.¹²

Before considering the nature and scope of the accessibility obligation, it is again helpful to consider its relationship with non-discrimination. The existence of some sort of link is clearly indicated by the fact that the obligation is couched, by Article 9(1), in the language of requiring States Parties to take 'appropriate measures' to ensure that disabled people have 'access' to specified types of structure, information and service 'on an equal basis with others'. A failure to fulfil this obligation would thus result in inequality of access which might, at least in some situations, be expected to constitute discrimination on the basis of disability which States are required by Article 5 to prohibit. Although this much is clear, the CRPD goes no further in establishing more precisely when a failure to provide access might amount to discrimination. Unlike reasonable accommodation, accessibility does not appear explicitly in the definition of 'discrimination'.

There is also some uncertainty as to the extent of the reach of the Article 9 accessibility duty. There is a firm emphasis on achieving access to physical structures on the one hand, and to information and communication technology, on the other. Frequent mention is made of the need to ensure accessibility in these respects in the contexts of buildings or other facilities open to the public and of services available to the public. However, questions as to the exact scope of the Article remain.

In Article 9(1), for instance, reference is made to 'housing' and 'workplaces'. It is thus unclear whether Article 9 requires States to promote accessibility within non-public spheres such as the private housing sector through measures that might include building and planning permission regulations, licensing laws, non-discrimination requirements or procurement policies. It is also of interest that the Article 9(2) (h) duty to 'promote the design, development, production and distribution of accessible information and communications technologies' demonstrates that the obligation is not confined to ensuring the accessibility of facilities and services already available to the public as it also extends to supporting the development and making available of new ones.

Unlike reasonable accommodation, 'accessibility' is not defined by the CRPD. However, several of its constituent elements can be discerned from a close reading of the relevant provisions. First, according to Article 9(1) measures required of States by the accessibility duty 'include the identification and elimination of obstacles and barriers to accessibility'. This is a dimension of the accessibility duty which is unlikely to be achievable without the direct input of disabled people and their organisations as they would seem to be best placed to identify relevant barriers and obstacles.¹³ It is also apparent that this aspect of the duty must refer to obstacles and barriers which are generally experienced by disabled people as a group.

¹¹ Article 3(f).

¹² <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGD7102010.aspx>.

¹³ Involvement of such people would also be consistent with Article 4(3).

It therefore stands in sharp contrast with the reasonable accommodation duty which, as has been seen, focuses on the particular barriers experienced by one disabled person and on the identification of the methods for their removal that would be most effective for that individual.

Another constituent element of the accessibility duty is the development and implementation of 'minimum standards and guidelines for the accessibility of facilities and services open or provided to the public'.¹⁴ Although the term 'universal design' does not appear in Article 9, this aspect of the accessibility obligation must be read in conjunction with the general obligation imposed on States by Article 4(1)(f) to 'promote universal design in the development of standards and guidelines' and to 'promote or undertake' research into and the development of universally designed facilities, services, goods and equipment. 'Universal design' is itself defined in Article 2 as:

... the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design.

An interesting aspect of the Article 9 accessibility duty is its demand that States ensure that 'forms of live assistance and intermediaries, including guides, readers and professional sign language interpreters' are provided where needed to facilitate access.¹⁵ This requirement makes it plain that the Article 9 accessibility obligation cannot be conceived of simply in terms of compliance with appropriately drafted design standards. Important though such standards are, the accessibility obligation requires thought to be given to barriers that disabled people might experience, unless provided with some form of live assistance, however well designed a building or information system might be. An example might be a blind person travelling alone by train and required to change platforms in an unfamiliar station.

The final constituent element of the accessibility duty which will be addressed here is one which is closely linked to the awareness-raising obligations placed on States by Article 8. States are required, by Article 9(2)(c) to ensure that training in all aspects of accessibility is provided to 'stakeholders'. They are also required to 'ensure' that private providers of services open to the public 'take into account all aspects of accessibility' – an obligation which has the potential to be interpreted as going beyond awareness-raising to demand legal intervention perhaps through non-discrimination, planning, licensing and procurement laws.

Reasonable Accommodation and Accessibility in the Member States in Non-Employment Areas

Sources

Some useful information on the position within Member States as regards reasonable accommodation and accessibility in fields other than employment is contained in the annual country reports produced by the European Network of Legal Experts in the non-discrimination field.¹⁶ The 2006 Mapping Study of national non-discrimination laws outside the employment context also contains valuable data and discussion.¹⁷ These sources have been supplemented by flash reports from the national experts provided in response to a special request from the Commission for information on reasonable accommodation and accessibility in non-employment fields.

¹⁴ Article 9(2)(a).

¹⁵ Article 9(2)(e).

¹⁶ Available at http://www.migpolgroup.org/publications_info.php?id=18.

¹⁷ A. McColgan, J. Niessen and F. Palmer, *Comparative Analysis on National Measures to Combat Discrimination outside Employment and Occupation: Mapping Study on Existing National Legislative Measures and their Impact in Tackling Discrimination outside the Field of Employment and Occupation on the Grounds of Sex, Religion or Belief, Disability, Age and Sexual Orientation*, VT/2005/062, (December 2006).



It should be noted that comparison and analysis of the legal and policy positions of Member States is rendered somewhat challenging by the fact that national experts (unsurprisingly, given the inconsistency of national approaches) appear to understand the terms in a variety of ways, some of which are quite different from the meanings attributed to them above. In particular, there is a tendency to use the term 'reasonable accommodation', in non-employment contexts, to refer to social security payments, pensions, tax deductions or reduced fares. It also appears that accessibility is sometimes understood in the very wide sense of having an entitlement to access a service or facility, regardless of the practical, physical or informational barriers which might be encountered by disabled people attempting to use that service or facility.

Reasonable Accommodation

Space constraints prevent a detailed analysis here of the situation within Member States as regards reasonable accommodation and employment.¹⁸ Nevertheless it is useful to note that, with a handful of exceptions,¹⁹ Member States have enacted reasonable accommodation duties in this field. Despite the fact that such legislation has generally been prompted by (or amended in light of) Article 5 of the Employment Equality Directive, the terminology and structure which shapes these duties is surprisingly diverse. So too is their relationship with discrimination law – a failure to comply with the duty being treated by some States as direct discrimination,²⁰ by others as indirect discrimination²¹ or a free standing form of discrimination²² and by still others as not constituting discrimination at all.²³

Given such diversity of approach in the employment field, where EU law might be expected to have exerted some harmonising influence, it is unsurprising that there appears to be an even greater variety of approach outside employment. There is also a considerable degree of uncertainty. This relates, for instance, to whether general obligations not to discriminate on grounds of disability would be interpreted by the courts to include a reasonable accommodation duty;²⁴ and to the meaning that courts might give to terms such as 'reasonable' or 'undue burden' which are often unexplained in the legislation.²⁵ Another issue which is unclear is the extent to which obligations, couched in the language of reasonable accommodation (or reasonable 'adjustments' or 'measures') but aimed principally at facilitating access by removing obstacles in advance of the appearance of a particular disabled customer or student,²⁶ in fact also carry the classic individual-orientated reasonable accommodation obligation to respond to the

¹⁸ See further L. Waddington and A. Lawson, 'Disability and Non-discrimination Law in the European Union: A Thematic Report' (European Commission, 2009), available at: http://www.migpolgroup.com/publications_detail.php?id=254.

¹⁹ Italy, Poland and Slovenia are identified in L Waddington and A Lawson, *ibid*, section 2.3, as countries in which the obligation has either not been introduced at all or in a way which is vague or unclear.

²⁰ See e.g. Article 7 of the Maltese Equal Opportunities (Persons with Disability) Act 2000.

²¹ See e.g. § 7c of the Austrian Act on the Employment of People with Disabilities.

²² See s 20 of the UK Equality Act.

²³ See e.g. the Bulgarian Protection against Discrimination Act.

²⁴ See e.g. s 2(3) of Slovakia's Anti-Discrimination Act (Act No 365/2004). See also Germany, where s 19(1) of the AGG prohibits disability discrimination in relation to goods and services – and a decision of the German Constitutional Court (BVerfG 96, 288) supports the view that a prohibition of discrimination does include a duty to accommodate in the education context.

²⁵ See e.g. Articles 6 and 9 of Cyprus's Law on Persons with Disability 127(I)/2000; and Lithuania's Law on Social Integration of People with Disabilities 2004, Nr. 83-2983.

²⁶ Such as the UK's anticipatory reasonable adjustment duty (s 20 and schedules of the Equality Act 2010); Spain's duty to provide reasonable accommodation in contexts including telecommunications, goods and services, the built environment and public administration (Article 7 of Law 51/2003); and Sweden's duty on higher education providers to take reasonable measures regarding the accessibility and usability of premises (Chapter 2 Section 5, second passage, of the Discrimination Act 2008:567).

specific circumstances of a particular disabled person. In the vast majority of countries, there have been very few if any relevant cases and such uncertainties as there are therefore persist.²⁷

It seems fairly clear that in a number of countries (including Estonia, Greece, Hungary, Italy, Latvia, Luxembourg, the Netherlands, Poland, Romania and Slovenia) there is no form of generalised reasonable accommodation duty in non-employment fields. Interestingly, in a number of such countries, there has been considerable recent legislative and lobbying activity to remedy this gap. Slovenia is an example of a country in which ratification of the CRPD seems to have provided the necessary catalyst for the enactment of relevant reasonable accommodation legislation.²⁸

In some countries there are laws or policies which demand that adaptations be made for disabled people in non-employment fields but they are not couched in the language of reasonable accommodation, not linked to non-discrimination requirements and not supported by clear enforcement mechanisms. An example is the Italian requirement that public services be adapted appropriately for disabled people.²⁹ In other countries, such as Sweden,³⁰ the absence of a wide-reaching reasonable accommodation duty seems to be linked to the provision of publicly funded personal assistance to help overcome any obstacles in accessing a service and of the cost of travel by taxi to help overcome barriers in the use of public transport.

Where there are clear reasonable accommodation duties, breach of which constitutes discrimination, their classification varies. Breach of the reasonable accommodation duty created by s 4(1) of the Irish Equal Status Act 2000, for instance, constitutes a form of discrimination distinct from direct or indirect discrimination. Breach of the reasonable accommodation duty created by s 3(2) of the Czech Republic's Anti-Discrimination Law, on the other hand, constitutes indirect discrimination and breach of the Swedish duty to take reasonable measures to ensure accessibility and usability of higher education premises constitutes direct discrimination.³¹

Accessibility

It is clear that strategies designed to promote accessibility have been developed by the vast majority, if not all, of the EU Member States. Indeed, compliance with minimum accessibility standards, as already mentioned, is required by EU law in certain contexts. Many countries appear to go beyond the demands of EU law, particularly in the context of accessibility requirements relating to the construction of new buildings and to the substantial renovation of existing buildings.

There is a wide divergence of approach between different Member States in relation to accessibility entitlements and standards. This variation is to be found in the nature and breadth of the issues subjected to principles of accessibility. In Germany, for instance, the Law on the Equality of the Disabled requires public bodies (but not the private sector) to grant disabled people hindrance-free access to infrastructure including public buildings, street environments and transport; and also to communication with public bodies (which should be made available through methods such as Braille and sign language). In Finland,

²⁷ In the UK there have been important cases on anticipatory reasonable adjustment but they have not addressed the question raised by the text accompanying the previous note.

²⁸ Article 3(4) of the Slovenian draft Act on the Equal Opportunities of People with Disabilities.

²⁹ Directive of the President of the Council of Ministers, 27 January 1994.

³⁰ Law (1993:387) on Support and Service to Certain Disabled Persons.

³¹ Chapter 2 Section 5, second passage, of the Discrimination Act 2008:567 – but see note 26 above for discussion of the nature of this duty.

there are requirements that the buildings used by the public administration as well as by public and private service-providers and businesses should be broadly accessible to disabled people.³²

The accessibility strategies adopted by Member States place a heavy emphasis on issues of physical access. Less attention is generally devoted to issues of access to information, communication and technology. There are some notable exceptions, however, where careful attention has been given to ensuring access to information (e.g. through the provision of guidelines for accessible web design³³), television and products.³⁴

In addition to this variation between Member States as to the coverage of their accessibility strategies, there also appears to be considerable variation in their content. Detailed standards and specifications may be entirely absent. Even where they exist, it appears that their content may vary considerably from country to country.

As regards enforcement mechanisms, there is also considerable variation. The Australian approach of introducing legally enforceable disability standards,³⁵ under its federal Disability Discrimination Act 1992, does not appear to have been widely replicated in Europe.³⁶ In some Member States, a failure to comply with relevant accessibility standards represents an important consideration in discrimination cases (e.g. for direct discrimination in Hungary,³⁷ and for indirect discrimination in Austria³⁸ and Bulgaria³⁹). It also represents an important consideration in discrimination claims based on a failure to comply with the UK reasonable adjustment duty. This is an interesting form of discrimination duty, consisting of a requirement to take reasonable steps to ensure access, which shares some similarities with the proposal to

³² Land Use and Building Act (132/1999) and Land Use and Building Decree (895/1999).

³³ See e.g. the 'Remove Barriers' guidance provided in the Netherlands, available at www.drempelsweg.nl. This appears to be non-binding and unenforceable, however. It is also worth noting that in the US the Federal Government has adopted the W3C, Web Content Accessibility Guidelines, available at: <http://www.w3.org/TR/WAI-WEBCONTENT>.

³⁴ See e.g. developments under the Spanish Law 51/2003 on Equality of Opportunities, Non-Discrimination and Universal Accessibility for the Disabled 2003; and the Law on Urgent Measures to Promote Digital Terrestrial Television 2005. Note also that in the US the Architectural and Transportation Barriers Compliance Board (Access Board) promulgates accessibility standards for federal agencies in areas related to hardware and software products, telecommunications, and video and multi-media.

³⁵ For Education Standards see http://www.dest.gov.au/sectors/school_education/programmes_funding/forms_guidelines/disability_standards_for_education.htm; and for Accessible Public Transport Standards, see <http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrumentCompilation1.nsf/0/E31CFFB47B7946CBCA256FFE0015A9A3?OpenDocument>.

³⁶ Although the Spanish and Portuguese approaches involve the drawing up of detailed plans covering accessibility issues, it is not clear from the reports whether compliance with these plans is mandatory and enforceable.

³⁷ Article 8 of the Hungarian Equal Treatment Act and Guideline no. 10.007/3/2006 of the Equal Treatment Advisory Body interpreting certain legal issues related to the obligation to make the environment accessible for people with disabilities. See also Equal Treatment Authority, Case 13/2006, available at: www.egyenlobanasmod.hu, where it was held that the inaccessibility of a courtroom constituted direct discrimination and that it could not be justified on the basis of shortage of funds for carrying out the necessary modifications.

³⁸ Section 5 of the Federal Disability Equality Act 2005 specifies that indirect discrimination may arise from 'features of designed areas' as well as from provisions, criteria or practices.

³⁹ It appears to be on this basis that the Supreme Court of Cassation (dismissing arguments based on cost and time) has found city authorities liable for failing to provide a built environment and transport system that was accessible to wheelchair-users - Decision no. 1301 in civil case N 5117/2007; Decision no. 556 in civil case N 1514/2007; Decision no. 589 in civil case no.1728/2007; Decision no. 1158 in civil case no. 5162/2007; Decision no. 1286 in civil case no. 3371/2007.

include a duty to provide effective non-discriminatory access by anticipation in the Draft Equal Treatment Directive. It is therefore worthy of a brief explanation.⁴⁰

The UK anticipatory reasonable adjustment duty operates in a wide range of areas including the provision of goods and services, education, transport and public functions (but not in employment or housing). It is triggered whenever a group of disabled people (e.g. those with mobility impairments, visual impairments or hearing impairments) would experience disadvantage when attempting to access the relevant service or facility. The duty therefore requires providers of education, healthcare, transport, accommodation, public functions and other goods and services to monitor the accessibility of their services on a continual basis. Once triggered, the duty requires duty-bearers to take reasonable steps to remove the disadvantage. Inherent in this requirement is the need to take steps, wherever possible, which would allow disabled people to access the relevant service or facility on the same basis as non-disabled people (e.g. to have access through the same entrance).⁴¹ Discrimination claims may be brought by a disabled individual who experiences disadvantage when attempting to access a facility or service because of a difficulty which the duty-bearer should have anticipated and taken steps to remove.

Compliance with access standards (laid down, for example, by building regulations or the World Wide Web Consortium) will generally provide duty-bearers with a means of proving that they had indeed taken the appropriate steps to remove access-related barriers. The anticipatory reasonable adjustment duty, however, requires more than compliance with access standards. It requires duty-bearers to anticipate disadvantage that may flow from sources other than inaccessible design. For instance, a transport provider is likely to be required to anticipate and take steps to remove (e.g. through the provision of appropriate and timely staff assistance) the difficulty which a blind passenger may face when trying to locate the correct train; and a shopkeeper is likely to be required to anticipate and take steps to remove the difficulty that some people with physical impairments may have in taking items from the shelves (again, perhaps in the form of making staff assistance available).

Conclusion

Reasonable accommodation and accessibility obligations have vital roles to play in facilitating the equality and inclusion of disabled people in areas outside (as well as within) employment. Individually tailored adjustments, as required by reasonable accommodation duties, are likely to prove particularly vital in fields such as education, healthcare and the provision of other services which may entail a close or long-term relationship between the service-provider and the disabled person concerned. In such cases, service-providers may be expected to take more extensive steps to ensure that the particular disabled person is not disadvantaged by their standard procedures or practices than would be expected of them in cases where the relationship between the service-provider and the disabled person is fleeting or transitory.

In the latter type of case, reasonable accommodation duties are unlikely to require the provision of physical access (other than by the use of a door, lift or temporary ramp not in common use); by providing information in Braille or easy-to read formats; by communicating in sign language; or even by providing appropriate staff assistance in a timely manner. While such measures might be effective in removing the disadvantage, they frequently require long-term planning. Such planning, based on informed anticipation of obstacles and the dedication of resources and systems for their removal, is exactly what accessibility obligations require. The establishment of accessible systems is likely to reduce (though not to remove) the need for reasonable accommodations and the provision of some reasonable accommodations will

⁴⁰ See for further details A. Lawson, *Disability and Equality Law in Britain: The Role of Reasonable Adjustments* (Hart Publishing, Oxford, 2008).

⁴¹ *Roads v Central Trains* [2004] EWCA Civ. 1540 para [13] per Lord Justice Sedley.

have the effect of improving access for other disabled people. There is thus a strong and mutually reinforcing relationship between the two forms of duty.

The current pattern of reasonable accommodation and accessibility provision outside employment in EU Member States is complex and inconsistent – though it does demonstrate a good degree of political interest and the adoption of some innovative strategies. While quite a number of duties to provide adaptations of some kind may be identified, their delineation, operation, enforcement and effect is often left vague and undefined. Similar uncertainty and variety is to be found in all aspects of accessibility strategies – including the areas of life to which they apply, the requirements which they lay down, the extent to which they are mandatory obligations rather than guidelines as to good practice or policy objectives, the extent to which they can be enforced and their relationship with principles of equality and non-discrimination.

The advent of the CRPD has made it clear that states must enact reasonable accommodation duties (and impose them upon private as well as public actors) in fields beyond employment and that these duties must operate within the context of non-discrimination. This is likely to promote a greater consistency of approach in Europe to reasonable accommodation outside employment. Nevertheless, such duties are likely to be effective in practice only if they are accompanied by detailed guidance as to terms such as ‘reasonable’ and ‘undue burden’, and energetic awareness-raising efforts (particularly amongst those who will be adjudicating in cases of alleged breaches). The CRPD also lays down an accessibility requirement. However, until the exact implications of that requirement are clarified by the Committee on the Rights of Persons with Disabilities – perhaps through a general comment and/or decisions in individual complaints – it would seem overly optimistic to expect it to trigger a more coherent approach across EU Member States. It is therefore to be hoped that such guidance will be forthcoming, that it will be clear and that it will grapple with issues of enforcement and of mechanisms (such as procurement requirements, discrimination law, planning and licensing law) through which change in the private sector can be encouraged. Such guidance would then have the potential, not only to generate a more unified European approach, but a more effective one.

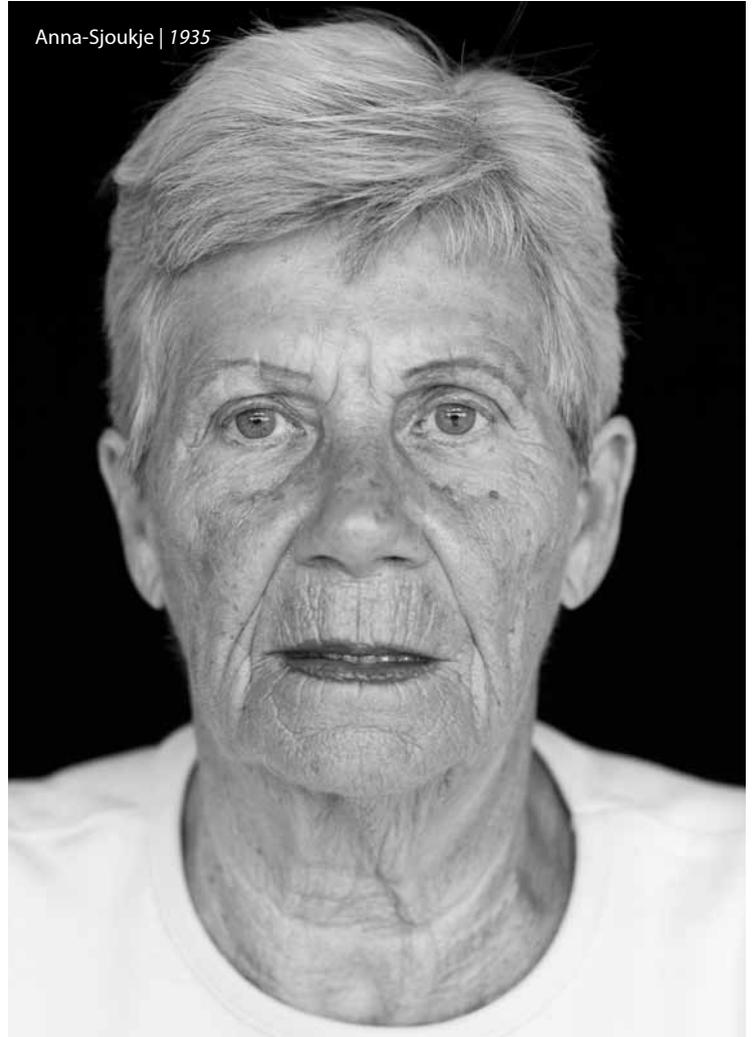
Amber | 1995



Steven | 2001



Anna-Sjoukje | 1935



Recognition of the rights of minorities and the EU's equal opportunities agenda

Olivier De Schutter⁴²

Introduction

The Treaty of Lisbon⁴³ entered into force on 1 December 2009, putting an end to the division of the European Union's institutional structure into separate supranational and intergovernmental 'pillars' and generalising the 'Community method', 'supranational' by nature, across EU's actions at the very same moment as the overarching entity of the European Union took over from the European Communities. One of the novelties of the Treaty of Lisbon was its reference to the rights of minorities. For the first time, the Treaty mentions 'the rights of persons belonging to minorities', listing these rights among the values on which the Union is founded.⁴⁴ In addition, the Treaty gives binding force to the EU Charter of Fundamental Rights, initially proclaimed in 2000.⁴⁵ The Charter prohibits any discrimination based, *inter alia*, on grounds of membership of a national minority,⁴⁶ and it states that the Union shall respect cultural, religious and linguistic diversity.⁴⁷

This new openness to the rights of minorities, a subject long taboo at EU level because of the resistance of countries such as France, Greece, and to a certain extent Belgium and Luxembourg,⁴⁸ is also reflected in the definition of the tasks attributed to the Fundamental Rights Agency (FRA) of the European Union. The FRA formally came into existence on 1 March 2007.⁴⁹ Its role is to 'provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights.'⁵⁰ In a resolution regarding the Multi-Annual Framework (MAF) of the Agency for

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⁴³ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed in Lisbon, 13 December 2007, OJ C 306 of 17 December 2007, p. 1.

⁴⁴ Article 2, inserted into the Treaty on European Union by the Treaty of Lisbon. A reference to the rights of persons belonging to minorities was already present in the Treaty establishing a Constitution for Europe, which was signed on 29 October 2004 but failed to achieve ratification. The reference to the rights of persons belonging to minorities was not agreed upon during the European Convention convened in February 2002, but was the result of the Intergovernmental Conference of 2003-2004, at Hungary's insistence.

⁴⁵ Article 6(1) of the Treaty on European Union as amended by the Treaty of Lisbon (referring to the EU Charter of Fundamental Rights) in its revised form proclaimed on 12 December 2007, OJ C 303 of 14 December 2007, p. 1.

⁴⁶ Article 21.

⁴⁷ Article 22. See also Article 3(3) of the Treaty on European Union, as amended by the Treaty of Lisbon (referring to cultural and linguistic diversity within the Union).

⁴⁸ Belgium, France, Greece and Luxembourg are the only states among the EU 27 not to have ratified the Council of Europe Framework Convention for the Protection of National Minorities (CETS no. 157). This instrument was opened for signature to the Member States of the Council of Europe on 1 February 1995, and it entered into force on 1 February 1998.

⁴⁹ Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, OJ L 53 of 22 February 2007, p. 1.

⁵⁰ Article 2, *ibid*.

2007-2012,⁵¹ the European Parliament requested the Council to include a reference to ‘traditional and linguistic’ minorities in order to encourage a broad interpretation of the concept of minorities and to ensure that the Agency’s work programme would not just take account of ethnic minorities.⁵² The Council partly followed that suggestion by listing ‘discrimination based on sex, race or ethnic origin, religion or belief, disability, age or sexual orientation and against persons belonging to minorities and any combination of these grounds (multiple discrimination)’ among the thematic areas on which the Agency should focus during its first five years of operation.⁵³ The Agency is therefore likely to take a number of initiatives in the future regarding minority rights, including recommendations for legislative proposals to be adopted or to better mainstream the protection of minority rights in the law and policy-making processes of the EU.

These developments occurred without the terms ‘minorities’ (as it appears in Article 21 of the Charter) or ‘national minorities’ (as referred to in Article 2 of the Treaty on European Union – TEU) being defined in EU law. While there is no authoritative definition of minorities in international law, a common (albeit controversial) definition proposed in legal doctrine is that a minority is a group of persons who reside on the territory of a state and are citizens thereof; display distinctive ethnic, cultural, religious or linguistic characteristics; are smaller in number than the rest of the population of that state or of a region of that state; and are motivated by the concern to preserve together what constitutes their common identity, including culture, traditions, religion or language.⁵⁴ But there has been a tendency, particularly within the Human Rights Committee (when interpreting Article 27 of the International Covenant on Civil and Political Rights⁵⁵) and within the Advisory Committee established under the Council of Europe Framework Convention for the Protection of National Minorities, to broaden the scope of the provisions protecting minority rights so as to ensure that ‘minority rights’ benefit all those under the jurisdiction of the state who present certain distinct characteristics related to their national origin or ethnicity, language, or religion. This tendency has however been strongly opposed by certain states. Germany, for example, argues that ‘the objective of the Framework Convention [for the protection of national minorities] is to protect national minorities; it is not a general human rights instrument for all groups of the population which differ from the majority population in one or several respects (ancestry, race, language, culture, homeland, origin, nationality, creed, religious or political beliefs, sexual preferences, etc.). Rather, the members of the latter groups are protected by the general human rights and, if they are nationals, by the guaranteed civil rights.’⁵⁶ These controversies need not be settled here. At a minimum, there is a consensus that ‘minorities’ are the groups falling under the traditional definition provided by international law, as recalled above.

Neither the changes brought about by the Treaty of Lisbon nor the reference to discrimination against persons belonging to minorities included in the Multi-Annual Framework of the Fundamental Rights Agency establish new competences for the EU to legislate on minority rights. The obligation under Article 21 of the EU Charter of Fundamental Rights not to discriminate on grounds of membership of a national minority

⁵¹ The MAF was originally proposed by the Commission: see Commission Proposal for a Council decision implementing Regulation (EC) No 168 (2007) as regards the adoption of a Multiannual Framework for the European Union Agency for Fundamental Rights for 2007-2012, COM(2007) 515 final.

⁵² Resolution of 17 January 2008 (P6 TA(2008)0014) (rapp. M. Cashman, report A6-0514/2007 of 20 December 2007, and amendment no.13).

⁵³ Decision of 28 February 2008 as regards the adoption of a Multi-Annual Framework for the European Union Agency for Fundamental Rights for 2007-2012, OJ L 63 of 7 March 2008, p. 14.

⁵⁴ See, for example, Recommendation 1201(1993) adopted by the Parliamentary Assembly of the Council of Europe, proposing the adoption of an additional protocol on the rights of national minorities to the European Convention on Human Rights; F. Capotorti, *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities*, New York, United Nations, 1991, paragraph 568; J. Deschênes, Proposal concerning the definition of the term ‘minority’, E/CN.4/Sub.2/1985/31, 14 May 1985.

⁵⁵ Human Rights Committee, General Comment no. 23: The rights of minorities (Article 27), CCPR/C/21/Rev.1/Add.5 of 8 April 1994, paragraphs 5.1. and 5.2.

⁵⁶ Germany, Third State Report, ACFC/SR/III(2009)003, 2009, paragraph 8.

simply imposes a limitation on how existing competences are exercised, and it should not be interpreted as transferring any power to the EU to adopt legislative measures in this regard. Indeed, even this prohibition cannot be said to be entirely new since the principle of equality has long been recognised as a general principle of EU law for which the European Court of Justice ensures respect in the field of application of EU law.

Nevertheless, the introduction of minority rights into EU law may have an impact on EU anti-discrimination law in two ways: first, by guiding the exercise of the competences attributed to the EU to adopt measures against discrimination on grounds of ethnic origin or of religion; and second, by creating an incentive for EU institutions to use the other powers they have been given in order to protect the rights of minorities, thus moving the anti-discrimination agenda beyond what is now Article 19 of the Treaty on the Functioning of the European Union (ex-Article 13 TEC). These two potential developments are considered in turn.

The rise of the rights of minorities and measures to combat discrimination on grounds of ethnic origin or religion (Article 19 TFEU)

Since the entry into force of the Treaty of Amsterdam on 1 May 1999, the European Union (previously the European Community) may, through the Council acting unanimously, 'take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'.⁵⁷ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin⁵⁸ (hereinafter referred to as the 'Racial Equality Directive') and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation⁵⁹ (hereinafter referred to as the 'Employment Equality Directive') were adopted on the basis of Article 13 TEC shortly after its entry into force. It is now Article 19 TFEU, which succeeded Article 13 TEC, which enables the Council of the EU to protect ethnic and religious minorities from discrimination. It is relevant to note in this regard that promotion of the Union's values, including 'the rights of persons belonging to minorities',⁶⁰ is one of the foundations of the EU.⁶¹ Although this does not directly influence the allocation of competences between the EU and the Member States,⁶² it may nevertheless influence the way existing competences are used.

Relying on Article 19 TFEU to improve the rights of persons belonging to minorities and to protect them from discrimination on grounds of ethnic origin or religion may bring about significant shifts in our understanding of the role of anti-discrimination legislation. The Racial Equality Directive already ensures protection of ethnic and racial minorities from discrimination - and the Employment Equality Directive protects against discrimination on grounds of religion in the field of employment and occupation.⁶³ But these instruments, while extraordinarily important to strengthen the legislative anti-discrimination framework in all Member States, remain confined to a traditional *non-discrimination* approach and may therefore be insufficient to

⁵⁷ Article 13 TEC.

⁵⁸ OJ L 180 of 19.7.2000, p. 22.

⁵⁹ OJ L 303 of 2.12.2000, p. 16.

⁶⁰ Article 2 TEU.

⁶¹ Article 3(1) TEU.

⁶² As made clear by Article 3(6) TEU: 'The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties.'

⁶³ Not all racial, ethnic or religious groups whose members benefit from protection under these directives will be considered 'national minorities' in the understanding of the Framework Convention for the Protection of National Minorities, however. According to the *travaux préparatoires* of the Framework Convention, the FCNM 'does not imply that all ethnic, cultural, linguistic or religious differences necessarily lead to the creation of national minorities' (Explanatory Report, paragraph 43).

promote the effective *integration* of ethnic and religious minorities in the Union⁶⁴ – and indeed, this is not part of their aim.⁶⁵ This appears most clearly in two areas: statistics and positive action.

Statistics

While both Directives establish a shift of the burden of proof in discrimination cases,⁶⁶ they do not compel Member States to provide for the possibility of establishing a presumption of discrimination by bringing forward statistical data which would illustrate the disproportionate impact of certain measures on ethnic or religious minorities. Member States have the choice whether or not to allow the alleged victim to rely on such statistics, where they exist. The facts from which it may be inferred that there has been direct or indirect discrimination are to be left to the appreciation of national judicial or other competent bodies, in accordance with rules of national law or practice. The preambles to the Directives add that these national rules ‘may provide in particular for indirect discrimination to be established by any means including on the basis of statistical evidence.’⁶⁷

However, both the Council of Europe’s European Commission against Racism and Intolerance (ECRI) and the Advisory Committee of the FCNM insist on the need for states to gather precise data as to the situation of minority groups in order to combat discrimination more effectively.⁶⁸ In practice, only a minority of EU Member States have developed such monitoring strategies. The authors of the 2004 *Comparative Study on the collection of data to measure the extent and impact of discrimination within the United States, Canada, Australia, Great Britain and the Netherlands* noted the paradox underlying the debate in Europe on the implementation of anti-discrimination strategies.

Although there is a lack of statistical indicators assessing the extent of discrimination in the Member States, the belief is widely shared that discrimination is widespread and that there is a need to mobilise all social institutions and stakeholders to reduce this discrimination. Nevertheless, there has been strong resistance to the collection of statistics relating to ethnic or racial origin, religion, disability or sexual

⁶⁴ Of course, linguistic minorities are not meant to benefit from these instruments, which do not prohibit discrimination on grounds of language. Proposals were made, during the European Convention of 2002-2003 and the following Inter-governmental Conference of 2003-2004, to expand the reach of what was then Article 13 TEC in order to attribute to the EU a competence to adopt measures to combat discrimination on grounds of language. These proposals failed, however. See, in particular, the resolution adopted by the European Parliament with recommendations to the Commission on European regional and lesser-used languages – the languages of minorities in the EU – in the context of enlargement and cultural diversity (2003/2057(INI)) (P5_TA(2003)0372), where the Parliament asks the Commission to ‘ensure that Article 13 TEC also covers discrimination on the grounds of language’ (paragraph 21 of the Recommendation 2 relating to the Programme for linguistic diversity (to include regional and minority languages) and language learning).

⁶⁵ For a more detailed discussion on this, see O. De Schutter, ‘Three Models of Equality and European Anti-discrimination law’, *Northern Ireland Legal Quarterly*, vol. 57, no. 1 (2005), pp. 1-56; O. De Schutter and A. Verstichel, ‘Integrating the Roma into European Society: Time for a New Initiative’, *European Yearbook of Minority Issues*, vol. 4, 2004/5, pp. 411-443.

⁶⁶ Both Article 8(1) of the Racial Equality Directive and Article 10(1) of the Employment Equality Directive provide that ‘when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment’.

⁶⁷ 15th Recital of the Preamble. This is misleading insofar as statistics may serve to establish a presumption either of direct or of indirect discrimination.

⁶⁸ For the views of the ECRI, see the Third Report on Hungary, 5 December 2003, CRI (2004) 25, paragraph 93 and the Third Report on the Czech Republic, 5 December 2003, CRI (2004) 22, paragraph 86; see also ECRI General Policy Recommendation no.1 on combating racism, xenophobia, anti-Semitism and intolerance, 4 October 1996, CRI (96) 43 rev. For the views of the Advisory Committee of the Framework Convention (ACFC), see the Opinion on Slovakia, 22 September 2000, ACFC/OP/I(2000)001, paragraph 21; Opinion on Croatia, 6 April 2001, ACFC/OP/I(2002)003, paragraph 29; Opinion on the Czech Republic, 6 April 2001, ACFC/OP/I(2002)002, paragraph 28.

orientation. The experience of the countries under study in this report demonstrates that the lack of sufficient statistics to illustrate and evaluate discrimination is not compatible with establishing an operational scheme whose main characteristic is the intensive use of statistical data. It appears necessary – and possible – to transcend the European paradox opposing the fight against discrimination and the production of ‘sensitive’ statistics.⁶⁹

Positive action

Under the Racial Equality and Employment Equality Directives, EU Member States have the choice whether or not to adopt positive action measures in favour of certain disadvantaged groups whose integration cannot be realised only by relying on the prohibition of (direct and indirect) discrimination. It may be argued, however, that in certain cases of systematic inequality – or of what might be called structural discrimination – against groups that are politically powerless and thus cannot influence the political process in their favour, positive action should not only be allowed, but rather be obligatory. The International Convention for the Elimination of All Forms of Racial Discrimination,⁷⁰ ratified by all EU Member States, not only provides in Article 1(4) that positive action measures will not be considered discriminatory in the meaning of the Convention,⁷¹ but also suggests in Article 2(2) that the adoption of such measures may be required under certain conditions. In its General Recommendation XXVII on Discrimination against Roma adopted in 2000, the Committee for the Elimination of Racial Discrimination, although not making explicit reference to Article 2(2) ICERD, encourages the State Parties to ‘take special measures to promote the employment of Roma in the public administration and institutions, as well as in private companies’, and to ‘adopt and implement, whenever possible, at the central or local level, special measures in favour of Roma in public employment such as public contracting and other activities undertaken or funded by the Government, or training Roma in various skills and professions’.⁷²

⁶⁹ Co-ord. P. Simon, Medis Project (Measurement of Discrimination) *Comparative Study on the collection of data to measure the extent and impact of discrimination within the United States, Canada, Australia, Great-Britain and the Netherlands*, (INED – Economie & Humanisme), August 2004, p. 87. This study was ordered by the European Commission; it can be found at: <http://ec.europa.eu/social/keyDocuments.jsp?type=0&policyArea=0&subCategory=0&country=0&year=0&advSearchKey=datcol&mode=advancedSubmit&langId=en>.

⁷⁰ Opened for signature by the UN General Assembly Res. 2106(XX) of 21 December 1965; entered into force on 4 January 1969.

⁷¹ Article 1(4) provides that: ‘Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved’.

⁷² Committee for the Elimination of Racial Discrimination, General Recommendation XXVII on Discrimination against Roma adopted at the fifty-seventh session (2000), in: *Compilation of the General Comments or General Recommendations adopted by Human Rights Treaty Bodies*, UN doc. HRI/GEN/1/Rev.7, 12 May 2004, at p. 219, paragraphs 28-29. Similarly, in its General Recommendation XXIX on Article 1, paragraph 1, of the Convention (Descent), adopted in 2002, the CERD Committee recommends the adoption of ‘special measures in favour of descent-based groups and communities in order to ensure their enjoyment of human rights and fundamental freedoms, in particular concerning access to public functions, employment and education’, as well as to ‘educate the general public on the importance of affirmative action programmes to address the situation of victims of descent-based discrimination’ and to take ‘special measures to promote the employment of members of affected communities in the public and private sectors’. See Committee for the Elimination of Racial Discrimination, General Recommendation XXIX on Article 1, paragraph 1, of the Convention (Descent), adopted at the sixty-first session in 2002, in: *Compilation of the General Comments or General Recommendations adopted by Human Rights Treaty Bodies*, UN doc. HRI/GEN/1/Rev.7, 12 May 2004, at p. 226, paragraphs 1, f) and h), and 7, j).



The requirement to adopt positive actions is sometimes seen in international human rights law as a possible consequence of the general principle of equality.⁷³ But such an implication is particularly clear as regards the improvement of the situation of minorities. Under Article 4 of the Framework Convention for the Protection of National Minorities, State Parties are to adopt ‘adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority’, taking due account in this respect of ‘the specific conditions of the persons belonging to national minorities’. Such measures are specifically designated as not being discriminatory in nature. The Advisory Committee of the Framework Convention encourages the introduction of positive measures in favour of members of minorities which are particularly disadvantaged.⁷⁴ Thus, in an Opinion on Croatia, the Advisory Committee ‘considers that one key to reaching full and effective equality for persons belonging to national minorities is the launching of additional positive measures in the field of employment and it supports efforts to seek financing for such measures. In this regard, the situation of persons belonging to the Serb minority merits particular attention, taking into account the past discriminatory measures, stirred by the 1991-1995 conflict, aimed at curtailing their number in various fields of employment, ranging from law-enforcement to education.’⁷⁵ In an Opinion on the Czech Republic, the Advisory Committee ‘notes with deep concern that many Roma in the Czech Republic face considerable socio-economic difficulties in comparison to both the majority and other minorities, in particular in the fields of education, employment and housing. (...) The situation calls for the preparation and implementation of specific measures to realise full and effective equality between Roma and persons belonging to the majority as well as to other minorities.’⁷⁶ A very similar observation was made with respect to the situation of the Roma in Hungary.⁷⁷ In its Opinion on Ireland adopted on 22 May 2003, the Advisory Committee emphasised the need for setting targets to include Travellers in general recruitment strategies.⁷⁸

⁷³ Under the International Covenant on Civil and Political Rights, the UN Human Rights Committee noted that ‘the principle of equality sometimes *requires* State Parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant’ (Human Rights Committee, General Comment no.18: Non-discrimination (1989), in *Compilation of the General Comments or General Recommendations adopted by Human Rights Treaty Bodies*, UN doc. HRI/GEN/1/Rev.7, 12 May 2004, at p. 146, paragraph 10). This is also the position of the Committee on Economic, Social and Cultural Rights, tasked with monitoring the implementation of the International Covenant on Economic, Social and Cultural Rights. See General Comment no. 20: Non-Discrimination in Economic, Social and Cultural Rights (Article 2, paragraph 2) (UN doc. E/C.12/GC/20), paragraph 9: ‘In order to eliminate substantive discrimination, States parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination. Such measures are legitimate to the extent that they represent reasonable, objective and proportional means to redress *de facto* discrimination and are discontinued when substantive equality has been sustainably achieved. Such positive measures may exceptionally, however, need to be of a permanent nature, such as interpretation services for linguistic minorities and reasonable accommodation of persons with sensory impairments in accessing health care facilities.’

⁷⁴ See also, e.g. Opinion on Azerbaijan, 22 May 2003, ACFC/OP/I(2004)001, paragraph 28; Opinion on Ukraine, 1 March 2002, ACFC/OP/I(2002)010, paragraph 27; Opinion on Serbia and Montenegro, 27 November 2003, ACFC/OP/I(2004)002, paragraph 38.

⁷⁵ Opinion on Croatia, 6 February 2002, ACFC/INF/OP/I(2002)003, paragraph 26.

⁷⁶ Opinion on the Czech Republic, 25 January 2002, ACFC/INF/OP/I(2002)002, paragraph 29. In paragraph 30, the Advisory Committee further ‘welcomes the decision of the Czech authorities to adopt the “Concept of the Government policy towards the members of the Roma community, supporting their integration into society” (Resolution of the Government of the Czech Republic no. 599 of 14 June 2000). It also welcomes the fact that the Government has already launched a strategic action plan for the period 2001-2020, in order to implement the above-mentioned policy. The Advisory Committee is of the opinion that greater participation of Roma women should be ensured in that process.’

⁷⁷ In an Opinion on Hungary adopted on 22 September 2000, the Advisory Committee ‘notes with concern, that, as the Government openly recognises, the Roma/Gypsies in Hungary face a broad range of serious problems to a disproportionate degree, be it in comparison to the majority or in comparison to other minorities. This state of affairs certainly justifies that specific measures be designed and implemented to tackle these problems’ (ACFC/INF/OP/I(2001)004, at paragraph 18).

⁷⁸ Opinion on Ireland, 22 May 2003, ACFC/INF/OP/I(2004)003.

Conflicting models of equality?

In sum, the instruments adopted hitherto on the basis of Article 19 TFEU have not gone as far as they might have, had the international human rights obligations of the Member States generally, and the requirements of the FCNM in particular, been more systematically taken into account in their formulation. But the absence of any obligation for Member States either to allow victims of discrimination to establish a presumption of discrimination by putting forward certain statistics demonstrating the disproportionate impact certain measures may have on the disadvantaged group they belong to, or to adopt certain positive action measures in favour of such groups, also reflect a deeper disagreement between the Member States as to the legitimacy and desirability of an approach towards the integration of minorities based on the identification of certain individuals with the group they are presumed to belong to.

With regard to the contribution of European Union anti-discrimination strategy to the implementation of the principles of the FCNM, the fundamental question is therefore not simply whether the EU could go further as it is clear that it could. It is rather whether it will be possible, in time, to achieve a sufficiently strong consensus within the EU Member States to move in a direction which may be perceived as opting for one model of integration (based on the acknowledgement and promotion of differences) rather than another competing model (based on integration by assimilation and the imposition of uniform standards on all, in combination with robust protection from discrimination).⁷⁹

In its resolution on the Commission's communication 'Non-discrimination and equal opportunities for all – a framework strategy',⁸⁰ the European Parliament insists that:

if blatant inequalities of an 'endemic', 'structural or even 'cultural' nature are to be remedied and a seriously compromised balance is thus to be restored, it may be necessary in certain cases for a temporary exception to be made to the concept of equality based on the individual in favour of group-based 'distributive justice' through the adoption of 'positive' measures

and that:

notwithstanding cultural, historical or constitutional considerations, data collection on the situation of minorities and disadvantaged groups is critical and that policy and legislation to combat discrimination must be based on accurate data.⁸¹

The position of the current framework of EU law in this debate seems superficially to be agnostic or neutral. But that appearance may be misleading when considered more carefully. EU law imposes limits on

⁷⁹ The first model is perhaps most clearly illustrated by the approach of the United Kingdom, and the second model by that of France. For an attempt to conceptualise the differences between the two models, see A. Geddes & V. Guiraudon, 'Britain, France and EU Anti-Discrimination Policy': The Emergence of an EU Policy Paradigm', (2004) *West European Politics* 27, 334-353.

⁸⁰ COM(2005) 224. See also the more recent Commission Communication 'Non-discrimination and equal opportunities: A renewed commitment', COM(2008) 420 final, page 7.

⁸¹ European Parliament resolution on non-discrimination and equal opportunities for all - A framework strategy (2005/2191(INI)), 8 May 2006 (rapp. T. Zdanoka), paragraphs 7 and 14.

the use of positive action measures⁸² as well as on the processing of personal data which may be required for the implementation of such measures.⁸³ It therefore already sets certain limits on the extent to which the EU Member States can move beyond the anti-discrimination law model of the Racial Equality and Employment Equality Directives in order to improve the situation of certain segments of the community by affirmative measures going beyond the elementary requirement that the members of such categories should not be discriminated against.

We should thus consider with caution the statement in both the Racial Equality and the Employment Equality Directive that these instruments only set minimum requirements for the Member States and that the latter therefore ‘may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment’ than those laid down in these instruments.⁸⁴ This statement is misleading to the extent that it underestimates the fact that the Equality Directives themselves impose severe restrictions, in particular on the use of positive action measures in order to compensate for, or prevent, certain disadvantages, mostly linked to racial or ethnic origin or to religion; nor does it imply that any measures seeking to implement the principle of equal treatment may disregard the requirements of European Union law, in particular as regards the protection of personal data.

The debate concerning the implementation of the 1998 Belfast Agreement by the Police Service of Northern Ireland (PSNI) provides one particularly vivid illustration of the dilemmas that face EU anti-discrimination lawmakers when confronted by national schemes adopted to remedy imbalances between communities using measures that may be denounced as violations of the prohibition of discrimination. Following the recommendations of the Patten Commission on the means by which the Police Service of Northern Ireland was to become more representative of the community it serves, the Police (Northern Ireland) Act 2000 introduced new recruitment mechanisms in the PSNI through the creation of a pool of candidates who are qualified for appointment as police trainees, followed by selection from that pool of the same number from each category (Catholics and Protestants). Due to fears that these mechanisms might not be compatible with the Employment Equality Directive, even taking into account the permissibility of positive action measures under Article 7(1) of that directive, the United Kingdom negotiated an exemption from its provisions, leading to the inclusion of Article 15(1) of the Employment Equality Directive.⁸⁵ This illustrates how, unless EU anti-discrimination law is reformed, policies aimed at the inclusion of certain minorities may be discouraged, or even made impossible, under the existing legal framework.

⁸² The general view adopted by the European Court of Justice has been that positive action measures are only acceptable to the extent that they comply with the principle of proportionality, and thus remain within the limits of what is appropriate and necessary in order to achieve the aim in view. The aim being to eliminate or reduce actual instances of inequality which may exist in the reality of social life, any schemes which establish an automatic and absolute preference in favour of women are considered in violation of the principle of equal treatment, and incompatible with the requirements of Community Law. See Case C-450/93, *Kalanke* [1995] ECR I-3051; Case C-409/95, *Marschall v Land Nordrhein Westfalen* [1997] ECR I-6363; Case C-158/97, *Badeck* [2000] ECR I-1875; Case C-407/98, *Abrahamsson v Fogelqvist* [2000] ECR I-5539; Case C-476/99, *Lommers*, [2002] ECR I-2891; Case C-319/03, *Serge Briheche* [2004] ECR I-8807. Reference can also be made to the judgment delivered by the EFTA Court on 24 January 2003, *Surveillance Authority v The Kingdom of Norway*, Case E-1/02, EFTA. These cases were decided under Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p.40), in its original version. After defining the principle of equal treatment as the absence of any discrimination on grounds of sex, whether direct or indirect, Directive 76/207/EEC provides in Article 2(4) that the Directive ‘shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women’s opportunities’.

⁸³ Directive 95/46/CE of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 28 of 23.11.1995, p. 31.

⁸⁴ Article 6(1) of the Racial Equality Directive; Article 8(1) of the Employment Equality Directive.

⁸⁵ I am grateful to Christopher McCrudden for having suggested this example to me.

Enlarging the equality agenda in order to protect minority rights

While the adoption of measures to combat discrimination on the basis of Article 19 TFEU clearly makes the most direct contribution to an EU minority rights policy, other competences attributed to the EU may also serve as tools to implement such a policy.⁸⁶ The possibilities remain limited, however: in many areas relevant to the protection of minority rights, the EU has had no choice but to resort to soft law measures, such as funding certain programmes or encouraging improved coordination between the initiatives adopted by the Member States. Even where the Union does have competences to adopt legislative measures, the potential of EU law has remained under-utilised in the absence of a systematic attempt to exercise existing competences in order to implement the values of the FCNM, including those values which are replicated in the EU Charter of Fundamental Rights.

In the area of education, the EU may encourage cooperation between Member States and supplement their action ‘while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity’ (Article 165 TFEU, ex-Article 149 TEC). Under Article 167 TFEU (ex-Article 151 TEC), the EU may encourage cooperation between Member States and, if necessary, support and supplement their action in the field of culture. It may legislate in order to promote the freedom to provide services throughout the Union pursuant to Articles 56 and 59(1) TFEU (ex-Article 49 and 52(1) TEC). It may adopt measures establishing the internal market, including by harmonising national rules according to Articles 114 and 115 TFEU (ex-Articles 95 and 94 TEC). Still other provisions of the TFEU could be listed, insofar as they allocate to the EU certain powers which may be used in order to promote the EU’s equal opportunities agenda and to implement the principles of the Council of Europe Framework Convention for the Protection of National Minorities. Finally, certain soft law coordination mechanisms in the employment or social inclusion fields have been relied upon in order to encourage EU Member States to improve the integration of minorities. In particular, since the European Employment Strategy was launched in 1997, the EU has addressed the specific concern of tackling discrimination in employment in order, in particular, to improve access to employment by visible minorities. The Employment Guidelines revised in 2005, based then on Article 128 TEC (now Article 148 TFEU), provided that Member States should seek to make their employment markets more inclusive, and that ‘Combating discrimination, promoting access to employment for disabled people and integrating migrants and minorities are particularly essential’ in this regard.⁸⁷ While the most recent proposal for a Council Decision on guidelines for the employment policies of the Member States (Part II of the Europe 2020 Integrated Guidelines) has dropped any reference to combating discrimination on the labour market from Guideline 7 on increasing labour participation, Guideline 10 on promoting social inclusion and combating poverty refers to the need for Member States to put in place effective anti-discrimination measures.⁸⁸

These various tools could be used in the future to expand the EU’s equality agenda beyond the adoption of measures to combat discrimination under Article 19 TFEU; and this could be encouraged both by

⁸⁶ For a full list, see B. de Witte, ‘The constitutional resources for an EU minority policy’, in Gabriel N. Toggenburg (ed.), *Minority protection and the enlarged European Union. The Way Forward*, LGI Books, Budapest, 2004, pp. 109-124; and see the European Parliament resolution on the protection of minorities and anti-discrimination policies in an enlarged Europe (2005/2008(INI)), adopted on 8 June 2005 and based on the report A6-0140/2005 of 10 May 2005 (rapp. Cl. Moraes). See also EU Network of Independent Experts on Fundamental Rights, Thematic Comment no.3: the rights of minorities in the Union (April 2005).

⁸⁷ Council Decision of 12 July 2005 on Guidelines for the employment policies of the Member States (OJ L 205 of 6 August 2005, p. 21). This wording follows the proposal of the Commission made on 12 April 2005 (COM(2005)141 final) (see the explanations on Guideline 18 (to ensure inclusive labour markets for job-seekers and disadvantaged people)).

⁸⁸ See <http://ec.europa.eu/social/main.jsp?catId=108&langId=en> (last accessed on 30 July 2010).

establishing the fight against discrimination as an EU transversal objective under Article 3(3) EU and by increasing recognition of minority rights in the EU.⁸⁹

If this option is chosen, it will be important, however, to ensure – using the various tools that have been listed – that the EU does not redefine or pre-empt standards set by the Council of Europe. Nowhere is this more clearly visible than in the anti-discrimination field. For instance, as explained above, the EU Member States are not currently subject to any positive duty to adopt special measures taking into account the specific needs of members of ethnic or cultural, religious or linguistic minorities. More precisely, only in the exceptional circumstance where not doing so would amount to a form of discrimination prohibited under the TFEU or under secondary legislation adopted on the basis of the Treaty – in particular, under the Racial Equality and Employment Equality Directives of 2000 – is such an obligation imposed on them under EU law. In the understanding of discrimination under the Racial Equality and Employment Equality Directives, measures which, although apparently neutral, put persons of a particular race or ethnic origin, or of a particular religion or belief, at a particular disadvantage should be abolished unless it can be demonstrated that such measures can be objectively justified as pursuing a legitimate aim by means both appropriate and necessary.⁹⁰ To that extent, and to that extent only, EU Member States are obliged under EU law to take into account the specific situation of ethnic or religious groups – among which groups who might qualify as national minorities – in order to ensure that this situation is taken into account.

The approach of the Directives, however, is not that of minority rights: it is not the purpose of the Directives to ensure that the Member States ‘promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage’ (in the wording of Article 5(1) FCNM); their objective is defined, more restrictively, as the prohibition of discrimination based, *inter alia*, on religion or on the traditions and cultural heritage of an ethnic group. Yet certain EU Member States – whether or not they are State Parties to the FCNM – believe, or would like to believe, that they fully comply with the internationally defined requirements of equality law in that they have adequately implemented the Equality Directives. The very fact that they have implemented the Directives may make it difficult to convince them that they should go further.

Conclusion

Minority rights have permeated EU law since the adoption of the Treaty of Lisbon. It is still unclear whether this will have an impact on the EU’s equal opportunities agenda, and if so, what this will be.

The impact could be twofold. It could lead to a rethinking of the focus of anti-discrimination law itself, moving from a focus on the prohibition of discrimination to a focus on the positive integration of under-represented groups – among which are minorities defined by the ethnicity or religion of their members, for whom the protection of minority rights intersects with Article 19 TFEU. It could also lead to a broadening of the EU’s equality agenda beyond reliance on measures based on Article 19 TFEU, to effectively

⁸⁹ In the resolution adopted in June 2005 on the basis of a report by Claude Moraes MEP, the European Parliament ‘urges the Commission to establish a policy standard for the protection of national minorities, having due regard to Article 4(2) of the Framework Convention for the Protection of National Minorities (FCNM) (...)’ (European Parliament resolution on the protection of minorities and anti-discrimination policies in an enlarged Europe (2005/2008(INI)), paragraph 6).

⁹⁰ See Article 2(2) of the Racial Equality Directive and of the Employment Equality Directive. The definition of indirect discrimination as provided by the Directives does not amount to a prohibition of disparate impact discrimination: the disproportionate impact of certain neutral measures, as might be highlighted by statistics, will not necessarily lead to the burden of justifying a measure’s adoption being shifted onto its author.

include a concern for minority rights, for instance, in the establishment of the internal market or in the European Employment Strategy.

The emergence of minority rights can thus be seen as an opportunity to inject new life into the EU's existing agenda. At the same time, to the extent that they invoke the need to promote minority rights, whatever initiatives are taken should be carefully aligned with existing Council of Europe standards, as codified in the Framework Convention for the Protection of National Minorities, in order to avoid creating an unnecessary and potentially damaging divergence between the approach adopted within the EU and the approach pursued within the wider Europe.

European Legal Policy Update

Employment equality rules: reasoned opinion to Poland

On 28 January 2010, the European Commission sent a reasoned opinion to Poland for incorrectly implementing the Employment Equality Directive 2000/78/EC prohibiting discrimination based on religion or belief, disability, age or sexual orientation in employment and occupation.

In this opinion, the Commission pointed out that not all categories of trainees are covered by the prohibition of harassment in Polish legislation. Moreover, national legislation regarding access to certain professions does not contain specific provisions prohibiting discrimination on the grounds of religion or beliefs, disability, age or sexual orientation. Finally, the obligation to give reasonable accommodation has not been properly transposed to cover job applicants and trainees. The Commission also stated that the law on conditions of vocational training does not adequately define direct and indirect discrimination and instruction to discriminate.

Internet link source:

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/71&format=HTML&aged=0&language=EN&guiLanguage=en>

Employment equality rules: case closed for Hungary

On 28 January 2010, the European Commission decided to close infringement proceedings against Hungary as the Equal Treatment Law and the Act on Disabled Persons' Rights and Equal Opportunities have been brought into line with the Employment Equality Directive 2000/78/EC prohibiting discrimination based on religion or belief, disability, age or sexual orientation in employment and occupation.

Internet link source:

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/71&format=HTML&aged=0&language=EN&guiLanguage=en>

European Commission closes two legal cases against the Czech Republic on anti-discrimination legislation

In a reasoned opinion sent in June 2007, the Commission pointed out that the Czech Republic had not adequately defined all forms of discrimination addressed by the Racial Equality Directive 2000/43/EC and that several fields were not sufficiently covered. In addition, the rule regarding the burden of proof did not apply in some areas and protection against victimisation covered employees only. Finally, the Czech Republic had not designated a body for the promotion and protection of equality as required by the Directive.

As for Employment Equality Directive 2000/78/EC, the Commission stressed that Czech legislation failed to adequately define the various types of discrimination and that the material scope of the prohibition of discrimination was narrower than that provided by the Directives. In particular, the Czech Republic did not prohibit discrimination on grounds of disability but on grounds of state of health, which does not cover all disabled workers. Moreover, discriminatory conditions related to sexual orientation applied to the recruitment of customs officials.

On 4 May 2010, the European Commission closed infringement proceedings against the Czech Republic following the successful adoption of a comprehensive Anti-Discrimination Act complying with EU anti-discrimination standards.

Internet link source:

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/530&format=HTML&aged=0&language=EN&guiLanguage=fr>

European Commission refers Poland to Court of Justice over racial equality rules

On 4 May 2010, the European Commission referred Poland to the EU Court of Justice for incorrectly implementing EU rules prohibiting discrimination on the basis of racial or ethnic origin. The infringement case has been opened because Poland failed to adequately transpose EU law into its national legislation by the time of its accession to the EU on 1 May 2004.

The European Commission pointed out that Poland has failed to transpose the Racial Equality Directive outside the field of employment as there are no specific national provisions prohibiting discrimination on the grounds of race or ethnic origin in relation to social protection, including social security and healthcare, social advantages, education, access to and supply of goods and services which are available to the public including housing, and membership of trade unions, employers' bodies and professional organisations. In addition, protection against victimisation is provided only in the field of employment.

Internet link source:

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/531&format=HTML&aged=0&language=EN&guiLanguage=en>

European Court of Justice Case Law Update

References for preliminary rulings – Applications

Case C-547/09 Reference for a preliminary ruling in the case of Pensionsversicherungsanstalt v. Andrea Schwab, lodged on 28 December 2009
OJ C 100 of 17.04.2010, p.14

A reference for a preliminary ruling has been made to the European Court of Justice by the *Oberlandesgericht* (Higher Regional Court) of Innsbruck, Austria, regarding direct discrimination based on sex in the context of Directive 2006/54/EC. The first question referred asks whether direct sex discrimination by a public pension insurance fund may be justified.

The referring court is also seeking to know whether Article 4(1) of Directive 91/80/EEC and Article 19(1) of Directive 2006/54/EC – and possibly Article 2(2), second indent, of Directive 76/207/EEC, as amended by Directive 2002/73/EC and Article 2(1)b of Directive 2006/54/EC or Article 2(2)(a) in conjunction with Article 6(1) of Directive 2000/78/EC – preclude national legislation which does not permit social factors or interests to be considered in the event of actions for the annulment of termination/dismissal *inter alia* on the grounds of sex but only the assessment of evidence of sex discrimination as being the predominant motive for dismissal or whether another reason to be substantiated by the employer predominated.

Internet link source:

http://curia.europa.eu/jcms/jcms/j_6/ (search case: C-547/09)

Case 159/10 Reference for a preliminary ruling in the case Gerhard Fuchs v. Land Hessen and Case 160/10 Reference for a preliminary ruling in the case Peter Köhler v. Land Hessen, lodged on 2 April 2010
OJ C 161 of 19.06.2010, p.24 and p.26

Two similar references for a preliminary ruling regarding retirement age in the *Land* of Hessen have been brought to the Court of Justice. In both cases, the referring court is primarily seeking to know whether provisions providing for a compulsory retirement age for civil servants based on an aim prescribed in the public interest comply with the requirements set out by EU law and Directive 2000/78/EC. More specifically, the first question relates to whether Article 6(1) of the Directive precludes national measures on the compulsory retirement age on the grounds of budgetary savings and reduction of labour costs and whether other justifications relating to promotion opportunities, planning certainty and age structure pursue a legitimate aim in the public interest. Secondly, interpretation of the reasonable nature and suitability of measures regarding the compulsory retirement age is sought by the referring court. Finally, the third question addresses the requirements to be satisfied with regard to the coherence of legislation on the retirement age in the *Land* of Hessen and at federal level in Germany.

Internet link source:

http://curia.europa.eu/jcms/jcms/j_6/ (search case: C-159/10 – C-160/10)

References for preliminary rulings – Advocate General Opinions

Case C-45/09 Opinion of Advocate General Ms Trstenjak Verica in the case of Gisela Rosenblatt v. Oellerking Gebäudereinigungsgesellschaft GmbH delivered on 2 February 2010
Not yet reported in the OJ

A reference for preliminary ruling has been made to the European Union Court of Justice by the *Arbeitsgericht* (Labour Court) of Hamburg, Germany, regarding the automatic termination of employment upon



attainment of a specific age.⁹¹ In this case, the employer ended the employment relationship with the plaintiff after she reached the age of 65, in accordance with the applicable collective agreement.

The Advocate General first examines the material scope of Council Directive 2000/78/EC and concludes that it applies to the present case as dismissal for reason of reaching a specific age is at issue. *In fine*, although the referring court did not mention it, interpretation of Article 6 of Directive 2000/78/EC concerning age discrimination is being sought.

The first question referred to the Court asks whether the adoption of collective rules regarding retirement age limits by social partners without the German General Law on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz*, 'the AGG') expressly so allowing is compatible with Article 6(1) of Directive 2000/78/EC. According to the Advocate General, Article 6(1) does not preclude the AGG from conferring specific authorisation to social partners to conclude collective agreements fixing retirement age limitations, even if it does not explicitly set out the grounds that may justify age discrimination.

The referring court also seeks to know whether a national rule that permits the state, social partners and parties to an individual employment contract to specify the automatic termination of an employment relationship upon reaching a specific fixed age is in breach of Article 6(1) of Directive 2000/78/EC if, according to established practice, clauses of this type are consistently applied to the employment relationships of nearly all employed workers, irrespective of the prevailing economic, social and demographic state of affairs and the actual labour market situation. In this case, the legislative authorisation granted to social partners to conclude collective agreements is compatible with Article 6(1) provided that they verify prior to fixing the age that differences in treatment are objectively justified, inasmuch as aims related to employment policy and measures to combat unemployment are pursued. Judicial review of such verification must be available.

Finally, the Advocate General notes that Article 6(1) of Directive 2000/78/EC allows a collective agreement permitting employers to end employment relationships at a specific age to be generally applicable if the social partners have checked before the time limit for transposition that such a difference in treatment based on age is objectively justified to achieve the aim pursued by the legislator.

Internet link source:

http://curia.europa.eu/jcms/jcms/j_6/ (search case: C-45/09)

Case C-499/08 Opinion of Advocate General Ms Juliane Kokott in the case of Ole Andersen delivered on 6 May 2010

Not yet reported in the OJ

In the present case,⁹² the Court of Justice's attention is drawn to a claim alleging age discrimination in the context of the dismissal of a salaried employee who had been continuously employed for 18 years and the payment by the employer of a severance allowance upon termination of his contract. Under Danish law, such an allowance is not payable when the salaried worker is entitled upon termination of employment to receive an old-age pension from a pension scheme to which the employer has contributed, even if the worker intends to seek a new job. The Danish court has applied for a preliminary ruling on the interpretation of Article 2 and 6 of Directive 2000/78/EC.

The personal scope of Directive 2000/78/EC applies to the present case as Mr Andersen's employer is a public authority (*Sønderjyllands Amtsråd*, County Council of Sønderjylland).⁹³ The Advocate General

⁹¹ See *European Anti-Discrimination Law Review* (EADLR), issue 9, pp.33-35.

⁹² See *European Anti-Discrimination Law Review* (EADLR), issue 8, p.27.

⁹³ Article 3, Directive 2000/78/EC.

(AG) holds that the difference in treatment constitutes direct discrimination on the grounds of age, as an old-age pension is exclusively granted to workers who have reached the minimal retirement age. The AG then seeks to determine whether, under the terms of that provision, the means employed to achieve the legitimate aim are 'appropriate and necessary'. In this respect, the AG agrees the measure may be an instrument to better support the transition of workers who have been employed over a long period of time by the same employer to new employment. Nonetheless, such a measure cannot be deemed necessary since it might encourage employers to terminate the employment of workers who have reached the retirement age in preference to younger workers with the same length of service with the company. But even if the measure were to be considered necessary in the present case, it cannot unduly prejudice workers' legitimate expectations. According to the AG, the Danish law in question does not distinguish between workers who have reached the minimum retirement age and will receive a reduced old-age pension and workers who have reached normal retirement age and are entitled to a full old-age pension. Against this background, the AG concludes that such a provision disproportionately affects workers' interests. It is therefore proposed to the Court that the facts of the case constitute direct discrimination based on age which cannot be justified on the grounds of Article 6(1) of Directive 2000/78/EC.

Internet link source:

http://curia.europa.eu/jcms/jcms/j_6/ (search case: C-499/08)

European Court of Human Rights Case Law Update

Judgements

Kozak v. Poland (no. 13102/02), Fourth Section Judgement of 2 March 2010

Piotr Kozak, a Polish national, was denied succession to the tenancy of his partner's flat although they had lived together in a homosexual relationship for several years before his partner died.

Mr Kozak submitted an application regarding his right to succession to the municipality, which rejected the request on the ground that he had not lived in the flat. Under Polish law, a person seeking succession to a tenancy must prove that he/she had lived with the tenant in a close relationship, such as a *de facto* marital cohabitation. In judicial proceedings, the District Court held that only different-sex relationships qualify as *de facto* marital cohabitation. This view was further endorsed by the Regional Court.

Relying on Articles 8 and 14 of the European Convention on Human Rights, Mr Kozak complained that he was discriminated against based on his sexual orientation. The European Court of Human Rights considered that the exclusion of Mr Kozak from succession on the basis of the homosexual nature of the relationship could not be reasonably justified. The Polish government cited protection of the family founded on a union of a man and a woman as the justification for a difference in treatment. According to the Court, although such an aim may be legitimate and justify a differential treatment, developments in society must also be taken into consideration when implementing measures designed to protect the family. In its view, provisions automatically excluding those involved in homosexual relationships from succession to a tenancy cannot be held necessary for the protection of the family.

Oršuš and Others v. Croatia (no. 15766/03), Chamber Judgement of 16 March 2010

Fifteen Croatians citizens of Roma origin lodged a complaint arguing they had been segregated at primary school on the grounds of their racial or ethnic origin. They also alleged that the fact that they had been placed in separate Roma-only classes in primary school deprived them of their right to education. In these classes, the curriculum was significantly reduced compared to other classes. In 2008,⁹⁴ the First Section of the European Court of Human Rights rejected the claim, alleging that a state cannot be prevented from taking positive measures which aim to establish separate classes or different types of school for children with difficulties or to implement special educational programmes addressing specific needs.

The Grand Chamber overruled the decision of the First Section, asserting that there had been a difference in treatment based on ethnic origin and that such separations, resulting from a lack of command of the Croatian language, had not been objectively justified, appropriate and necessary. That being said, such differential treatment is in principle not contrary to Article 14 of the European Convention on Human Rights when specific safeguards to ensure care of special needs are put in place. But in the present case, children were put in separate classes at their schools' own initiative and not by virtue of Croatian law. The test they were subject to did not specifically address their command of the Croatian language but instead was designed to assess their general psycho-physical condition. The alleged learning difficulties and language deficiency displayed by the children had not been adequately addressed by placing them in Roma-only classes. The Court also deplored the lack of monitoring procedure as regards progress made

⁹⁴ *Oršuš and Others v. Croatia (no. 15766/03)*, First Section Judgement of 17 July 2008.

by children put in separate classes and the absence of positive measures to raise awareness among the Roma of the importance of education.

Dimitras and Others v. Greece (nos. 42837/06 3237/07, 3269/07, 35793/07 and 6099/08), First Section Judgement of 3 June 2010

Greek legislation requires witnesses, complainants and suspects involved in criminal proceedings to take an oath by placing their hands on the Bible. In the present case, the four complainants informed the authorities that they were not Orthodox Christians and asked to make a solemn declaration instead, which they were authorised to do in conformity with the exceptions provided for by the law. Before the European Court of Human Rights, they alleged that the fact that they had to reveal their religious convictions was in breach of Article 9 (right to freedom of thought, conscience and religion) and Article 14 (prohibition of discrimination) of the European Convention on Human Rights.

The Court recalled the importance in society of freedom of thought, conscience and religion. Freedom of religion includes the right for individuals not to reveal their faith or belief and not to be obliged to act in a way that would reveal their faith or belief.

In Greece, criminal procedural law assumes that parties intervening in courts are Orthodox Christians. Hence, the four complainants were put in a situation where they had to refute that presumption and to further specify their religion or belief. The Court held that requiring the applicants to reveal their religious convictions in order to be allowed to make a solemn declaration had interfered with their freedom of religion, and that the interference was neither justified nor proportionate to the aim pursued. There had therefore been a violation of Article 9. The Court did not consider it necessary to further examine the facts of the case in the light of Article 14.

Grzelak v. Poland (no. 7710/02), Fourth Section Judgement of 15 June 2010

The case concerned a complaint from Ms and Mr Grzelak and their son Mateusz regarding the absence of a mark for religion/ethics on the latter's school reports. The complainants claimed that from the age of seven, Mateusz had suffered from the school authorities' failure to provide an alternative class in ethics as his parents are declared agnostics and did not want him to attend religious instruction. The parents alleged that their son was subjected to discrimination and physical and psychological harassment by other pupils on account of the fact that he did not attend religious education classes and relied on Article 14 (prohibition of discrimination) read in conjunction with Article 9 (freedom of thought, conscience and religion) of the European Convention on Human Rights. It was argued that the whole educational system in Poland is geared towards Catholicism and subsequently discriminates against those who do not share that faith.

The Court recalled that freedom of thought, conscience and religion is one of the foundations of a democratic society. This freedom also reads by its negative aspect as it also addresses atheists, agnostics, skeptics and the unconcerned as it entails the right not to believe. Individuals therefore enjoy the right to manifest their religious beliefs as much as they have the right not to be required to reveal their faith or beliefs. According to the Court, the absence of a mark on school reports as in the present case may reveal the lack of religious affiliation and falls under the scope of Article 9 and Article 14 of the Convention. The Court observed that in spite of various requests by the parents to the school authorities, no ethics class was organised since the number of interested pupils was too small. The authorities invoked the lack of sufficient numbers of pupils interested in attending such classes, the lack of suitable teachers, and financial reasons as grounds for their refusal to organise such classes. The Court held that the absence of a mark could be read as showing that the plaintiff had no religious beliefs. In addition, information on

faith and religious beliefs cannot be used to distinguish an individual citizen in his relations with the State as they can change over a lifetime. The argument relating to the alleged neutrality of the absence of a mark did not convince the Court either. It concluded that Poland had discriminated against the plaintiff under Article 14 read in conjunction with Article 9, that the difference in treatment could not be objectively and reasonably justified, and that the means were not proportionate to achieve the aim pursued.

Schalk and Kopf v. Austria (no. 30141/04), First Section Judgement of 24 June 2010

Mr Schalk and Mr Kopf are Austrian nationals engaged in a same-sex relationship. In 2002, they were denied the right to marry on the ground that two persons of the same sex cannot contract marriage by virtue of Article 44 of the Civil Code (*Allgemeines Bürgerliches Gesetzbuch*). The applicants lodged an appeal with the Vienna Regional Governor, who confirmed the Municipal Office's decision in April 2003. In a subsequent constitutional complaint, they alleged a violation of their right to respect for private and family life and of the principle of non-discrimination enshrined in the European Convention on Human Rights. The applicants argued that the concept of marriage has evolved, pointing at European Court of Human Rights case law and European countries where homosexual marriages or registered partnerships are allowed. The Constitutional Court dismissed the complaint, holding in particular that neither the Austrian Constitution nor the Convention require that the notion of marriage, as being geared to the possibility of parenthood, should be extended to relationships of a different kind. In addition, the fact that the Convention grants protection to same-sex relationships does not provide an obligation to change the law of marriage.

On 1 January 2010, the Registered Partnership Act entered into force in Austria, providing same-sex couples with a formal mechanism for recognising and giving legal effect to their relationships.

The European Court of Human Rights first examined Article 12 securing the right for a man and woman to marry and found a family. According to the plaintiffs, the concept of marriage has evolved to take into account today's changes in society and same-sex marriages should be allowed by virtue of the Convention. The Court noted that there is no general consensus among European countries regarding same-sex marriage. Turning to the Charter of Fundamental Rights of the European Union, the Court held that even if the right to marry enshrined in Article 9 makes no specific reference to men and women, states are still best positioned to assess and respond to society's needs and that they are not obliged to grant same-sex couples access to marriage. The Court then turned to Article 14 read in conjunction with Article 8, as the applicants alleged discrimination on the ground of sexual orientation. It admitted that a cohabiting same-sex couple living in a stable partnership falls within the notion of 'family life', just as the relationship of a different-sex couple in the same situation would. It remained to be examined whether Austria should have instituted alternative means of legal recognition of same-sex partnerships any earlier than 1 January 2010. The Court observed there was not yet a majority of European countries providing for it. The Austrian law reflected this evolution; though not in the vanguard, the Austrian legislator could not be reproached for not having introduced the Registered Partnership Act any earlier. The fact that the Act allows same-sex couples to obtain a status similar or comparable to marriage but does not grant them access to the right to contract marriage corresponds to the trend largely followed in other countries. The Court concluded by finding that there was no violation of Article 14 of the Convention read in conjunction with Article 8.

European Committee of Social Rights Update

Decision on the merits of Complaint no. 48/2008, European Roma Rights Centre (ERCC) v. Bulgaria

The complaint, lodged on 28 March 2008, relates to Article 13§1 (the right to social and medical assistance) alone or in conjunction with Article E (non-discrimination) of the Revised European Social Charter. It is alleged that from 1 January 2008 Bulgarian legislation has no longer ensured the right to adequate social assistance to unemployed persons without adequate resources. This has affected Roma and women in particular.

Between 2006 and 2008, Bulgaria amended the Social Assistance Act to provide for the suspension of social assistance to unemployed persons of active age after a certain period of time. Measures encouraging reintegration into the labour market and improving the education and training opportunities of unemployed persons were also put in place.

Pursuant to Article 13§1 of the European Social Charter, states are required to guarantee a minimum income and social assistance to people without adequate resources and cannot deprive persons in need of their means of subsistence in a manner that is incompatible with human dignity. The Committee found the Social Assistance Act to be in breach of the requirement to provide a minimum level of income in spite of the positive measures adopted, considering that only a limited number of people are likely to find a job.

The complainant also alleged that the Social Assistance Act was incompatible with the principle of non-discrimination contained in Article E of the Charter as the measures affected mostly Roma. The Committee did not consider it necessary to further examine these allegations since a breach of Article 13 had been recognised.

Decision on the merits of Complaint no. 49/2008, International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Greece

The complaint, lodged in September 2008, relates to Article 16 (right to social, legal and economic protection) read in conjunction with Article E (non-discrimination) of the Revised European Social Charter.

INTERIGHTS alleged that the forcible eviction of Roma by the Greek Government without providing suitable alternative accommodation or effective remedies violates the right of access to housing. In addition, a significant number of Roma families live in settlements that fail to meet minimum standards. The Committee upheld all points alleged and found the situation in Greece to be in breach of the obligation to provide adequate housing laid down in Article 16 of the European Social Charter. It also underlined the systematic discrimination experienced by Roma and the failure of the Government to provide adequate safeguards and remedies for this vulnerable community.

Complaint no. 61/2010, European Roma Rights Centre (ERCC) v. Portugal

The complaint was lodged on 23 April 2010. The complainant organisation alleges a violation of Articles 16 (the right of the family to social, legal and economic protection), 30 (right to protection against poverty and social exclusion) and 31 (right to housing), read alone or in conjunction with Article E (non-discrimination) of the Revised European Social Charter. The ERCC claims that housing-related injustices in Portugal (including problems of access to social housing, substandard quality of housing, lack of access

to basic utilities, residential segregation of Roma communities and other systemic violations of the right to housing) are in breach of these provisions.

Sharon | 1994



Samuel | 1989



Daniëlla | 1972



Diederick | 1969



Judith | 1996



Monique | 1963



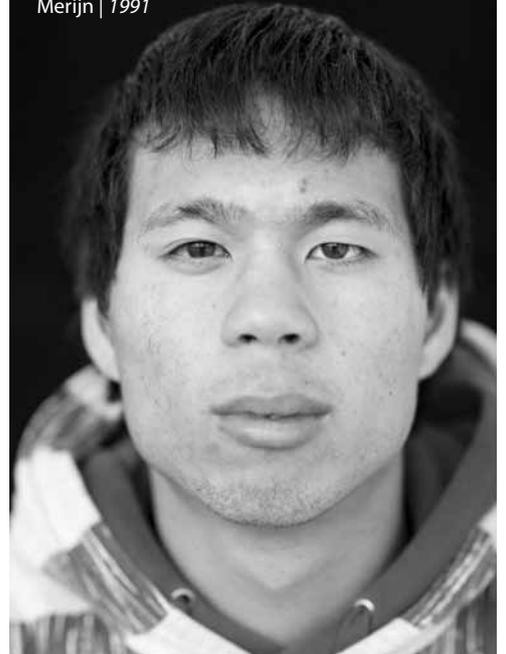
Jeftha | 1997



Theodora | 1984



Merijn | 1991



News from the EU Member States, Croatia, FYR of Macedonia and Turkey

More information can be found at www.non/discrimination.net

Austria

Case law

First reported rulings on discriminatory door policy in clubs

A young man of Egyptian origin was denied access to a club in the provincial capital city of St Pölten (Lower Austria). With the support of the Litigation Association of NGOs against Discrimination,⁹⁵ he filed two complaints, each seeking EUR 720 as compensation for the damage he suffered. The District Court of St Pölten sanctioned the door policy as it was clearly applied on the basis of ethnic origin and held that discriminatory behaviour at the entrance of a club incurs the owner's liability even if the doormen were not directly employed by the discotheque but were employees of a security agency.⁹⁶ The amount claimed by the plaintiff as compensation was granted by the Court.

racial
or ethnic
origin

Belgium

Legislative developments

Draft proposal prohibiting the wearing of any clothes totally or partially covering an individual's face in public spaces

On 31 March 2010, the Commission of the Interior of the Federal Parliament unanimously enacted a legislative proposal modifying the Penal Code.⁹⁷ The proposal criminalises any kind of total or partial head covering that masks or hides the face with the effect that individuals are no longer identifiable in areas accessible to the public. The *burka* and *niqab* are not specifically and exclusively addressed but are given as examples in the explanatory note. Public spaces are defined as streets, parks, public gardens, playgrounds, cultural places and places where a service is available to the public (such as shops or hotels). Exceptions to the prohibition are possible for motorcyclists or for specific professions such as firefighters. Municipalities are also allowed to provide for exceptions in limited cases such as occasional or festive activities (e.g. carnivals or fairs). Criminal sanctions (fines from EUR 82.50 up to EUR 137.50 and/or a jail sentence from one to seven days), as well as administrative sanctions (fines up to EUR 250) are specified in the law. The objective put forward is to respond to security concerns through the rapid identification of individuals in public areas.

racial
or ethnic
origin

religion
or belief

Presented by some parliamentary members from the French-speaking right-wing party (*Mouvement Réformateur*, MR), the text was amended to incorporate other similar proposals recently presented by the Flemish and French-speaking centre-Catholic parties (*Christendemocratisch & Vlaams*, CD&V and *Centre Démocrate Humaniste*, CDH).⁹⁸ Since 2004, several proposals pursuing the same aim have been presented at the initiative of the MR⁹⁹ and of the Flemish extreme right-wing party (*Vlaams Belang*, VB).¹⁰⁰ The VB proposal expressly targeted both the *burka* and the *niqab*, arguing that communication is not possible

⁹⁵ The Austrian Litigation Association of NGOs against Discrimination was founded in 2004 as an umbrella organisation of NGOs already working against discrimination and advising victims of discrimination <http://www.klagsverband.at/english>.

⁹⁶ Decision of the District Court of St Pölten no. 4 C 480 /09x-12 of 29 January 2010.

⁹⁷ *Documents parlementaires*, DOC 52-2289/001-004.

⁹⁸ *Documents parlementaires*, Doc 52-2495/001 and 52-2442/001.

⁹⁹ *Documents parlementaires*, Doc 51-1625/001 and 52-0330/001.

¹⁰⁰ *Documents parlementaires*, Doc 51-0880/001 and 52-0433/001.

when wearing such clothing and that women's rights are violated. In addition, some municipalities in Belgium (including eight municipalities in the Brussels-Capital Region) have already ruled on the issue, through administrative regulations. The proposal also therefore aims at imposing one uniform set of rules to ensure legal certainty throughout the country.

On 29 April 2010, the Parliament's House of Representatives unanimously adopted the proposal by 136 votes in favour and two abstentions (from the Flemish socialist party). The abstentions were motivated by concerns relating to freedom of expression or to the potential isolation or stigmatisation of those wearing the *burka*. Pursuant to constitutional law,¹⁰¹ the Senate had applied its right to discuss and vote on the proposal but due to the recent political crisis and the federal government's resignation, the entire process has been paralysed. The text could possibly be discussed again by the next Parliament if recalled (*relevé de caducité*).

Internet link source:

<http://www.lachambre.be/kvvcr/showpage.cfm?section=/flwb&language=fr&rightmenu=right&cfm=/site/wwwcfm/flwb/flwbn.cfm?lang=F&legislat=52&dossierID=2289>

Opinion of the Council of State on several decrees aiming at prohibiting religious symbols

In March 2010, wide consultations regarding prohibition of religious symbols at school and within the public service were conducted by a joint commission established by the Parliaments of the French Community, the Walloon Region and the French-speaking part of the Brussels Region. As a result, the Council of State (*Conseil d'Etat*) was required to give preliminary opinions on the conformity with the law of several initiatives that have been recently tabled.



1) Prohibition of religious, philosophical and ideological symbols at school

The first proposal referred to the Council of State¹⁰² was for a decree banning the wearing of religious, philosophical and ideological symbols (*signes convictionnels*) by personnel working in schools organised and financed by the French Community.¹⁰³ The draft decree consisted of two articles¹⁰⁴ providing that 'personnel shall refrain from wearing any "symbols of belief or faith" (*signes convictionnels*) at school, as well as at training places and during extracurricular and external activities arranged by the school. "Symbols of belief or faith" are understood as any clothing or accessories showing a conviction or a political, philosophical or religious identity'.¹⁰⁵ The authors of this initiative intended to address social cohesion and integration in a diverse society and consequently also presented a proposal to introduce a common course on cultural and religious diversity for pupils of different religions or beliefs,¹⁰⁶ a proposal introducing a course on the philosophy and cultural history of religions,¹⁰⁷ a proposal aiming at reinforcing social cohesion (*vivre ensemble*) at school¹⁰⁸ and a proposal on teaching citizenship at school.¹⁰⁹ The proposal

¹⁰¹ Article 78, Constitution.

¹⁰² Council of State Opinion no. 48.022 of 20 April 2010.

¹⁰³ Doc. no. 84 (2009-2010) – no. 1 of 15 March 2010 and Doc. no. 84 (2009-2010) – no. 2 of 12 May 2010.

¹⁰⁴ These articles are to be included in the French Community Decree of 31 March 1994 defining the principle of neutrality in education, and in the French Community Decree of 17 December 2003 ensuring the neutrality inherent in state publicly financed education.

¹⁰⁵ Excursions or school study trips are considered extracurricular or external activities.

¹⁰⁶ Doc. 24 (2009-2010) – no.1 of 28 September 2009 <http://www.pcf.be/req/info/dossier?section=&id=001292896>.

¹⁰⁷ Doc. 25 (2009-2010) – no.1 of 25 November 2009 <http://www.pcf.be/req/info/dossier?section=&id=001297279>.

¹⁰⁸ Doc. 37 (2009-2010) of 28 October 2009 <http://www.pcf.be/req/info/dossier?section=&id=001295246>.

¹⁰⁹ Doc. 36 (2009-2010) of 28 October 2009 <http://www.pcf.be/req/info/dossier?section=&id=001295185>.

for a decree banning the wearing of religious, philosophical and ideological symbols at school aims at guaranteeing the principle of neutrality in the field of education as enshrined in the Constitution.¹¹⁰

Relying on the case law of the ECtHR, the Council of State held that a huge margin of appreciation is left to the states to decide on the issue of religious symbols and secularism. Nonetheless, a case-by-case assessment must be made to determine whether, on the one hand, there is a pressing social need, and on the other hand, whether the restriction on the freedom of religion is proportionate to the legitimate objective pursued.

Turning to the principle of neutrality, the Council recalled that it requires teachers to be neutral, or in other words, to show respect to all religions. Hence, neutrality cannot be ensured if a teacher shows his or her beliefs in a proselytising manner. The social situation cited by the authors of the proposal as justification for the need for a decree was deemed to be in conformity with the Constitution and the ECHR.¹¹¹ However, the Council of State stressed that the terms used to justify the decree were too general and it requested the legislator to address more accurately the specificities of education and the particular reasons the decree will serve the principle of neutrality, especially as other proposals could have equally contributed to fulfilling this purpose. The Council of State also limited the personal scope of the decree so it cannot be applied to teachers of religious instruction. Finally, the decree itself should specify that personnel are prohibited from wearing symbols of belief or faith during school trips or excursions, such as study trips, exhibitions, etc., but not on the way to and from school as that would be disproportionate in the view of the Council.

2) Prohibition of religious, philosophical and ideological symbols in the public service

Two proposals for a Walloon Decree were presented with the aim of banning the wearing of religious and philosophical symbols by members of municipal, inter-municipal or provincial councils¹¹² and by civil servants working in these public institutions within the exercise of their functions.¹¹³ The *rationale* behind the two texts is similar to the justification raised with regards to the decree banning symbols of beliefs or faith at school. The authors of this second proposal alleged that local elected officials represent all citizens and therefore must hold to the common values which underpin democracy, without giving priority to or creating the impression that they favour any particular cultural, religious or philosophical orientation, in keeping with the principle of neutrality. The proposal regarding staff working for local public authorities states that the principle of equality justifies the prohibition of any symbol expressing any cultural, religious, philosophical or political conviction.

In its first opinion, which related to council members, the Council of State recalled that when they act on behalf of a public authority, they must adopt neutral conduct. By contrast, when they act as elected political representatives, they can freely express their own political opinion and their freedom of speech can only be limited by overriding reasons such as those enshrined in Article 10 §2 ECHR. In the present case, the Council of State deemed that the term used in the decree ‘within the exercise of their function’ did not sufficiently distinguish these two contrasting situations. Consequently, the general terms invoked to justify the proposal do not comply with the requirement of imperative reasons. In addition, the Council of State was very critical of any limitation of political opinion imposed on political representatives, except when there is incitation to hatred, violence or discrimination. It was also stressed that the meaning of ‘cultural opinion’ was not clear enough and that it should be clarified why the proposal targeted only certain public authorities.

¹¹⁰ Article 24, § 1, 3°, Constitution.

¹¹¹ Point 13 of the Opinion.

¹¹² Doc. no. 99 (2009-2010) – no. 1 of 22 October 2009.

¹¹³ Doc. no. 101 (2009-2010) – no. 1 of 22 October 2009.

In its opinion on the proposal relating to civil servants, the Council of State focused its reasoning on freedom of religion. As far as civil servants in contact with the public are concerned, it acknowledged that the proposal was adequately justified by the principle of neutrality. With respect to those not in contact with the public, the proposal required better justification, and in any event, the prohibition of the wearing of religious or philosophical symbols could not be as general as originally envisaged.

Internet link source:

<http://www.pcf.be/req/info/dossier?section=&id=001305801>

http://nautilus.parlement-wallon.be/Archives/2009_2010/DECRET/99_1.pdf

http://nautilus.parlement-wallon.be/Archives/2009_2010/DECRET/101_1.pdf

Case law

Ban on a mathematics teacher for wearing a headscarf at school

Even though the wearing of visible religious symbols was not expressly forbidden by internal school regulations or by administrative decrees in the city of Charleroi, in September 2009 a mathematics teacher was forbidden to wear her headscarf on school premises as it was argued that this contravened the principle of neutrality in the field of education.¹¹⁴ The teacher subsequently put herself on sick leave. Meanwhile, she filed an expedited claim with the court of first instance asking to be temporarily authorised to teach with her headscarf while another cumulative action for the annulment of the school's decision was pending before the Council of State.¹¹⁵ The President of the Charleroi court of first instance dismissed the claim.

In March 2010, the Court of Appeal of Mons recognised that the emergency of the situation justified interim measures. Based on the blameless conduct of the teacher, the Court lifted the ban and allowed her to continue teaching.

Further to this judgement, the Charleroi local authorities rapidly adopted a regulation prohibiting teachers from wearing any visible religious, political or philosophical symbol at school. In fear of being dismissed on this ground, the teacher brought the regulation to the attention of the Council of State using expedited proceedings¹¹⁶ asking for the regulation to be suspended. The action was rejected on the ground that no serious danger existed and that the sanctions feared by the teacher could not be pronounced on the basis of the general regulation. Only an individual decision to dismiss the teacher could possibly be disputed. The teacher was eventually dismissed in June 2010.

Internet link source:

<http://www.raadvst-consetat.be/Arrets/202000/700/202768.pdf#xml=>

<http://www.raadvst-consetat.be/apps/dtsearch/getpdf.asp?DocId=16555&Index=c%3a%5csoftware%5cdtsearch%5cindex%5ccarrets%5ffr%5c&HitCount=2&hits=13+14+&04562120103017>

<http://www.raadvst-consetat.be/Arrets/202000/800/202852.pdf#xml=>

<http://www.raadvst-consetat.be/apps/dtsearch/getpdf.asp?DocId=16556&Index=c%3a%5csoftware%5cdtsearch%5cindex%5ccarrets%5ffr%5c&HitCount=2&hits=14+15+&04405420103017>

¹¹⁴ Decree of the French Community of 17 December 2003 on ensuring the neutrality inherent in state publicly financed education, *Moniteur belge*, 21 January 2004, p. 3747.

¹¹⁵ The action was later dismissed on the ground that no serious danger which was likely to be difficult to compensate existed. Decision no. 202.768 of 2 April 2010.

¹¹⁶ Council of State Opinion no. 202.852 of 7 April 2010.



Bulgaria

Case law

disability

Recognition of special educational needs of students with disabilities

The Supreme Administrative Court held that the provision of the Regulations on the Implementation of the National Education Act preventing students from completing the same level of secondary education twice indirectly discriminated against students with mental disabilities.¹¹⁷ According to the Court, such legislation precludes students from acquiring more than one vocational qualification (or diploma) and disproportionately affects students with mental disabilities as they have fewer opportunities to acquire vocational qualifications and subsequently to access employment and achieve social integration.

sexual orientation

Municipal ban on public demonstration of sexual orientation is discriminatory

The equality body ruled that the Municipal Council of Pazardzhik had directly discriminated against homosexuals by adopting a regulation banning public demonstration of sexual orientation. The body held that although the prohibition was formulated in apparently neutral terms ('sexual orientation' as opposed to 'homosexual orientation'), it specifically targeted non-heterosexuals. This view was reinforced by public statements made by some councillors. The body ordered the Municipal Council to repeal the impugned rule and to abstain from further adoption of discriminatory norms.

racial or ethnic origin

Supreme Court refuses to recognise anti-Roma prejudice

The Supreme Court of Cassation refused to acknowledge discrimination against the Roma in the prosecution of a case.¹¹⁸ A prosecutor had terminated an investigation into the death of a Roma and wrote manifestly anti-Roma statements. The Court overruled previous findings of both the court of first instance and the court of appeal, which held that the Prosecutor's Office was liable for racial discrimination under the UN Convention for the Elimination of All Forms of Racial Discrimination. The Supreme Court considered that the statements made were not 'ethnically-based appraisals' but rather 'comments on the conduct of a certain group of people defined as predominantly (but not exclusively) of Gypsy origin'.

Cyprus

Case law

racial or ethnic origin

Racial profiling of migrants

The equality body reported racial discrimination in police practice towards migrants. It observed that recent police operations had resulted in mass arrests, detentions and deportations of Chinese women allegedly sold into prostitution and undocumented migrants. The equality body report relied on a number of provisions of the European Convention on Human Rights, also enshrined in the Cypriot Constitution, as well as the legislative framework regarding arrests and deportations. Particular reference was made to a decision of the UN Human Rights Committee¹¹⁹ which found that police checks conducted to determine

¹¹⁷ Decision 1964 of 15 February 2010. The decision was rendered on appeal against Decision No 87 of 28 May 2009.

¹¹⁸ File 460/ 2003 of the Razgrad Prosecutor's Office. Civil case No 1796/2008.

¹¹⁹ *Rosalind Williams Lecraft v. Spain*, Communication no. 1493/2006 UN Doc CCPR/C/96/D/1493/2006 of 30 July 2009.

a person's identity and motivated by race or ethnicity are contrary to the principle of non-discrimination. The report also referred to a statement by the Council of Europe Human Rights Commissioner on 20 July 2009 qualifying the police practice of 'stop and check' (also known as 'ethnic profiling') as a form of discrimination.¹²⁰ As a result, the equality body found that the police operation and the mass checks and arrests that followed were motivated by a presumption of guilt, in breach of the Constitution. In addition, the fact that the operation took place at dawn, roadblocks were set up and handcuffs used, and that widespread media coverage was organised cast doubt on the operation and on the proportionality of the measures undertaken. Specific recommendations to redress such practices were put forward, for example a guarantee of judicial procedure prior to deportation, the definition of racial profiling in the law, the issuance of police guidelines and the involvement of migrants in the police force.¹²¹

Equality body rules on the limitation of state financial support for artificial insemination to women under 40 years of age



The equality body criticised the age limit of 40 as a condition of eligibility for financial support for artificial insemination.¹²² The plaintiff, aged 42, had her application rejected based on scientific evidence brought forward by the Council of Ministers that women under 40 have more chance of a successful conception following artificial insemination. The Ministry of Health therefore argued that the chances of success for women over 40 are so limited that the overall budget available would be rapidly spent and that younger couples for whom the probability of success is higher would be unable to benefit from it. The equality body reported that the chances of success of artificial insemination for every woman are based on a combination of several factors including age, physical health, diseases, etc. The age criterion alone cannot sufficiently justify the exclusion of a large number of women from the scheme. The equality body recommended the introduction of a comprehensive system for assessing each application which will take into consideration various factors including the applicant's age, physical health, family status, income and nature and quality of family relations that will develop from having a child, so as to ensure priority is given to financially supporting couples that meet all the eligibility conditions.

Czech Republic

CZ

Case law

Dissolution of a political party because its programme focused on racial hatred, xenophobia and instigating violence



The Czech Ministry of Interior urged the Supreme Administrative Court to dissolve the Workers Party, alleging that its programme was based on a systematic and persistent spreading of racial hatred against certain groups such as Roma and migrants. The party served as an umbrella organisation for neo-Nazis and was capable of amassing considerable resources to instigate violence against vulnerable groups. The party also glorified individual acts of armed racial violence. The Court found that the party represented a severe danger to the whole constitutional system of the Czech Republic. When coming to this conclusion, it applied the criteria set out by the ECHR,¹²³ namely (i) the existence of an urgent social need to dissolve a political party and (ii) the proportionality of such a decision to the legitimate aim pursued. The conduct

¹²⁰ See the viewpoint of the Commissioner for Human Rights': http://www.coe.int/t/commissioner/Viewpoints/090720_en.asp.

¹²¹ With respect to this last issue, the law will need to be modified accordingly as at the present time only Cypriot citizens can become police officers.

¹²² AKR 126/2009 of 27 April 2010.

¹²³ *H. Batasuna and Batasuna v. Spain*, no. 25803/04 and no. 25817/04 of 30 June 2009.

of the party leaders was deemed to be contrary to basic principles of democracy. According to the Court, democracy could not run the risk of such a party gaining access to power and starting to implement its political programme.

Internet link source:

http://www.nssoud.cz/docs/Delnicka_strana_original.pdf

DK

Denmark

Case law

Access to free legal aid granted further to request from the Danish Institute for Human Rights

For the first time, the Danish Institute for Human Rights has applied for free legal aid on behalf of a victim of discrimination. The case concerns a person with a non-Danish ethnic background who applied for the position of coordinator in a school. Although he was considered the most qualified applicant, he was informed that the school wanted someone with more professional experience, and consequently the vacancy was re-advertised with the new requirement added. He was, however, reassured that his profile still matched the position and that he would be called for an interview. As the job was then given to another candidate, the complainant claimed that he had been discriminated against on the grounds of ethnic origin as he was not given an interview at any stage. The Board of Equal Treatment held that insufficient evidence of discrimination was supplied by the plaintiff in accordance with EU law relating to the burden of proof and dismissed the case. In accordance with its mandate, when the Danish Institute for Human Rights does not agree with the Board's decisions, it may request free legal aid so as to access the courts. In the present case, the Institute agreed to provide its assistance as it considered that the burden of proof imposed on the complainant had been adequately fulfilled. The Institute subsequently applied to the state for free legal support in order to have the scope of the burden of proof tried in court. In July 2010, free legal aid was granted. Accordingly, the complainant can now choose a lawyer and have the case brought to court free of cost.

racial
or ethnic
origin

EE

Estonia

Case law

Prison doctors assessed on their language proficiency are not discriminated against

A former prison doctor filed a complaint claiming, *inter alia*, ethnic discrimination on the ground of language. She alleged that her remuneration in 2006 and 2007 was affected by her command of the Estonian language. In Estonia, prison administrations grant additional pay to employees who can demonstrate all of the following skills, at least at an intermediary level: professional competence, professional skills, Estonian language proficiency and computer literacy. In the present case, the complainant did not receive additional pay because her proficiency in Estonian was allegedly below standard. She argued that other employees of minority origin were also put in the same unfavourable situation in comparison with the medical staff members of Estonian origin. The Tallinn District Court did not uphold that argument and focused its reasoning on language.¹²⁴ Directive 2000/43/EC was therefore deemed irrelevant in this

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¹²⁴ Administrative case 3-08-2604.

case as it deals with ethnic and racial discrimination and not language. The Court held that personnel of Estonian origin could get a higher salary due to their better command of Estonian and not because it was their native language. There was hence no discrimination against employees of minority origin. The Court concluded that 'ethnic origin cannot be altered but a person can develop better language proficiency'.

Internet link source:

<http://www.kohus.ee/kohtulahendid/index.aspx>

France

FR

Legislative developments

Draft law to incorporate the High Commission against Discrimination and for Equality (HALDE) into a new public institution

In June 2010, the Senate discussed a proposal relating to the 'Defender of Rights',¹²⁵ a new institution envisaged after the revision of Article 71-1 of the Constitution. The role of the Defender of Rights is to ensure that the State and bodies exercising state prerogatives respect individual rights and liberties.

An initial draft of the proposal extended the ombudsman's remit. However, in the course of the legislative process, the Government and the majority of the Senate committee responsible for the bill proposed further amendments in order to incorporate a number of independent public authorities dealing with fundamental rights, such as the Defender of the Child, the Commission for Ethics in the Security Services and finally the High Commission against Discrimination and for Equality (HALDE).

According to the bill, the Defender of Rights would have legal personality and would be appointed by the President of the Republic. Citizens would be able to file claims against the State regarding access to and functioning of the public service to the Defender of Rights, as well as complaints regarding children's rights, wrongful use of violence by security forces and discrimination cases. For issues relating to ethics among the security services and to discrimination, which were originally covered by the Commission for Ethics in the Security Services and the HALDE, a specific deputy defender would be nominated by the Prime Minister. In addition, two special advisory committees would be put in place, one for ethics in the security services and one for discrimination. The deputy with the position of Defender of the Child keeps the title and acts alone with the support of his or her staff.

The amendment was passed at its first reading by the Senate on 2 June 2010. The second reading in the National Assembly should take place in autumn 2010.

Internet link source:

<http://www.senat.fr/dossierleg/pjl08-611.html>

<http://www.senat.fr/dossierleg/pjl08-610.html>

<http://www.senat.fr/petite-loi-ameli/2009-2010/483.html>

¹²⁵ Draft proposal no. 610 regarding the Defender of Rights of 9 September 2009.



Criminal liability of a training centre for denying access to a student wearing a headscarf



A young woman was registered on a programme organised jointly by the University of Paris XI and a training centre leading to a degree in accounting and financial audit. Two days after her first day in class, she was informed by the director and the president of the training centre that in-house regulations prohibited the wearing of the Islamic veil on their premises. The young woman alleged that the Law of 15 March 2004 prohibiting religious symbols in state schools does not apply to adult students registered in higher education centres. The director maintained her position and gave the student some time to think about whether to remove her veil or to leave the programme.

The following day the young woman showed up at work as required by her trainee employment contract. On that same day, the employer received a notification that she had been excluded from the programme due to her refusal to comply with the training centre's internal regulations.

After the incident, the board of the training centre discussed a proposal to modify the internal regulations but this was rejected on the ground that religious symbols may cause unrest, proselytism and disruption to teaching. It was argued that the training centre was a private structure and its members had strong views on secularism.

The case was dismissed at first instance. Before the Court of Appeal of Paris,¹²⁶ the HALDE recalled that the Council of State had already held that the wearing of religious symbols does not amount to proselytising behaviour and is part of freedom of religion. On these grounds, the HALDE alleged that the facts constituted an offence as it subjected an offer of service to a discriminatory condition contrary to Article 225-2 of the Criminal Code. The Court decided that the defendants failed to establish disruptive and proselytising behaviour that could justify exclusion. The simple wearing of the Islamic veil does not qualify as behaviour that can be sanctioned by a training centre. The Court condemned the association managing the training centre to a fine of EUR 3775 and the director to a fine of EUR 1250. In addition, the Court ordered both the training centre and the director to jointly pay EUR 10 500 to the young woman for damage suffered.

Age limitation and conformity with Article 6 (1) of Directive 2000/78



The Court of Cassation was required to determine whether age limitations for compulsory retirement set out by regulations meet the requirements of Article 6 paragraph 1 of Directive 2000/78 which provides that they must be objectively and reasonably justified by a legitimate aim of employment policy and that the means to achieve the objective must be appropriate and necessary.¹²⁷

One case brought to the attention of the Court of Cassation concerned the compulsory retirement of aeroplane pilots on reaching the age of 60 as laid down in Article L421-9 of the Civil Aviation Code. The second case related to the compulsory retirement of producers at the Paris National Opera in Paris on reaching the age of 60 as laid down in Decree no 68-382 of 5 April 1968.

In both cases, the Court concluded that although the age limitation was set out by regulations, the Court of Appeal should have verified whether it was objectively and reasonably justified and whether the means to achieve the aim pursued were appropriate and necessary.

¹²⁶ Court of Appeal Paris, 8 June 2010, case no. 08/08286.

¹²⁷ Court of Cassation, no. 08-45307 and no. 08-43681 of 11 May 2010.

In the case of the aeroplane pilot, the Court stressed that even when a profession involves fitness requirements that justify controls and restrictions, it must also be verified whether the job's requirements render the age limitation absolutely necessary. If not, fitness requirements are sufficient to meet concerns relating to a pilot's ability to perform duties. No specific ruling beyond the principles set out by the Court as to the justification test was given in the case relating to producers at the National Opera.

Internet link source:

<http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000022214723&fastReqId=2089156303&fastPos=25>

<http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000022214750&fastReqId=1398109072&fastPos=26>

MK

FYR of Macedonia

Case law

Public event prohibits the presence of homosexuals and non-believers

The Sixth International Moto Festival was announced as taking place on 18 and 19 June 2010 in Skopje. The promotional material (posters, websites and video advertisements) included a ban on attendance by homosexuals and non-believers. The former were described using the English word 'homo' and 'pederasi' (a pejorative Macedonian word for homosexuals) while the latter were designated using the symbol '666'. The City of Skopje traditionally sponsors the festival, and is doing so this year. Neither the City of Skopje nor any other public authorities reacted against the advertisements. Only after a press conference denouncing hate speech and discrimination by a group of NGOs and some media was held, the City of Skopje issued a statement that the authorities were not aware of the content of the promotional material and requested that the word 'homo' be deleted. However, the authorities did not request the deletion of the symbol '666'. They did not announce that they would be investigating the responsibility of the city administration nor did they condemn the harassment. In the end, no case was taken to court.

Internet link source:

http://www.nightwolves.com.mk/index_mk.htm

<http://www.utrinski.com.mk/default.asp?ItemID=CDF3F9A69AEAFD48A186FB0D6D8AC7F7>

<http://www.skopje.gov.mk/ShowAnnouncements.aspx?ItemID=3442&mid=482&tabId=1&tabindex=0>

sexual
orientation

religion
or belief

DE

Germany

Legislative developments

Proposal for abolishing the term 'race' in Article 3 of the Basic Law

The German Institute of Human Rights has proposed amending Article 3(3) of the Basic Law regarding the prohibition of discrimination on various grounds and removing the word 'race' ('Rasse') by replacing it with the term 'prohibition of racist discrimination or preferential treatment' ('*Verbot rassistischer Benachteiligung oder Bevorzugung*'). The background of this initiative, which is in line with efforts by the European Parliament to abolish use of the term 'race' in all EU legal texts, lies in the conviction that 'a theory of different races is racist in itself'. The Head of the Federal Anti-Discrimination Agency (FADA)

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origin

supported the proposal, stressing that the FADA already avoids the term 'race' and uses the term 'racist' instead.

Case law

Prohibition of public prayer at school is legitimate

A Muslim pupil brought a complaint to court as he could not pray within the school premises because the school authorities did not grant him permission. The Berlin Administrative Court (*Verwaltungsgericht Berlin*) ruled that the school had to provide such a possibility.¹²⁸ Consequently, the school allocated a separate prayer room to the pupil on a provisional basis as meantime it had filed an appeal against the decision.



At appeal, the Regional Administrative Court of Berlin (*Oberverwaltungsgericht Berlin*) overruled the decision of the lower court, arguing that even if prayer at state schools falls within the ambit of freedom of religion, the right is, however, limited by other constitutional values.¹²⁹ In particular, the neutrality of the State requires equal treatment of all religions and would therefore entail providing a space for all prayers of all religions, which is not possible due to organisational constraints. The Court therefore concluded that the absence of prayer rooms at school was legitimate.

Internet link source:

<http://www.berlin.de/sen/justiz/gerichte/ovg/presse/archiv/20100527.1605.297041.html>

Greece

EL

Case law

Supreme Court confirms the acquittal of a neo-Nazi author

Costas Plevris, a self-professed neo-Nazi author, has been acquitted by the Supreme Court¹³⁰ of charges of violating anti-racism legislation.¹³¹ In the initial decision by the Court of Appeal of Athens, he had been sentenced to 14 months in jail for incitement to discrimination, hatred or violence and expression of offensive ideas against Jews because of their racial or ethnic origin (...) through his book *The Jews – the Whole Truth*.¹³² Costa Plevris was acquitted in a second subsequent judgement on the ground that his work was based on historical sources and that the content of the book did not reflect any intention of discrimination, hatred or violence against Jews, nor were offensive ideas expressed against the Jews solely because of their racial or ethnic origin.¹³³ The case was brought to cassation by the Deputy Prosecutor of the Supreme Court,¹³⁴ who alleged that criminal law had been erroneously interpreted and that it was automatically self-evident that the author had publicly expressed ideas that could incite discrimination, hatred and violence against Jews and cause offence to persons or a group of persons because of their ethnic origin. The Greek Supreme Court held that Mr Plevris did not offend the human values of Jewish



¹²⁸ VG 3 A 984.07 of 29 September 2009.

¹²⁹ OVG 3 B 29.09 of 27 May 2010.

¹³⁰ Greek Supreme Court's Criminal Section, number 3/2010.

¹³¹ Law 927/79 (interdiction of racial discrimination) as amended by Law 1419/84 (sanctions against racial and religious discrimination) and by Law 2910/01 (*ex officio* prosecution).

¹³² Second Three-Member Appeal Court of Athens (Misdemeanours) Judgment 8705 and 9006/2007.

¹³³ First Five-Member Appeal Court of Athens Judgment 913/2009.

¹³⁴ Cassation appeal no. 34/2009.

persons on the grounds of their ethnic or racial origin because he referred to 'Zionist Jews' and not to Jews in general. According to the Court, 'Zionist Jews' do not constitute a group that is related to ethnic or racial origin and they do not fall within the scope of the relevant legal protection. Moreover, the Court stressed the scientific character of Mr Plevris's work and argued that the writer 'did not have the intention of urging readers to engage in acts that could possibly result in discrimination, hatred or violence against Jewish people'. A minority opinion given by the Court stated that Mr Plevris's statements were offensive and racist and addressed all Jews as the distinction between Jews and Zionists was used as a pretext.

Internet link source

<http://cm.greekhelsinki.gr/index.php?sec=192&cid=3638>

http://cm.greekhelsinki.gr/uploads/2008_files/efet_athin_apofasi_8705-9006-2007_diki_plevri_el_kosmou_13-12-07.pdf

HU

Hungary

Legislative developments

Equal Treatment Authority's decisions may not be altered or annulled by the minister exercising supervisory powers over the Authority

In June 2009, the Parliament enacted an amendment to Article 17 (2) of Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (ETA). The revision raised concerns that the minister exercising supervisory powers over the Equal Treatment Authority may annul or alter the Authority's decisions, with the risk of its independence being compromised.

Government Decree 182/2009 amending Government Decree 362/2004 on the Equal Treatment Authority and the Detailed Rules of its Procedure (ETAD) also stipulates that decisions of the Authority delivered in administrative proceedings may not be altered or annulled through the supervisory powers of the competent minister.

In anticipation of a possible conflict between the ETA and the ETAD, the Authority contacted the Ministry of Justice in December 2009 to express its concerns. The Ministry confirmed that decisions of the Authority may not be altered or annulled through ministerial supervision. It added that no further amendment to the texts was needed, as the formulation in the ETA and the ETAD was already clear.

Case law

Unlawful discrimination against Deaflympics medal winners

The Hungarian medal winners of the 21st Summer Deaflympics filed a complaint with the Equal Treatment Authority for violation of the principle of equal treatment. The complainants claimed that the government body responsible for sports affairs granted the 2008 Summer Olympic and Paralympic Games medal winners pecuniary rewards, but not the medallists of the 2009 Deaflympics. The government body explained the differential treatment by citing the rules for qualification and competition applied to the Olympic and Paralympic Games on the one hand, and the Deaflympics on the other. Furthermore, it claimed the discretionary power to decide which groups to reward.

The Equal Treatment Authority found a breach of the principle of equal treatment and observed that there was no reasonable ground for the difference in treatment from either a fiscal or sport point of



view.¹³⁵ The Authority drew attention to Article 59 Paragraph (1) of the Sports Act, which prescribes that medal winners over the age of 35 at the Summer or Winter Olympics, Paralympics, Deaflympics, and the Chess Olympiad are entitled to a pecuniary allowance throughout their lifetime. The Authority called upon the government body to put an end to the discriminatory situation faced by the medallists of the 2009 Deaflympics as a result of not receiving any reward or pecuniary allowance. The Authority emphasised that equal treatment can only be achieved if rewards are paid to the medal winners of the 2009 Deaflympics.

Internet link source:

<http://www.egyenlobanasmod.hu/zanza/9-2010.pdf>

Anti-Roma statements by the Mayor of Kiskunlacháza qualify as harassment

In 2009, the Mayor of Kiskunlacháza (Central Hungary) spoke at a public demonstration in relation to a murder of a young girl about the population having had enough of 'Roma aggression' and made other statements giving the impression that he believed the murder to have been committed by Roma.

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origin

On 19 October 2009, a lawyer from the Hungarian Helsinki Committee¹³⁶ filed an *actio popularis* claim to the Equal Treatment Authority concerning the statements of the Mayor, alleging that by making statements capable of raising negative sentiments against the Roma community and creating a hostile environment for its members, he had committed harassment.

In its decision dated 19 January 2010, the Equal Treatment Authority established that harassment had been committed.¹³⁷ The Equal Treatment Authority stated that it was clear on the basis of the facts and documents that the Mayor knew that there was ethnic tension in the city and that there was in general a strongly negative attitude to Roma members of the community. The Equal Treatment Authority established that the Mayor's statements were likely to create fear of Roma inhabitants and contribute to an environment that is hostile to them. No fine was imposed.

Internet link source:

http://helsinki.hu/dokumentum/EBH_hatarozat.pdf

Act on registered partnerships of same-sex couples is constitutional

In 2008, the Parliament adopted an act on registered partnerships, providing official recognition for same and opposite-sex couples who did not want or could not get married. The Constitutional Court ruled that the institution of registered partnership was *per se* unconstitutional as – through offering a form of officially recognised and registered partnership that is an alternative to marriage – it undermines the traditional values of marriage and family life, the promotion of which is the State's obligation under the Constitution.¹³⁸

sexual
orientation

The Parliament subsequently adopted a new law. Act XXIX of 2009 recognises the right to registered partnership, but this time only for same-sex couples. The constitutionality of the law was again challenged before the Constitutional Court.¹³⁹ This time, the Court ruled that registered partnerships are not unconstitutional. The judges based their reasoning on the right to human dignity recognised by Article 54 paragraph (1) of the Constitution.

¹³⁵ Equal Treatment Authority, Decision EBH no. 9/2010.

¹³⁶ <http://helsinki.hu/index.php?PHPSESSID=7235c8c4889f65135c7f6d8c35c0c379>.

¹³⁷ Equal Treatment Authority, Decision EBH no. 187/1/2010.

¹³⁸ Decision no. 154/2008.

¹³⁹ Decision no. 32/2010.

Internet link source:

<http://isz.mkab.hu/netacgi/ahawkere2009.pl?s1=32/2010&s2=&s3=&s4=&s5=&s6=&s7=&s8=&s9=&s10=&s11=Dr&r=1&SECT5=AHAWKERE&op9=and&op10=and&d=AHAW&op8=and&l=20&u=/netahtml/ahawuj/ahawkere.htm&p=1&op11=and&op7=and&f=G>

Ireland

Case law



Practice of specifically annotating final school examination of students with dyslexia is not discriminatory

A student with dyslexia alleged that she was discriminated against as the special annotation to her Leaving Certificate (final school examination) indicated that she was not assessed on spelling and certain grammatical elements in language subjects. The High Court rejected the claim. The Equality Authority and the Dyslexia Association¹⁴⁰ expressed their disappointment with the decision to uphold the practice of annotating the Leaving Certificates of students with dyslexia.

In 2001, the student obtained reasonable accommodation for her dyslexia in her Leaving Certificate. The certificate she received stated that certain parts of the exam had not been assessed in English, Irish and French. Supported by the Equality Authority, she took a complaint to the Equality Tribunal where it was upheld, but the Minister for Education appealed the decision and the Circuit Court overturned it. The Authority then appealed to the High Court, which upheld the practice.

The High Court judge said that failure to record the 'reasonable accommodation' made to the plaintiff would 'adversely affect the integrity of the testing process', and 'essentially defeat the purpose of the exam in the first place'.

The Leaving Certificate occupies 'an important place in the Irish educational system and abroad' and 'must stand for something'. It was a record of the level of achievement of a person at the end of their secondary education, and if a person was not assessed in spelling and grammar elements of subjects, that 'should and must be reflected' in the resulting certificate. The High Court Judge accepted the Minister's argument that the deletion of the annotation from the complainant's certificate would constitute a misrepresentation to employers or other persons invited to consider or rely on that document, and would also call the integrity of the exam into question.

The judge also rejected the claim that the Leaving Certificate exam itself was inherently discriminatory in applying standardised testing to a student with dyslexia. The student alleged that such standardised testing effectively assessed a student's disability rather than his/her ability or knowledge in the subject being examined.

¹⁴⁰ The Dyslexia Association of Ireland is a national charity.

Case law

Limitation of support by teachers to students with a disability is unlawful

In 2007, new provisions regarding the assistance granted to disabled students at school were adopted, with the effect of limiting support by teachers.¹⁴¹ Pursuant to the law of 1992 which contains general principles for the integration of persons with disabilities,¹⁴² the full integration of disabled persons should be ensured through the support of specialist teaching staff. A later law adopted in 1997¹⁴³ stipulated that when providing such support to students with particularly severe disabilities, the school authorities could derogate from the ordinary ratio between teachers and students if necessary, by hiring extra teachers with fixed-term contracts. The new provisions of 2007 abolished this possibility.

The parents of a disabled child challenged a decision by a Sicilian school authority to reduce the teaching support provided (from 25 to 12 hours per week) before the Regional Administrative Court and asked for the decision to be suspended. An interim order was subsequently issued and brought by the school authorities to the Special Administrative Appeal Court. The case was referred to the Constitutional Court.

The Court¹⁴⁴ declared that the new limits on the provision of individualised specialist support are constitutionally unlawful. The Court's reasoning is that 'persons with disabilities do not form an homogenous group' and for each form of disability 'it is, therefore, necessary to identify mechanisms for removing obstacles that take into account the type of disability that actually affects a person'.

Against this background, the Court held that removing the possibility to hire extra occasional support teachers for cases of severe disability is 'unreasonable'. Disabled people have a 'fundamental right' to education and, although the State has a 'discretionary power to identify the measures for the protection of persons with disabilities', the Court recalled that 'such discretion is not absolute in character and finds a limit in the respect of a minimum nucleus (*nucleo indefettibile*) of guarantees'. Article 24, section 2, c) of the UN Convention on the Rights of Persons with Disabilities specifies an individualised approach to their needs. In addition, legislation implementing Article 38, section 3, of the Italian Constitution establishing the right of children with disabilities to educational support aims at pursuing a 'manifest national interest'. Further to the Constitutional Court ruling, the Special Administrative Appeal Court will have to further decide on the interim order.

Internet link source:

www.cortecostituzionale.it

¹⁴¹ *Legge 24 dicembre 2007, n. 244 (Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato - legge finanziaria 2008)* (Law of 24 December 2007, no. 244 - Provisions for the preparation of the annual and pluriannual budget of the State - Finance Law 2008).

¹⁴² *Legge 5 febbraio 1992 n. 104, Legge quadro per l'assistenza, l'integrazione sociale e i diritti delle persone handicappate* - Framework law on the assistance, social integration and rights of disabled persons.

¹⁴³ *Legge 27 dicembre 1997, n. 449, Misure per la stabilizzazione della finanza pubblica.*

¹⁴⁴ Decision (*sentenza*) of the Constitutional Court of 22 February 2010, no. 80, published in the Official Journal on 3 March 2010.

Sandra | 1967



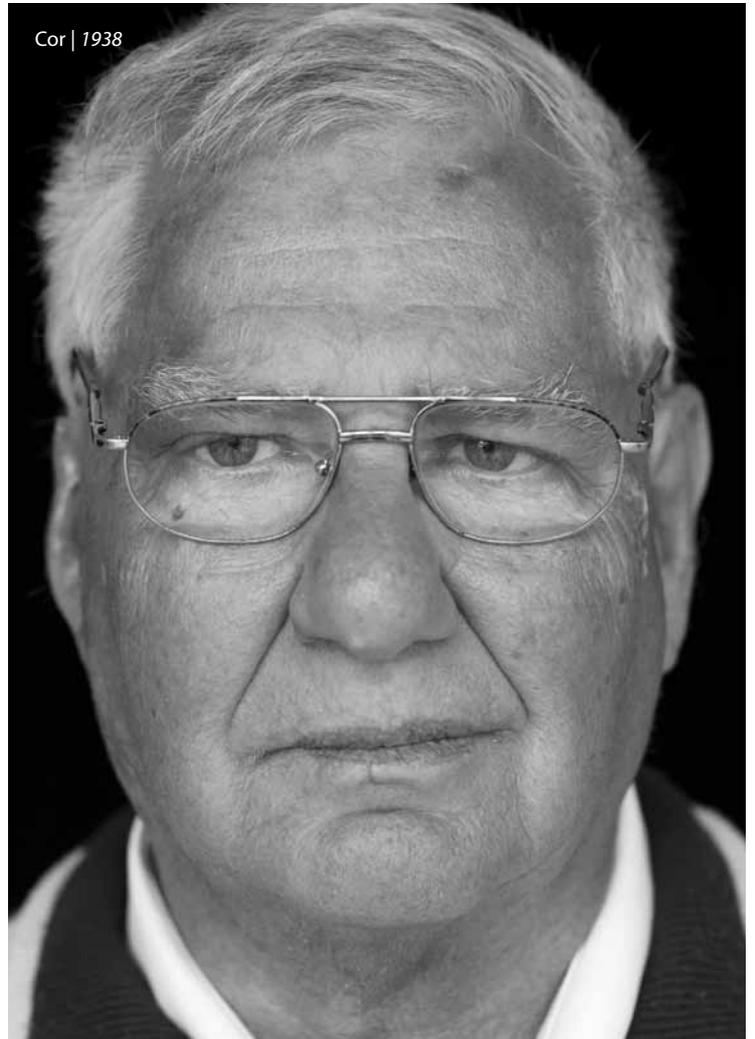
Arjo | 1984



Thalita | 1998



Cor | 1938



*Legislative developments***Legislative amendments to prohibit discrimination in various fields**

In the course of spring 2010, several amendments regarding the prohibition of discrimination in employment and education were adopted. The Law on the prohibition of discrimination of natural persons who are economic operators only prohibited discrimination on the grounds of racial or ethnic origin and gender in relation to the supply of and access to goods and services of self-employed persons. New provisions now prohibit discrimination with regard to access to self-employment on the same grounds. Similarly, a discrimination clause was added to the Law on support to unemployed workers and job seekers to undertake active employment measures and prevent unemployment. A third set of amendments to the Law on Education supplements the already-existing list of protected grounds (property and social status, race, ethnicity, gender, religious or political opinions, existence of a health condition, occupation and place of residence) in the field of education with ethnic origin. The new amendments redress the gaps remaining in relation to the Racial Equality Directive 2000/43/EC but do not fully ensure the transposition of the Employment Equality Directive 2000/78/EC.

Lithuania

*Case law***The Supreme Administrative Court overrules the suspension of the Baltic Pride event**

On 5 May 2010, the Vilnius Regional Administrative Court adopted interim measures suspending the validity of the certificate allowing Baltic Pride's 'March for Equality' for security reasons.¹⁴⁵ In an appeal to the Supreme Administrative Court of Lithuania,¹⁴⁶ the suspension was overruled by reference to the *Bączkowski* case.¹⁴⁷ According to the ECtHR, democracy constitutes a fundamental feature of the European public order and the only political model reflected in the Convention. In that respect, interference with the rights enshrined in the Convention may only derive from a 'democratic society'. Referring to the characteristics of a 'democratic society', the Supreme Administrative Court highlighted the particular importance of pluralism, tolerance and broadmindedness. In this context, it held that although individual interests must on occasion be subordinated to those of the largest group, democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position. Consequently, the State has positive obligations to secure the effective enjoyment of freedoms, particularly for persons holding unpopular views or belonging to minorities because they are more vulnerable to victimisation. The Supreme Administrative Court referred to the presumption of legality and added that insufficient evidence that public safety was endangered or that the state institutions were unable to maintain order during the event had been brought forward.



Subsequently, Baltic Pride's 'March for Equality' took place on 8 May 2010. Approximately 450 people participated, with 800 members of the police force to protect them from the crowd of spectators and pro-

¹⁴⁵ <http://www.balticpride.eu/news>.

¹⁴⁶ Case no. AS822-339/2010 of 7 May 2010.

¹⁴⁷ *Bączkowski v. Poland* no.1543/06.

testors. Two members of Parliament (members of the 'Law and Order' and 'Homeland Union – Christian Democrats' parties) and the protesters urged the crowd to break through the barricades set by the police. Twelve protestors were arrested by the police for instigation to rioting and hooliganism. Investigation is now being carried to determine whether the members of Parliament should be held liable for administrative or criminal offences.

M

Malta

Case law



disability

Failure to provide adequate access for persons with a disability

The National Commission of Persons with a Disability (NCPD) filed a complaint against Banif Bank asking the court to declare that the Bank had failed to provide adequate access to persons with disabilities and to order the Bank to rectify the infringement, in particular by providing people using a wheelchair with access to its branches in St Julians and Gzira. As regards the branch in St Julians a 'platform lift' had been installed, but it did not conform to the guidelines established by the NCPD. The Bank claimed the exception established in Article 12(2) of Chapter 413 of the NCPD Guidelines, arguing that failure to conform was due to the particular location of the branch (situated at the top of a steep hill, having no pavement and forming part of an Urban Conservation Area). As regards the branch in Gzira, the NCPD's objection related to accessibility of the main entrance to the block within which the Bank's branch was situated. The Bank claimed that under the lease agreement with the landlord, the Bank was not allowed to affect structural alterations, and furthermore since the objection related to a common area, all of the tenants as well as the landlord should have been sued in order to rectify the infringement.

In a decision delivered on 1 March 2010, the Court rejected the Bank's claim in relation to the Gzira branch, holding that it was the Bank's duty to ensure that any premises chosen for the purposes of its operations were compliant with Maltese laws, and if they were not so compliant, the Bank should have chosen other premises or obtained the necessary authorisation from the other tenants/landlord to carry out the alterations required. The Court also rejected the Bank's dilatory pleas in relation to the form of the proceedings/form of the request and deferred the case for continuation on 17 May 2010. The decision in relation to the St Julians Branch has not been delivered yet as the case was deferred for hearing to be held on 29 September 2010.

Internet link source:

http://docs.justice.gov.mt/SENTENZI2000_PDF/MALTA/CIVILI,%20PRIM%20AWLA/2010/2010-03-01_394-2009_59707.PDF

NL

Netherlands

Case law



sexual orientation

Access denied to a discotheque/party to men not accompanied by a woman

Many clubs in the Netherlands apply a door policy towards men not accompanied by women denying them access to parties. A complaint was filed by an organisation of homosexuals against the Beach Club for discrimination on the ground of sex and/or sexual orientation. The Equal Treatment Commission (ETC)

concluded that the house rule challenged created a direct distinction on the ground of sex because male visitors were required to bring a woman to the party, while the same requirement did not apply to female visitors.¹⁴⁸ As this is a case of direct discrimination, no justification can legally be accepted. As for the claim that this also constituted indirect discrimination on the ground of sexual orientation, the ETC concluded that indeed the particular house rule negatively affected homosexual men as they could not attend the party with their partner, while heterosexual men could do so. The Beach Club invoked as an objective justification that the policy door contributed to a good atmosphere in the club and was an attempt to avoid aggressive conduct from (male) visitors. Since the club did not apply the rule strictly and since other means of achieving the goal of a good atmosphere were possible, this argument was not accepted by the ETC. The Beach Club was hence found to have indirectly discriminated on the ground of sexual orientation.

Internet link source:

<http://cgb.nl/node/15048/volledig>

A company refuses to print bath towels with a text referring to gay sports tournaments

An organisation that runs gay sports tournaments wanted to order bath towels featuring the text 'Gay Sports Nijmegen PINK Tournament 2009' and asked Company X to supply them. Company X's website clearly stated that no print work deemed to be blasphemous by the company or in any other way perceived as offensive to good morals would be carried out. Company X accordingly refused to print the towels.

On 9 March 2010, the Equal Treatment Commission (ETC) issued an opinion that such conduct did not constitute discrimination on the ground of sexual orientation.¹⁴⁹ Referring to Article 7 of the General Equal Treatment Act (GETA) relating to access to goods and services, the ETC noted that when a certain good or service is offered to the general public, this may not be done in such a way that certain groups are excluded on the basis of a prohibited ground. However, Article 7 does not compel a company to offer goods that are equally useful for everybody. The ETC made a comparison with a shop selling women's clothes which cannot be forced to sell men's clothing as well. According to the ETC, Company X made it clear on its website that it only offers goods that in its own opinion are morally correct and this position does not create a direct distinction on the ground of sexual orientation. The applicant also claimed that Company X made an indirect distinction on the ground of sexual orientation because homosexuals mostly suffered the consequences of such a policy. The ETC acknowledged that some people may take offence at the reason given by Company X for not wanting to deliver the requested towels. However, it repeated that Article 7 GETA does not compel any company to offer certain goods or services, irrespective of the reason for this. Otherwise, this would imply that the prohibition of discrimination in the field of supply of goods and services allows individuals to demand delivery of any good or service as long as this can somehow be linked to a protected ground.

Internet link source:

<http://www.cgb.nl/node/15075/volledig>

Apartment owners association is obliged to provide reasonable accommodation to a disabled person

In 2007, the scope of the Disability Discrimination Act (DDA) was extended to the field of housing. A complaint was subsequently filed against a private association of owners of an apartment complex for discrimination on the ground of disability. The plaintiff, also the owner of a flat in the complex, had suffered from a stroke and had since used a disabled electric vehicle as his only possible transportation. He

¹⁴⁸ ETC 2010-19 of 11 February 2010.

¹⁴⁹ ETC Opinion 2010-32 of 9 March 2010.



requested permission from the board of the owners association to park in a vacant space in the shared parking garage or near his front door. The board rejected the request on the ground that the complex's internal regulations precluded any parking near people's front doors and that the vacant space could not be used because difficulty might be caused to the two cars usually parked adjacently.

Nonetheless, the board sent out a questionnaire to all owners asking whether they agreed with owners either parking an electric vehicle near their front door or in a personal storage room. Answers indicated that the second option was preferred. The applicant was hence informed that he could park his vehicle either in his own storage room (one would in fact need to be constructed specifically for that purpose) or outside the building.

The Equal Treatment Commission (ETC) observed that the DDA applies to organisations such as associations of apartment owners.¹⁵⁰ Regulations¹⁵¹ adopted by owners associations should not directly or indirectly discriminate on the ground of disability and should envisage possibilities for providing reasonable accommodation.¹⁵² This included giving immaterial accommodation, such as granting permission to place an electric vehicle in the public common areas of a jointly-owned apartment building. The applicant had the duty to demonstrate that he/she needed reasonable accommodation and which accommodation would be appropriate and necessary. In turn, the defendant had to prove that the accommodation required was not reasonable.

The ETC did not clearly state whether it constituted direct or indirect discrimination but referred to a justification explicitly formulated for direct discrimination. Article 3 of the DDA allows justification on health and safety grounds. Refusing permission to the applicant to park on the landing near his front door was reasonable if this could lead to serious risks, e.g. obstruction in the case of fire. However, the ETC observed that the association should have substantiated its claim that parking in the garage would create a precedent and that parking on the landing would create a risk in the event of fire. The suggestion that a specific storage area be constructed was not reasonable, since there were other possibilities to park the vehicle in the garage that were less costly and more convenient. This should have been further investigated, concluded the ETC.

Internet link source:

<http://www.cgb.nl/node/15071/volledig>



All appropriate measures had already been taken to provide reasonable accommodation to students in wheelchairs

A university student who needed to use a wheelchair complained that the university where he studied had not provided reasonable accommodation to make it possible for him to attend all lectures and exams and to access libraries and other student facilities. According to the student, the university had thereby discriminated against him on the ground of disability. The university explained that it had taken all appropriate measures to make it possible for the student to participate as fully as possible. At the request of this particular student, it had adjusted a ramp and put separate tables in the auditoriums. It had also made some immaterial accommodations, such as personal assistance in the library.

The student also complained that the university did not comply with the general regulations set out in the *Bouwbesluit* (Decree on Building), which specifies how public buildings should be constructed, including accessibility criteria. The Equal Treatment Commission (ETC) asked an expert to investigate this,

¹⁵⁰ ETC Opinion 2010-35 of 5 March 2010.

¹⁵¹ Regulations passed by owners associations based on Article 5:111, sub d, of the Civil Code are explicitly mentioned in Article 6c DDA.

¹⁵² Articles 1 and 2 DDA.

and concluded on the basis of the expert's report that there had been no breach of the Decree.¹⁵³ The ETC also found that the university had indeed provided several reasonable accommodations and that the extra accommodations still requested by the student (i.e. full access to the library while personal assistance to bring books to a separate room next to the library was already provided) was not proportionate to the amount of investment that this would require from the university.

Internet link source:

<http://www.cgb.nl/node/15039/volledig>

Poland

PL

Legislative developments

New law on equal treatment under discussion

Over the past four years, subsequent proposals for an Act on Equal Treatment have been tabled without, however, reaching the Parliamentary stage of the legislative process. The different versions differ greatly with respect in particular to their scope. The draft proposals have all aimed at implementing four EC Directives: namely Directives 2000/43, 2000/78, 2004/113 and 2006/54.¹⁵⁴ The initial draft law presented in April 2007 went beyond the scope of Directives 2000/43 and 2000/78 in anticipation of the proposal for a new anti-discrimination framework directive then being discussed at EU level. This draft prohibited discrimination in the field of social security, health care, education and access to goods and services (including housing) on the grounds of race and ethnic origin, nationality, gender, religion or beliefs, political beliefs, disability, age, sexual orientation, property, and marital and family status. The following draft dated 21 January 2008 limited the scope of the law by removing the protection granted in the areas of social security, health care and education and by limiting the protection in access to goods and services to gender, race and ethnic origin only. The proposal of 24 April 2008 further narrowed the initial scope as it simply transposed the Directives, but the draft of October 2009 came back to the original wide scope. Meantime, it was renamed 'draft law on the implementation of certain European Union provisions in the field of equal treatment'.

Finally, the latest version presented for public consultation on 21 May 2010 is again very narrow in terms of scope and is limited to a verbatim transposition of the four EC Directives.

More specifically, the draft law envisages the designation of an ombudsperson (Commissioner for Civil Rights Protection) as the equality body to redress the existing lack of a specialised body and provides amendments to the law on the Ombudsperson to include his/her new competences. However, no additional resources or funding for fulfilling these new obligations are provided. The explanatory memorandum even specifies that these are not needed insofar as the ombudsperson's office will carry out the new competences within the existing structure and budget. The Government Plenipotentiary for Equal Treatment (within the Chancellery of the Prime Minister) remains the coordinating body in the Government.

Internet link source:

http://bip.kprm.gov.pl/kprm/dokumenty/61_3646.html

¹⁵³ ETC Opinion 2010-11 of 27 January 2010.

¹⁵⁴ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373/37 of 21 December 2004 and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, OJ L 204/23 of 27 July 2006.

Legislative developments**Adoption of a decree providing for same-sex marriages**

On 11 February 2010, Bill no. 7/XI providing for same-sex marriages was approved in a final vote in Parliament (125 in favour and 99 against). On the same day, the text was published together with Decree 9/XI on same-sex marriages.

The decree was then sent to the President of the Republic for promulgation. On 5 March 2010, he requested the Constitutional Court's opinion as to the constitutionality of the law. The Court examined whether marriages should be described as a 'contract between two people' rather than a 'contract between two people of different sex' as stated in the Civil Code.

According to the Court, there is no norm or principle in the Constitution forbidding two people of the same sex to contract a civil marriage.

As a result, Article 1577 of the Civil Code which defines marriage as 'a contract celebrated between two persons of different sex who wish to start a family through full communion of life under the provisions of this Code' will be amended and the reference to 'different sex' will be removed. Adoption by same-sex couples will still not be allowed.

Internet link source:

<http://www.presidencia.pt/?idc=22&idi=41167>

**School teacher charged with slander**

On 21 May, the First Criminal Court of Santarém condemned a music teacher charged with slander to a EUR 1 000 fine. Testimonies of students from a school in Santarém revealed that the teacher said 'Come in, black' to a 12-year-old student when he asked for permission to enter the classroom. His mother complained of this treatment to the local police.

Although the teacher also used terms such as 'dogs' and 'clowns' when he addressed some students, the judge held that his action did not constitute a crime of xenophobia or racism.

Nevertheless, the Court acknowledged that the teacher 'acted with the intention of offending the student's image and good name' and that all students have the right to equal treatment and respect.

Internet link source:

http://www.publico.pt/Educação/professor-condenado-a-multa-por-chamar-preto-a-aluno_1438441

Legislative developments

Restructuring of national bodies charged with protection of children, equal opportunities and protection of persons with disabilities



Further to the commitment made to reducing state expenditure, the Government issued an Emergency Ordinance¹⁵⁵ by which several bodies previously under the supervision of the Ministry of Labour will be restructured, namely the National Agency for Equal Opportunities between Women and Men, the National Agency for the Protection of the Family and the Rights of Children, the National Authority for the Protection of Persons with Disabilities, the Labour Inspectorate and the National Institute for Preventing and Combating the Social Exclusion of Persons with Disabilities. The National Pensions Agency, the National Agency for Employment as well as the National Agency for Social Benefits are also concerned.

Emergency Ordinance 68/2010 provides for two types of restructuring: either the institution will be dissolved and absorbed within the Ministry of Labour who will take over the responsibilities of the former authorities, or staff will be cut. All the bodies concerned were previously subordinate to the Ministry of Labour. In any event, the restructuring will jeopardise these bodies' current independent status.

Notification regarding segregation in education of Roma adopted by Ministry of Education



While the Education Code which included extensive provisions on segregation in education was declared unconstitutional by the Constitutional Court due to procedural considerations,¹⁵⁶ the Ministry of Education, Research, Youth and Sports issued an internal notification¹⁵⁷ on 3 March 2010 addressed to school inspectorates, schools principals and teachers to specifically deal with the prevention and elimination of segregation of Roma pre-school children and pupils in the educational system.¹⁵⁸

Notification 28463 provides for measures regarding education in minority languages and lays out very specific recommendations on the mandatory inclusion of all children aged between 6 and 16 in the educational system – including through alternative forms of education, registration of Roma pupils at school, reconfiguration of classes to avoid segregation of Roma pupils, courses taught in their mother tongue or classes in their maternal language, as well as classes on history and traditions of the minorities and school mediators to support Roma pupils.

¹⁵⁵ Emergency ordinances (delegated/secondary legislation) can be adopted under a constitutional procedure that allows the Parliament to delegate limited legislative powers to the Government during the parliamentary vacation according to Article 114 and Article 107 (1) and (3) of the Constitution. The ordinances (statutory orders) must be submitted to the Parliament for approval, though between their adoption by the Government and the moment of their adoption (or rejection, or amendment) by the Parliament, they are binding and have legal effect.

¹⁵⁶ Romania/*Curtea Constituțională*, Decision 1.557 of 18 November 2009 regarding the objection as to the constitutionality of the Education Code.

¹⁵⁷ The notification is based on the provisions of the Education Law (*Legea Învățământului nr. 84/1995*), the Government Ordinance on improving the situation of Roma (*Ordonanța de Guvern nr. 522/2006 privind îmbunătățirea situației romilor*), the Order of the Ministry of Education regarding education in pupils' maternal tongue [*Ordinul MEN nr. 3533/31.03.1999 privind studiul limbilor materne*], and the Order of the Ministry of Education prohibiting segregation in the education of Roma children (*Ordinul MECT nr. 1540/19 iul. 2007 privind interzicerea segregării școlare a copiilor romi și aprobarea Metodologiei pentru prevenirea și eliminarea segregării școlare a copiilor romi*).

¹⁵⁸ A new proposal for an Education Code is presently being discussed.



The Notification does not mention any specific sanction in the event of non-observance of the recommendations. However, compliance will be monitored on a permanent basis by school inspectors responsible for the educational issues of Roma and minorities as well as the school inspectors responsible for pre-school, primary school and secondary school education.

Internet link source:

<http://www.edu.ro/index.php/legaldocs/13466>

Case law

Access to education denied to a Roma girl

In a case regarding access to school for Roma,¹⁵⁹ a pupil complained that the teacher at her new school did not allow her to enter the classroom, with the result that she could not attend classes and had to wait at the door. Her father filed a criminal complaint with a court and a complaint with the national equality body that his daughter could not benefit from education over a very long period due to the teacher's attitude. As part of the criminal investigation, the prosecutor at the first-instance court (*Judecătoria Strehaia*, Strehaia District Court) proposed an administrative fine of RON 100 (approximately EUR 25) for abuses in services affecting individual interests.¹⁶⁰ The Strehaia District Court decided in January 2009 in favour of the plaintiff and imposed a fine of RON 1 500 (approximately EUR 360) as non-material damages that the teacher together with the local school inspector had to pay. The plaintiff and the defendants appealed the decision. Relying on the Anti-Discrimination Law in conjunction with the general provisions of the Civil Code, the Court of Appeal of Craiova found that an unlawful act had occurred as evidenced by the pupil being denied access into the classroom as well as the offensive language used by the teacher when addressing the pupil. The court held that the trauma caused to the pupil by her marginalisation and rejection, as well as the fact that her education had been severely hindered, justified higher damages. The Court of Appeal consequently awarded EUR 10 000 to the plaintiff to be paid by the teacher only. This decision is final and irrevocable.

racial
or ethnic
origin

Slovakia

SK

Legislative developments

Ratification of the Convention on the Rights of Persons with Disabilities

On 28 April 2010, following approval by the Parliament on 9 March 2010, the President of the Slovak Republic ratified the Convention on the Rights of Persons with Disabilities and its Optional Protocol. However, the Slovak Republic introduced a reservation to Article 27 paragraph 1a) of the Convention, worded as follows:

Pursuant to Article 46 of the Convention (...) and Article 19 of the Vienna Convention on the Law of Treaties, the Slovak Republic applies the provisions of Article 27 paragraph 1a) on the condition that the implementation of the prohibition of discrimination on the ground of disability when setting conditions of recruitment, hiring and employment duration does not apply to admittance to the service of members of the armed forces, armed security services, armed services, National Security Office, Slovak Intelligence Service, and Fire and Rescue Services.

disability

¹⁵⁹ File 8011/101/2009 of *Curtea de Apel Craiova* of 19 May 2010.

¹⁶⁰ Article 246 of the Criminal Code.

Internet link source:

<http://www.nrsr.sk/Default.aspx?sid=zakony/cpt&ZakZborID=13&CisObdobia=4&ID=1494>

<http://www.prezident.sk/?medzinarodne-zmluvy-podpisane-prezidentom-sr>

UK

United Kingdom

Case law



age

Age discrimination case not accepted by court

In the United Kingdom, a law degree is required to work at the top grade of legal adviser with the Police National Legal Database and to receive the commensurate pay. The Court of Appeal rejected a claim that such a requirement raised a *prima facie* case of indirect age discrimination against workers aged 60 to 65 who do not have a law degree.¹⁶¹ The claimant alleged that such workers were placed at a 'particular disadvantage' as they could not complete the degree course on a part-time basis prior to reaching the employer's retirement age of 65. The Court ruled that 'it was not the appellant's age but the temporal proximity of his intended retirement that stood in his way and prevented him from obtaining a law degree and attaining the third threshold [i.e. the pay grade in question]'. All those without a degree are treated in the same way as the rule does not apply only to workers over a certain age. Consequently, 'the particular disadvantage results not from age at all, but from the fact of impending withdrawal from the workplace at 65', this notwithstanding the existence in the UK of a default retirement age of 65 at which workers can be obliged by their employers to retire.

Internet link source:

www.bailii.org/ew/cases/EWCA/Civ/2010/419.html



sexual
orientation

Disclosure of sexual orientation at work

The Employment Appeal Tribunal ruled that a tribunal had erred in finding that the claimant was subject to unlawful sexual orientation harassment when his managers disclosed his sexual orientation to fellow workers.¹⁶²

This case raises the issue of an objective test for harassment. Given that the tribunal found that the manager had not intended to violate the claimant's dignity or to create an offensive working environment, the question was whether it was reasonable of the claimant to take the view that disclosure of his sexual orientation had this effect. The EAT ruled that it was not, given that he himself had chosen to make his sexual orientation known when he worked at another office of the Land Registry, and that his manager knew this.



sexual
orientation

Discrimination on the basis of sexual orientation in providing adoption services

The Catholic Care organisation provides adoption services among other charitable activities. In keeping with the beliefs held by the Roman Catholic Church, the organisation does not give support to same-sex cohabiting couples or civil partners and considers married heterosexual couples only. The Equality Act (Sexual Orientation) Regulations 2007 prohibits discrimination on grounds of sexual orientation in the provision of goods, facilities or services to the public or a section of the public. Catholic Care sought to rely on the exception set out in Regulation 18 of the Equality Act to modify its memorandum of as-

¹⁶¹ [2010] Industrial Relations Law Report 619.

¹⁶² [2010] Industrial Relations Law Report 583.

sociation in order to provide benefits to persons only of a particular sexual orientation.¹⁶³ The Charity Commission charged with policing charities, and subsequently the tribunal which hears appeals of its decisions, both rejected the amendment proposed on the ground that it would not bring the appellant within the exception conferred by Regulation 18, and so the permission would serve no useful purpose. An appeal was brought to the High Court.

First, the High Court was asked whether it would be lawful to decline to provide adoption services to a person on the grounds of sexual orientation pursuant to the proposed amendments. If, pursuant to Regulation 18, the answer was positive, the question further arose whether the Charity Commission ought to permit the proposed amendments under the Charities Act 1993 section 64 read together with Regulation 18(2). The Court ruled that the Sex Discrimination Act 1975, section 43(2A) allows sex discrimination in the conferring of benefits by a charity as a proportionate means of achieving a legitimate aim even if for a purpose which did not consist of meeting the special needs of the protected class. Further, some forms of differential treatment are justified in conformity with Article 14 of the European Convention on Human Rights provided that they pursue a legitimate aim and in a manner where the means employed are proportionate to the aim sought. The Court held that the exception set out in the Equality Act was designed to permit charities to establish differential treatment, as contemplated by Article 14, on grounds of sexual orientation wherever the public purpose being achieved by the charity in question constituted a justification falling under the scope of Article 14. The question of justification was remitted back to the Charity Commission who will have to further decide on the case in accordance with the principles set out by the High Court.

Internet link source:

www.bailii.org/ew/cases/EWHC/Ch/2010/520.html

¹⁶³ [2010] EWHC 520 (Ch).

